

EMPLOYMENT ALERT

**OSHA ETS Update
November 29, 2021**

Under the terms of the currently stayed OSHA ETS, the deadline for employer compliance with almost all of the deadlines would have been December 6th – in one week. The stay raises a host of questions for our clients. What is OSHA’s position? What will happen next in the litigation? What should employers be doing? How will the Omicron variant impact the case?

What is OSHA’s position?

The Fifth Circuit ordered OSHA to take no steps to implement or enforce the ETS. OSHA announced that it would suspend implementation and enforcement of the ETS. Subsequently, all litigation was consolidated in the Sixth Circuit Court of Appeals.

Last week OSHA filed court papers with the Sixth Circuit and requested that the stay be dissolved (legalese for "lifted"). The 52 page argument led off with the sentence, “COVID-19 has killed more than 750,000 people [in the U.S.] and caused serious, long-lasting and potentially permanent health effects for many more.” In a measured but forceful argument, OSHA made a case for the grave danger posed to workers by COVID-19, and the necessity of an emergency standard. OSHA argued:

“The Standard reflects OSHA’s judgment that these measure are necessary to mitigate COVID-19 transmission in the workplace, and the grievous harms the virus inflicts on workers. OSHA estimates that the Standard will, at a minimum, save over 6,500 worker lives and prevent 250,000 hospitalizations over the course of the next six months.”

Very interestingly, OSHA offered a potential compromise. It asked the Sixth Circuit to either lift the stay in its entirety or at least lift it with respect to the masking-and-testing requirement for unvaccinated workers. This raises the possibility of employers being subject to parts but not all of the ETS.

What happens next?

The claimants in the case (including many states) will file briefs in response to OSHA's arguments. When the parties have fully briefed the case, there is the possibility of oral argument. Right now the deadline for the final briefs is December 10th, which suggests no decision before December 6th.

The Sixth Circuit will rule on the current stay of the ETS. It could uphold the stay, lift the stay or stay only parts of the ETS. However, it rules, it seems highly probable that the case will head straight to the Supreme Court for the final say.

The timing of court action is hard to predict. Given the stakes, it seems likely that the Sixth Circuit will rule in a matter of weeks and after December 10th. Adding to the complexity of the case is the emergence of the Omicron variant. One would expect that OSHA will argue that this is additional evidence of the grave danger posed by COVID-19.

What should large employers do?

Right now the OSHA ETS is stayed and therefore the December 6th and January 4th deadlines are not in effect. However, a lifting of the stay could put the deadlines back into effect. It seems likely that OSHA will modify the deadlines if all or part of the ETS is permitted by the courts to move forward.

We have advised clients to be prepared, and not to bank on the courts blocking the ETS and OSHA abandoning on new emergency standards. The most recent court filing suggests that OSHA is willing to compromise, and could live with the testing-and-masking rule for unvaccinated employees. Therefore, we believe that employers should be evaluating how they would comply with at least a modified ETS.

Are we expecting other developments?

Yes. Public sector employees in Maine will be watching closely to see what actions the Board of Occupational Health and Safety (BOSH) take on Thursday, December 2nd. Will they adopt the OSHA ETS? Will they decide to hold off until the Sixth Circuit rules? We'll report on their decision. Right now the Maine Department of Labor website states that on December 2nd BOSH will exercise its emergency rulemaking authority to adopt the OSHA ETS.

Also, the Maine Department of Labor is expected to provide guidance with respect to the key question about whether the employer is mandated to pay the costs of the COVID-19 test, and possibly address other related wage and hour issues.