

compliance ALERT

5th Circuit Blocks OSHA from Enforcing Vaccine Mandate for Large Employers

November 16, 2021

Action Required:

- Monitor ongoing legal developments
- Consult with your compliance and legal teams
- Prepare to implement relevant policies if necessary

On November 12, the U.S. 5th Circuit Court of Appeals (the “Court”) issued a [decision](#) (the “Decision”) staying enforcement and implementation of the OSHA emergency temporary standard (ETS) [regulation](#) that would have required private sector employers with 100 or more employees to ensure that all of their employees are vaccinated or submit to weekly testing for COVID-19 by January 4, 2022 (see our [eAlert on the ETS](#)).

The ETS was challenged by a diverse group of states, employers, religious groups and individuals who filed a petition with the Court to stay its enforcement on various grounds. The Court concluded that the ETS was “fatally flawed” and that, among other issues, it failed to consider the needs of different workplaces and workers.

Does our organization still need to comply with the December 6 and January 4 deadlines?

Most likely no, but since this Decision is not the final say on the viability of the ETS, employers should still be prepared to implement their ETS-compliant policies and procedures if necessary. There’s still a possibility that the 5th Circuit Court’s stay on the ETS is modified or lifted.

If our organization is a federal contractor or healthcare provider subject to prior OSHA regulations or Executive Orders requiring COVID-19 vaccination, do we still need to comply with those prior rules?

Yes. While the ETS is no longer in effect, the Court’s Decision has no impact on the Centers for Medicare and Medicaid Services’ interim final rule for healthcare workers and President Biden’s Executive Order 14042 on mandatory vaccinations for federal contractors and subcontractors. Employers subject to these rules should continue to adhere to these requirements.

What Should Employers and Plan Sponsors Do Next?

The viability of the ETS may be ultimately decided by the U.S. Supreme Court. In light of the possibility that the 5th Circuit’s stay is modified or removed, prudent employers and plan sponsors should still be prepared to implement their vaccination and testing policies in compliance with the requirements of the ETS, and should consult with their trusted advisors, third-party administrators and vendors to ensure that appropriate plans are in place. Corporate Synergies can assist with this process. ■

↓ Full Explanation Follows ↓

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On November 12, the U.S. 5th Circuit Court of Appeals (the “Court”) issued a [decision](#) (the “Decision”) staying enforcement and implementation of the OSHA emergency temporary standard (ETS) [regulation](#) that would have required private sector employers with 100 or more employees to ensure that all of their employees are vaccinated or submit to weekly testing for COVID-19 by January 4, 2022, and to provide paid leave to get vaccinated by December 6, 2021 (see our prior [eAlert on the ETS](#)).

How Does the Court’s Decision Change the Law?

The Court’s 22-page decision concluded that the ETS was “fatally flawed” and that, among other issues, it failed to consider the needs of different workplaces and workers. The decision prohibits OSHA from enforcing and implementing the ETS “pending adequate judicial review” of a motion for permanent injunction. Pending such review, the ruling effectively nullifies the ETS, since OSHA is barred from both enforcing and implementing it.

While the Fifth Circuit Court does not necessarily have the final say on whether the ETS will eventually be implemented (and the matter could potentially go all the way to the U.S. Supreme Court), the Court’s ruling signals that at least one federal appeals court believes that challenges to the ETS can succeed on the merits, and that raises significant questions about the viability of the ETS.

Why did the Court Block the ETS?

The ETS was challenged by a diverse group of states, employers, religious groups and individuals who filed a petition with the Court to stay its enforcement on various grounds. In order to uphold an emergency regulation, OSHA must show that the rule is necessary to protect employees from “grave danger” due to exposure to “substances or agents determined to be toxic or physically harmful,” as contemplated in the Occupational Safety and Health Act of 1970 (the “OSH Act”).

In its Decision, the Court identified several reasons for why the ETS should be permanently enjoined (blocked), including issues under the Commerce Clause and nondelegation doctrine of the U.S. Constitution, but the Decision went even further, and concluded that even if the ETS could survive these constitutional challenges (which the Court did not rule on), COVID-19 could not be the proper subject of emergency administrative action by OSHA.

In reaching this conclusion, the Court first explained that COVID-19 does not pose a “grave danger,” because the virus—which is widely present, not particular to any workplace and “non-life threatening to a vast majority of employees”—does not arise to such a toxic or physically harmful “substance” or “agent” contemplated by the OSH Act. In concluding this, the Court referred to OSHA’s prior statements made by the agency earlier in the pandemic that COVID-19 does not pose the kind of emergency that allows OSHA to take the extreme measure of an emergency temporary standard regulation.

Further, with respect to the necessity of the ETS, the Court took issue with the attenuated relationship between the ETS’ vaccination requirements for all employers with 100 or more employees and the alleged hazard of COVID-19. Specifically, when deciding upon the necessity of the ETS, the Court concluded that the ETS is both overinclusive (that is, it is overly protective or burdensome) and underinclusive (not protective enough).

Specifically, the Court concluded that the ETS is overinclusive because it defines covered employers not by the actual threat of COVID-19 transmission posed by a specific workplace or to specific workers, but instead broadly encompasses all workplaces based on the number of employees it employs alone. The Court found the ETS to be equally underinclusive in that it fails to protect vulnerable workers simply because a given employer has less than 100 employees, even though these employees are exposed to the identical alleged “grave danger” from exposure to COVID-19.

Does our organization still need to comply with the December 6 and January 4 deadlines?

Most likely no, but since this Decision is not the final say on the viability of the ETS, employers should still be prepared to implement their ETS-compliant policies and procedures if necessary.

More specifically, since the Decision prohibits OSHA from both enforcing and taking steps to implement the ETS, the December 6 and January 4 deadlines are technically no longer in effect pending further court action. That being said, as discussed in more detail below, there’s still a possibility that the 5th Circuit Court’s stay on the ETS is modified or lifted.

If our organization is a federal contractor or healthcare provider subject to prior OSHA regulations or Executive Orders requiring COVID-19 vaccination, do we still need to comply with those prior rules?

Yes. While the ETS is no longer in effect, the Court's Decision has no impact on the Centers for Medicare and Medicaid Services' interim final rule for healthcare workers and President Biden's Executive Order 14042 on mandatory vaccinations for federal contractors and subcontractors. Employers subject to these rules should continue to adhere to these requirements.

What Should Employers and Plan Sponsors Do Next?

Multiple petitions for review of the ETS have been filed by various groups in 11 of the 12 U.S. circuit courts of appeal. As a result, within the next few days all such petitions for review will likely be consolidated before one of these 11 circuit courts via a lottery system. The circuit court chosen will ultimately determine whether to continue, modify, or remove the 5th Circuit Court's stay on the ETS. Regardless, the ultimate decision on the viability of the ETS may ultimately depend on a decision by the U.S. Supreme Court.

In light of the possibility that the 5th Circuit's stay is modified or removed, prudent employers and plan sponsors should still be prepared to implement their vaccination and testing policies in compliance with the requirements of the ETS, and should consult with their trusted advisors, third party administrators and vendors to ensure that appropriate plans are in place in such an event. Corporate Synergies can assist with this process. ■

**If you have any additional questions,
please call your Corporate Synergies
Account Manager or 866.CSG.1719.**