

compliance ALERT

6th Circuit Reinstates OSHA Vaccine Mandate for Large Employers; Mandate for Federal Contractors Remains Blocked by 11th Circuit

December 21, 2021

Action Required:

- Covered employers and plan sponsors should prepare to implement compliant policies by Jan. 10, 2022
- Covered employers and plan sponsors should prepare to implement any compliant testing procedures by Feb. 9, 2022
- Discuss the impact of this ruling on employment and benefits policies with advisors

On December 17, the 6th Circuit Court of Appeals reinstated OSHA's emergency temporary standard (ETS) [regulation](#) requiring employers to impose "vaccinate or test" policies. OSHA [granted](#) employers a brief grace period for compliance, giving employers until January 10, 2022 to develop ETS-compliant policies and until February 9, 2022 to begin compliant testing programs if they are acting in good faith to implement those policies and procedures prior to those deadlines.

Additionally on December 17, the 11th Circuit Court of Appeals denied, pending further review, the Biden administration's request to dissolve a nationwide preliminary injunction issued against the [vaccine mandate](#) applicable to federal contractors and subcontractors (the "Federal Contractor Vaccine Mandate").

What does our organization need to do to comply with the new January 10 and February 9 ETS enforcement deadlines?

Employers covered by the ETS should be prepared to implement their ETS-compliant policies and procedures (regardless of whether implementing a vaccination or testing policy) prior to January 10, 2022, and to implement any ETS-compliant testing procedures prior to February 9, 2022. These requirements were discussed in more detail in our prior [eAlert](#) on the ETS. Employers should now begin to take reasonable, good faith efforts to come into compliance in the event of an audit.

If our organization is a federal contractor or subcontractor, what do we need to do?

While the Federal Contractor Vaccine Mandate has been put on hold for now, the 11th Circuit may still reinstate that mandate after it has been fully briefed on the issues in late January. Accordingly, such employers should continue to prepare to implement policies and procedures in compliance with that mandate.

What Should Employers and Plan Sponsors Do Next?

Covered employers and plan sponsors should be prepared to implement their vaccination and testing policies in compliance with the requirements of the ETS by OSHA's new deadlines, and even before those deadlines, be able to demonstrate that they are making reasonable, good faith efforts to implement those policies in the event of an audit or investigation. Among other things, such employers should consider setting up appropriate training, working with testing vendors, and discussing the impact and implications of this ruling on their employment and benefits policies with their trusted advisors. Your Corporate Synergies team can assist in each of these areas.

↓ Full Explanation Follows ↓

6th Circuit Reinstates OSHA Vaccine Mandate for Large Employers; Mandate for Federal Contractors Remains Blocked by 11th Circuit

On December 17, the 6th Circuit Court of Appeals reinstated the Occupational Safety and Health Administration's (OSHA) emergency temporary standard (ETS) [regulation](#) requiring employers to impose "vaccinate or test" policies. The 6th Circuit's [decision](#) reverses the 5th Circuit's November stay of the ETS, which had halted the mandate's enforcement and implementation (see our prior eAlert [here](#)). As a result of the 6th Circuit's decision, OSHA then [granted](#) employers a brief grace period for compliance, giving employers until January 10, 2022 to develop ETS-compliant policies and until February 9, 2022 to begin compliant testing programs if they are acting in good faith to implement those policies and procedures prior to those deadlines.

Additionally on December 17, the 11th Circuit Court of Appeals denied, pending further review, the Biden administration's request to dissolve a nationwide preliminary injunction issued against the [vaccine mandate](#) applicable to federal contractors and subcontractors (the "Federal Contractor Vaccine Mandate"). While the 11th Circuit has kept this mandate blocked for now, this case is by no means over, as the 11th Circuit has extended the schedule for briefing on the case into late January.

Will the Supreme Court further delay or stay the ETS?

At the time of this writing, it is still unclear. Within two hours of the 6th Circuit's decision, a broad coalition of 26 trade groups filed the first of several emergency appeal applications to the U.S. Supreme Court requesting a stay pending Supreme Court review. A decision by the Supreme Court could result in an additional stay of the ETS pending the Supreme Court's review.

Why did the 6th Circuit reinstate the ETS?

The 6th Circuit's opinion cited the rapid increase in COVID-19 infections in the workplace due to the recent Delta and Omicron variants in reaching its conclusion that COVID-19 still poses an emergency. Disagreeing with the 5th Circuit, the 6th Circuit opined that OSHA has clear authority to regulate viruses and infectious diseases in the workplace.

What does our organization need to do to comply with the new January 10 and February 9 ETS enforcement deadlines? If our organization is a federal contractor or subcontractor, what do we need to do?

Employers covered by the ETS should be prepared to implement their ETS-compliant policies and procedures (regardless of whether implementing a vaccination or testing policy) prior to January 10, 2022, and to implement any ETS-compliant testing procedures prior to February 9, 2022. These requirements were discussed in more detail in our prior [eAlert](#) on the ETS. Prior to those deadlines, employers should now begin to take reasonable, good faith efforts to come into compliance in the event of an audit.

For federal contractors and subcontractors, while the Federal Contractor Vaccine Mandate has been put on hold for now, it's possible that the 11th Circuit may still reinstate that mandate after it has been fully briefed on the issues in late January. Accordingly, such employers should continue to prepare to implement policies and procedures in compliance with that mandate.

What Should Employers and Plan Sponsors Do Next?

Covered employers and plan sponsors should be prepared to implement their vaccination and testing policies in compliance with the requirements of the ETS by OSHA's new deadlines, and even before those deadlines, be able to demonstrate that they are making reasonable, good faith efforts to implement those policies in the event of an audit or investigation. Among other things, such employers should consider setting up appropriate training, working with testing vendors, and discussing the impact and implications of this ruling on their employment and benefits policies with their trusted advisors. Your Corporate Synergies team can assist in each of these areas.

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