

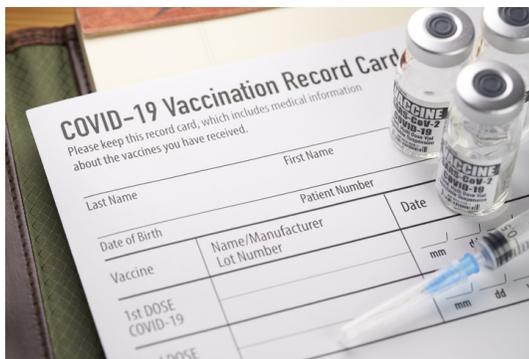
## Update on the OSHA "Vaccination or Test" ETS for Employers of 100 or More Employees

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### Working Together

11.17.2021

By Jonathan Orleans



On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its much-anticipated Emergency Temporary Standard (ETS) addressing COVID-19 vaccination policies for employers with 100 or more employees. My colleague Zach Zeid blogged about it here. The ETS – published in the Federal Register on November 5 and slated to take effect December 4 – requires that covered employers implement policies mandating that employees either be vaccinated or be tested at least weekly for the virus. However, there have been a number of interesting (and significant) developments in the few weeks since the rule

was released.

First, on November 6 the U.S. Court of Appeals for the 5<sup>th</sup> Circuit issued an order blocking implementation of the ETS. Under the Occupational Safety and Health Act, challenges to Emergency Temporary Standards go directly to the courts of appeals, rather than to federal district courts. A group of companies led by BST Holdings filed the action in the 5<sup>th</sup> Circuit challenging the ETS and asking the court to block implementation immediately. The court obliged, citing “grave statutory and constitutional issues.”

A week later, after the Justice Department urged the 5<sup>th</sup> Circuit panel to set aside its order staying the implementation of the ETS, the court stuck to its guns and reaffirmed the stay. In a 22-page opinion, the court criticized the vaccine mandate for burdening the liberty interests of individual employees, forcing them to choose “between their job(s) and their job(s).” In response, OSHA announced that it has “suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.”

Challenges to the ETS – 34 in total -- have been filed in all twelve circuit courts of appeal. Some of these challenges have been brought by employers, while others have been initiated by states, unions and other organizations. Under these circumstances, federal law requires that the cases be consolidated, and a lottery, overseen by the Judicial Panel on Multidistrict Litigation, be held to determine which Circuit will ultimately

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hear and decide the case on the merits. That lottery, conducted on November 16, determined that the consolidated cases will be assigned to the 6<sup>th</sup> Circuit Court of Appeals, where they will be heard by a three-judge panel sitting in Cincinnati, Ohio. While we don't yet know which judges will be on the panel, we know that the 6<sup>th</sup> Circuit has 16 active judges appointed by Republican presidents, and five appointed by Democrats, so the odds are high that the panel will include a majority of Republican-appointed judges. While that in itself does not necessarily predict the outcome, many observers consider it more likely that Democrat-appointed judges would uphold the ETS than their Republican-appointed counterparts.

Regardless of the result in the 6<sup>th</sup> Circuit – and we don't know how long it will take for the court to reach a decision there -- it seems likely that the losing side will petition the Supreme Court for review. In light of this, it appears that this struggle and the ensuing uncertainty surrounding the ETS will continue for a while. In the meantime, *The New York Times* reported on November 16 that the average daily number of reported COVID-19 cases in the U.S. has increased by 14% over the last two weeks. One wonders whether a surge in cases might influence the ultimate result of the litigation.

It is our view that employers who are subject to the ETS (as published on November 5) should prepare the required policies notwithstanding the current state of affairs. While employers may choose to delay actually implementing the policies unless or until the ETS receives a final "thumbs up" from the courts, organizations that proactively prepare to comply with the ETS will be in a much better position to comply quickly and avoid last-minute issues should the ETS be upheld. Watch this space for further developments.

**Posted in** Appellate, COVID-19, Vaccine

**Tags:** COVID-19 Emergency Temporary Standard, Occupational Safety and Health Administration (OSHA)