

Sixth Circuit Lifts Stay on OSHA's ETS Requiring COVID-19 Vaccination or Testing; OSHA Issues New Compliance Deadlines

December 20, 2021

On December 17, 2021, a divided Sixth Circuit Court panel issued an **opinion** dissolving the **Fifth Circuit's stay** of the **Emergency Temporary Standard (ETS) on COVID-19 Vaccination and Testing issued by the Occupational Safety and Health Administration (OSHA)**. The majority (2-1) decision explained:

- **The challenges against the ETS have little likelihood of success as:**
 - OSHA has statutory authority to (a) issue standards that protect workers against infectious diseases and viruses that present a significant risk in the workplace, even if exposure to such viruses may exist outside the workplace, and (b) require medical exams and vaccination as tools to protect the safety and health of employees.
 - The major questions doctrine – which requires the presence of clear congressional authorization when an agency makes a decision of "vast economic and political significance" – is inapplicable when it comes to the ETS because OSHA has regulated workplace health and safety, including diseases, for decades.
 - OSHA had sufficient justification to issue the ETS because:
 - COVID-19 currently presents a state of emergency that can be ameliorated by agency action.
 - OSHA has sufficiently demonstrated the pervasive and grave danger that COVID-19 poses to workers, particularly the unvaccinated, and the ETS is necessary to protect employees from that grave danger.
 - The constitutional challenges under the Commerce Clause and the non-delegation doctrine have little likelihood of success as:
 - The ETS regulates economic activity by regulating employers who engage in commercial activity; and
 - Congress has power to delegate broad authority to executive agencies and gave OSHA the authority to issue emergency standards to regulate infectious diseases in the workplace, even if they exist outside the workplace.
- **The ETS challengers have not shown that any injury from lifting the stay outweighs the injuries to the government and the public interest.**
 - The Fifth Circuit erred in asserting that a stay will "do OSHA no harm whatsoever" without analyzing any harms to OSHA.
 - In balancing the parties' harm, the majority found that the injuries to the ETS challengers are "entirely speculative," alleged without considering the accommodations, variances or options offered by the ETS. By contrast, the costs of delaying implementation of the ETS are comparatively high, in the forms of deaths and hospitalizations, as well as overburdening the health care system.
 - The majority concluded that the harm to the government and the public interest outweighs any irreparable injury to the individuals who may be subject to a vaccination policy, particularly when they have not shown a likelihood of success on the merits.

Continued

In light of the Sixth Circuit's decision, OSHA has updated its **website**, indicating that OSHA's implementation of the ETS is resumed. However, to account for the uncertainty created by the stay and provide employers with sufficient time to come into compliance, **OSHA has extended the time for covered employers to comply with the ETS. Specifically, OSHA states that it will not issue any citations for noncompliance before January 10 and will not issue citations for noncompliance with the ETS' weekly COVID-19 testing requirement for unvaccinated workers before February 9, "so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard."**

Within a few hours of the Sixth Circuit ruling, a group of petitioners filed in the Supreme Court an **Emergency Application for Immediate Stay of Agency Action Pending Disposition of Petition for Review**. The application seeks an immediate stay of the ETS or the application to be treated as both a motion to stay and a petition for *writ of certiorari* to the Supreme Court. The application, which also asks for expedited review, was referred to United States Supreme Court Justice Brett Kavanaugh, who is assigned to review petitions from the Sixth Circuit, and who can act on the application alone or refer it to the full court for consideration.

Miller Canfield will continue to monitor new developments concerning the ETS. If you have any questions about these developments or how they may impact your workplace, please contact the authors of this alert or your Miller Canfield attorney.

This information is based on the facts and guidance available at the time of publication and may change as the agency receives comments and/or updates its guidance.