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OSHA Halts Implementation and Enforcement of 'Large Employer' COVID-19 ETS (At Least for Now)

On November 12, 2021, the Fifth Circuit Court of Appeals issued a decision in which it reaffirmed its prior temporary injunction against implementation or enforcement of the Occupational Safety and Health Administration's Emergency Temporary Standard (the "ETS") mandating COVID-19 vaccination and testing. The November 12 decision reaffirmed a prior stay issued on November 6th and found that the ETS was both overbroad and under-inclusive. The court found the ETS overbroad because it failed to consider that COVID-19 is "more dangerous to *some* employees than to *other* employees." *BST Holdings, L.L.C. et al. v. Occupational Safety and Health Administration, et al.,* No. 21-60845, slip. op at 13. The court found it underinclusive because even the most vulnerable workers would draw no protection from the ETS if the company employs 99 employees or fewer. *Id.* at 15. It further ordered the agency to "take no steps to implement or enforce" the ETS until further court order.

In response, and somewhat surprisingly, OSHA has stated that although it "remains confident" that it had the required authority to issue the ETS, it was suspending activities related to the implementation and enforcement of the ETS pending future developments in the litigation. Prior to OSHA's statement, there had been some confusion over whether the Fifth Circuit's decision applied nationwide, or only in the states that the circuit covers (Texas, Louisiana, and Mississippi).

The decision by the Fifth Circuit and OSHA's announcement may seem like good news for employers. However, litigation regarding the ETS is ongoing. As with any litigation, the outcome is far from certain. If the ETS is ultimately implemented, employers may have little time to comply with its complex requirements. As a result, employers may be well advised to continue moving forward with plans to collect information, implement new policies, and communicate with employees regarding

changes in the workplace. Further information regarding the provisions in the ETS can be found here.

Key Takeaways

Because the requirements of the ETS are complex and there may be limited time to comply, employers may well wish to continue moving forward with their own implementation planning. We at Spencer Fane will continue to monitor the rapidly changing landscape.

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