INSIGHTS + NEWS

Client Alert: Sixth Circuit Breathes New Life into OSHA's Emergency Temporary Standard Mandating Vaccination or Testing for Private Employers with 100 or More Employees

BY TRACY THOMAS BOLAND • DECEMBER 20, 2021

On December 17, 2021, the United States Court of Appeals for the Sixth Circuit revived OSHA's Emergency Temporary Standard ("ETS") mandating COVID-19 vaccination or testing and masking for employers with 100 or more employees. We outlined the requirements of the ETS in a prior client alert. Thereafter, the Fifth Circuit Court of Appeals put the ETS temporarily on hold after scores of challenges to the ETS were filed in courts across the country. Those suits were consolidated in the Sixth Circuit.

In its opinion reviving the ETS, the Sixth Circuit noted that the challengers to the ETS had primarily argued that the ETS was beyond the scope of OSHA's authority. The Sixth Circuit found that pursuant to the OSH Act, "any agent, including a virus, that is *either* 'toxic' (i.e., poisonous, toxicity) *or* 'physically harmful' (i.e., causing bodily harm) falls within OSHA's purview." Judge Jane B. Stranch noted that the OSH Act has long been used to protect workers against infectious diseases such as HIV, hepatitis B, and hepatitis C, finding that the ETS "is not a novel expansion of OSHA's power; it is an existing application of authority to a novel and dangerous worldwide pandemic."

The Sixth Circuit rejected the challengers' argument that OSHA was limited in the means it could use to quell the "grave danger" presented by COVID-19, holding that "OSHA need only demonstrate that the solution it proposes 'is necessary to *alleviate* a grave risk of worker deaths'" during the ETS' six month term. The Court noted that the prevalence of the Delta variant "significantly changed public health policy and underscored a need for issuing an ETS – not only to control the variant itself, but to control the spread of disease to slow further mutations," which now include Omicron, as it spreads across the United States.

In conclusion, Judge Stranch noted that the costs of delaying implementation of the ETS are significant:

> Fundamentally, the ETS is an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs.

As expected, after the Sixth Circuit issued its decision, dozens of states and organizations submitted emergency filings to the United States Supreme Court, asking the Supreme Court to issue an immediate stay of the ETS, pending the Sixth Circuit's full review, or, alternatively, for the Supreme Court to immediately review and issue an opinion about the

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enforceability of the ETS itself.

In a news release issued on December 18, 2021, the United States Department of Labor noted that to "account for any uncertainty created by the stay, 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."

WHAT DO EMPLOYERS DO NOW?

Employers should continue to take steps to implement mandatory COVID-19 vaccination policies or, alternatively, test-and-mask policies, to come into compliance with the ETS requirements. To be clear, the requirements of the ETS, other than testing for unvaccinated employees (determining employee vaccination status, keeping records related to vaccination status, providing specific information about vaccines, developing and implementing a written policy, and requiring masks for the unvaccinated), must be met by **January 10**. For employers who choose the test and mask alternative, testing requirements must be met by **February 9**.

While employers have good reason to wonder if those dates will change again, depending on the future path of the latest legal challenges, employers do not have the luxury of delaying compliance in the event these deadlines remain in place.

ONE MORE NOTE FOR MA EMPLOYERS

As noted in our first alert on the mandate and then in our webinar, the ETS allows employers the right to pass test and mask costs on to the employees. In our client alert dated December 17, 2021, we provided employers with updated guidance from the MA Attorney General's office indicating that employers may pass test and mask costs to employees if they choose a test and mask option. The same advice applies in the face of the ETS. In other words, if the employer offers the test and mask alternative, and an employee chooses that option, the employer may require the employee pay for associated costs in line with the guidance in our alert. However, if the employee has no choice but to test and mask because of an approved exemption, the employer is advised to bear the burden of those costs.

This alert provides the current state of the ETS; we will continue to update you promptly with any future developments. For more information on the requirements of the ETS, in addition to our prior client alert, please also see OSHA's ETS Fact Sheet and OSHA's ETS Summary. Employers with questions about how to comply with these requirements, and how they apply to your organization, should consult with their Bowditch Employment & Labor attorneys.

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