

EMPLOYMENT ALERT

**OSHA ETS
December 20, 2021**

Well, it happened sooner than we'd expected.

Late on Friday the Sixth Circuit ruled that the OSHA ETS stay should be lifted. The decision was issued by a three judge panel, and it was a 2-1 vote in favor of lifting the stay. The majority of the 3 judge panel ruled that COVID-19 posed a grave danger to workers and that OSHA has the authority to issue the vaccine or testing mandate. A copy of the decision is available here:

<https://int.nyt.com/data/documenttools/sixth-circuit-osh-ruling/86fd0c47a33a99ba/full.pdf>

What Happens Next?

Within hours the decision was appealed to the Supreme Court. As this is an emergency appeal for the stay to be reissued, it will be presented to Justice Brett Kavanaugh, who is the Supreme Court justice assigned to handle these types of matters arising from the Sixth Circuit. He may distribute the petition for appeal to the whole court or handle it by himself.

What is the Status of the ETS Deadline?

OSHA announced in the wake of the ruling that it would not issue any citations for non-compliance with the ETS before January 10, 2022. It will also not issue citations for non-compliance with ETS testing requirements before February 9, 2022, if an employer is demonstrating reasonable good faith efforts to come into compliance with the ETS.

The OSHA statement is vague, and hopefully they will provide more details. It seems that OSHA has essentially moved the original December 6th deadline to January 10th, and the January 4th deadline (for employers to ensure employees that are not fully vaccinated are tested once a week) to February 9, 2022.

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What Happens to Public Sector Employers in Maine?

Maine now has an obligation to adopt the ETS for public sector employers with 100 or more employees under the State Plan. As of this morning the Maine Department of Labor has not updated its website which still reports just the 5th Circuit stay. Presumably this will change and the next step is for the Board of Occupational Health and Safety take up the ETS. BOSH postponed adoption of the ETS, which was scheduled to occur on December 2nd. We will be watching closely to see when BOSH schedules a meeting and what action it takes.

This remains a dynamic situation and the Supreme Court could renew the stay or allow the ETS to take effect. The timetable for their action is unclear, and certainly private sector employers should prepare for complying with the following ETS requirements by January 10, 2022:

- (1) establishing an ETS policy;
- (2) determining the vaccination status of employees;
- (3) supporting employee vaccinations;
- (4) requiring employees to promptly provide notice of a COVID positive test or diagnosis;
- (5) remove any employee from work who is positive for COVID-19;
- (6) require unvaccinated employees to wear face coverings;
- (7) provide employees with information about the ETS;
- (8) report work-related COVID-19 fatalities to OSHA and hospitalizations;
- (9) keep rosters of vaccination status and rates and make them available for inspection.

For more information, I can be reached at plowe@brannlaw.com.