



Fifth Circuit Issues Temporary Stay on OSHA ETS – What Does It Really Mean?

On November 6, 2021, the Fifth Circuit issued a temporary injunction on OSHA's ETS for employers with 100 or more employees. The Fifth Circuit's Order is brief citing "grave statutory and constitutional issues" with the ETS. The Court ordered the government to respond to the motion for a permanent injunction by 5:00 p.m. today, November 8, 2021. The petitioners have until tomorrow, November 9, 2021, at 5:00 p.m. to provide a reply to the government's response.

The real question is what does this mean for employers. It is somewhat unclear right now. The Order from the Fifth Circuit does not address whether this is a nationwide stay or only applicable to those employers in the Fifth Circuit. It is also only a temporary stay until further briefing is completed. Similar challenges have been filed in at least four other federal appellate courts (including the Sixth, Seventh, Eighth, and Eleventh).

For now, employers should continue to review and develop plans to comply with the ETS, specifically those provisions of the ETS that require compliance by December 5, 2021. Those obligations include:

- Determine and record the vaccination status of each employee, and maintain a roster with employees' vaccination status (all of which must be treated as confidential medical information).
- Obtain and record a copy of proof of vaccination for all vaccinated employees (which must also be treated as confidential medical information).
- Support vaccination by providing reasonable paid time off to get vaccinated and recover.

- Establish, implement, and enforce a written policy requiring mandatory vaccination for all employees (including new employees as soon as practicable) (OSHA sample policy available [here](#)), or in the alternative, a written policy that requires either vaccination or weekly COVID-19 testing and face coverings in the workplace in lieu of vaccination (OSHA sample policy available [here](#)).
- Establish, implement, and enforce a policy requiring that each employee promptly notify the employer when they receive a positive COVID-19 test or diagnosis, and provide for the immediate removal of such employees from the workplace until certain return-to-work criteria are met.
- Provide certain required information to each employee in a language and at a literacy level the employee understands.
- Implement a reporting procedure to ensure each work-related COVID-19 fatality is reported to OSHA within 8 hours of the employer learning of the fatality, and that each work-related COVID-19 in-patient hospitalization is reported within 24 hours.
- Make employee vaccination and testing records available to that employee and anyone having written authorized consent of that employee by the end of the next business day after a request.
- Make certain aggregate information available to any employee (including former employees) or employee representative (including authorized collective bargaining agents) available by the end of the next business day after a request, including (1) the aggregate number of fully vaccinated employees at a workplace; and (2) the total number of employees at that workplace.
- Make certain information, including required written policies, aggregate employee vaccination and workplace totals available to OSHA within four business hours of a request, and all other records required to be maintained under the ETS by the end of the next business day.

Communication with employees regarding the ETS will be very important in the coming days and weeks. Developing a communication strategy advising employees on what the employer is doing to prepare for compliance and how it is monitoring the legal developments surrounding the ETS may help to mitigate confusion and tension that could exist with current employees. Such a strategy may help managers to answer questions from potential candidates for employment as well.

Employers should also continue to monitor developments related to the ETS as we expect there will be more to come from the Fifth Circuit and other courts.

This client alert was prepared by Elizabeth Wente, a partner in the Spencer Fane Springfield office. For more information, please visit www.spencerfane.com.