

6th Circuit Rules in Favor of OSHA ETS: Appeal Filed, Draft Enforcement Guidance Updated, 12/18/21

We learned that the Sixth Circuit overturned the Fifth Circuit's temporary injunction to halt the OSHA emergency temporary standard (ETS), which requires businesses employing 100 or more to require proof of full vaccination or test employees weekly. That decision is attached. As we have been reporting, the temporary stay could be overturned by a higher court, and as is expected the state attorneys general that are opposing the ETS, have filed their appeal to the Supreme Court. Below is a brief statement and published guidance for enforcement, barring the Supreme Court does not intervene. OSHA has set February 9 as the beginning of requirements to regular test or to provide proof of full vaccination.

Earlier in the week, the Sixth Circuit had denied a request by OSHA for the full slate of judges (16 active judges) to hear this case. OSHA had been planning for a negative outcome and wanted to expedite this decision to the Supreme Court as quick as possible, that denial can be read here. We will continue to monitor the developments of this important case as they occur.

Litigation Update

OSHA is gratified the U.S. Court of Appeals for the Sixth Circuit dissolved the Fifth Circuit's stay of the Vaccination and Testing Emergency Temporary Standard. OSHA can now once again implement this vital workplace health standard, which will protect the health of workers by mitigating the spread of the unprecedented virus in the workplace.

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.

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