

Labor & Employment Alert

OSHA Vaccine and Testing Rule: Back in Business — For Now

OSHA's COVID Vaccine Emergency Temporary Standard (**Vaccine ETS**), first issued on November 5 and put on the shelf the next day by a federal court, is back in business—at least for now. The federal Occupational Safety and Health Administration (**OSHA**) has been battling in every federal circuit court, and most recently in the Sixth Circuit Court of Appeals, to salvage its Vaccine ETS, literally since the day the ETS was born.

Last night, however, in a move that would have been surprising until Wednesday of this week, a panel of Sixth Circuit judges lifted the stay that previously had been imposed by the Fifth Circuit Court of Appeals. The judges voted 2-1 in favor of lifting the stay (hints of this appeared in a separate decision two days before).

Within hours, all twenty-seven state challengers to the Vaccine ETS, and sixty-four other challengers, had filed papers in the Supreme Court, asking the high court to reverse the Sixth Circuit's decision. There is no telling at this point, of course, how the Supreme Court will respond, but until that becomes clearer, the immediate upshot is that the Vaccine ETS is back in business, and if you're covered, it's also back in **your** business.

However, also within hours of the Sixth Circuit's decision, OSHA published the following notice at its website, stating that the agency will treat the initial December 5 compliance date as January 10, and will treat the January 4 compliance date as though it is February 9. OSHA also assured employers that it will work with those who act reasonably and in good faith to come into compliance with the Vaccine ETS:

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, 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. OSHA will work closely with the regulated community to provide compliance assistance.

For a more complete discussion of the Vaccine ETS, and of steps employers must take to come into compliance, [click here](#) to read and download our November 8 Client Alert on the Vaccine ETS.