

Effective December 17, 2021

COURT RULES OSHA EMERGENCY TEMPORARY STANDARD COVID-19 VACCINE MANDATE CAN TAKE EFFECT

Background

On the evening of Friday, December 17, 2021, the Sixth Circuit Court of Appeals overruled a Fifth Circuit Court decision that had stayed OSHA's Emergency Temporary Standard (ETS) that requires employees of companies with one hundred or more employees to be vaccinated against COVID-19 or undergo weekly COVID-19 testing. The ETS had been stayed on November 6, one day after it was formally issued by OSHA.

Details:

A split three-judge panel of the U.S. Court of Appeals for the Sixth Circuit, determined that the injuries asserted by the plaintiffs are "entirely speculative". Circuit Judge Jane B. Stranch noted "[t]he harm to the government and the public interest outweighs any irreparable injury to the individual petitioners who may be subject to a vaccination policy". The decision further noted that "[t]o protect workers, OSHA can and must be able to respond to dangers as they evolve." In support of lifting the stay, Judge Julia Smith Gibbons wrote "[r]easonable minds may disagree on OSHA's approach to the pandemic, but we do not substitute our judgment for that of OSHA, which has been tasked by Congress with policymaking responsibilities...[b]eyond constitutional limitations, the work of an agency, often scientific and technical in nature, is outside our expertise."

Under the ETS, employers with 100 or more employees are to require their employees to be fully vaccinated by January 4, 2022, or require those unvaccinated employees who are not subject to an exemption to be tested for the virus weekly. There are exemptions for medical or religious reasons. The ETS also makes an exception for employees who do not come into close contact with other people at their jobs, such as those who work at home or exclusively outdoors. Unvaccinated employees were required to start wearing masks indoors starting December 5. In light of the recent stay and uncertainty concerning the ETS, OSHA will not issue citations for noncompliance with any requirements of the ETS (creation of a written policy, survey data, employee notification, etc.) before January 10 and will not issue citations for noncompliance with the ETS's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.

Summary:

As of Friday night, appeals of the Sixth Circuit's decision had already been filed with the U.S. Supreme Court for an emergency stay. We do note that earlier this month the U.S. Supreme Court refused to stay New York's requirement that health care workers be vaccinated against the coronavirus even when they cite religious objections. Also before the U.S. Supreme Court is a Department of Justice request that the Court lift a stay on requiring vaccines for certain health care workers.

The ETS and its implementation is a complex and evolving process. The attorneys at Litchfield Cavo are here to assist you with your questions and to assist with your compliance needs.

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