

What is the Status of OSHA's Vaccine Rules?

By Jessica Summers

For employers with 100 or more employees, the saga and uncertainty behind OSHA's Emergency Temporary Standard (ETS) on COVID-19 continues. **As detailed below, while there is still a chance that the Supreme Court will strike down the ETS, covered employers should be actively preparing to comply with the ETS by the new January 10 and February 9 deadlines to avoid being caught in a last minute scramble.**

Here's a breakdown of what has occurred so far:

- On November 5, OSHA issued the ETS. The ETS, which applies to employers with 100 or more employees, requires covered employers to establish and implement certain COVID safety protocols and to, at minimum, require that all employees be vaccinated or submit to weekly testing. Please see our earlier blog for a full breakdown of the ETS. Under the ETS, the safety rules, including the requirement that employers ascertain employees' vaccination statuses, were set to go into effect on December 5, with the vaccine or test requirement going into effect on January 4.
- The government was met almost immediately by a flood of lawsuits challenging the ETS. When multiple challenges are made to the same rule, the federal courts use a lottery system to select which of the courts of appeal will handle all of the cases.
- Before a single court could be assigned to hear all the cases, on November 6, the Fifth Circuit Court of Appeals went ahead and issued an order temporarily staying the ETS. On November 12, after receiving further briefs, the Fifth Circuit issued a more detailed order reaffirming and continuing the stay.
- On November 17, the Sixth Circuit Court of Appeals was selected in the lottery to handle all of the cases. The Sixth Circuit then had to make the decision whether to keep the stay issued by the Fifth Circuit in place or to vacate it.
- On December 17, the Sixth Circuit decided to lift the stay – allowing OSHA to move forward in implementing and enforcing the ETS. In doing so, the Sixth Circuit held that OSHA had not overstepped its authority in issuing the ETS and rejected arguments that the ETS was unnecessary.
- Since the original date for most of the ETS to go into effect had already passed, once the stay was lifted, OSHA announced that it would begin enforcing the safety provisions on January 10 and the vaccine and test requirements on February 9.
- The challengers to the ETS have appealed the Sixth Circuit's ruling to the Supreme Court. The Supreme Court has given the federal government until December 30 to respond to the appeal. Oral arguments will be held on January 7, the same day that the Supreme Court will be hearing challenges to the Centers for Medicare & Medicaid Services (CMS) vaccine rule for Medicare and Medicaid certified providers and suppliers.

In short, unless the Supreme Court rules otherwise, the provisions of the ETS will go into effect on January 10 and February 9, and OSHA will begin issuing penalties for non-compliance starting on those dates. The Supreme Court is not scheduled to hear oral arguments until January 7, and no stay has been issued in the interim. Accordingly, at best we will not know whether the rule will be upheld or struck down by the Supreme Court until mere days before the first enforcement deadline. There is also a very real possibility that January 10 will pass and OSHA will begin enforcing the rule before the Supreme Court renders its opinion.

Depending on what policies and procedures an employer has already implemented to date, there are a number of significant steps that employers will need to take to comply with the requirements that are set to go into effect on January 10. These include ensuring that the employer has written policies in place that comply with the requirements of the ETS and that the employer has ascertained the vaccination statuses of all of its employees. As the penalties for an OSHA violation can be significant, compliance with the ETS is not something businesses should be taking lightly.

Employers that are assuming that the rule will be struck down or that they will have sufficient time after a ruling from the Supreme Court to get into compliance are taking an unnecessary and

serious gamble. All covered employers, including those that want to wait for a decision from the Supreme Court before implementing the vaccine or test portion of the ETS (set to be enforced starting February 9), should be taking immediate steps to ensure that they are in compliance with the elements of the ETS that OSHA will begin enforcing on January 10.

Please do not hesitate to contact us if you have any further questions or need assistance navigating these challenging issues.