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OSHA Sets January 10 Deadline for Employers to Implement Mandatory Vaccinate or Test Requirements, Following Federal Appeals Court Victory

Employers with 100 or more employees have until January 10, 2022, to implement the obligations required under the mandatory vaccinate or test requirements in OSHA's Emergency Temporary Standard issued on November 4, 2021, as published in the Federal Register at 86 Fed. Reg. 61402 (Nov. 5, 2021). Even though the ETS is now effective, the agency is granting a short time period for companies to satisfy the requirements.

OSHA announced the January 10 deadline just hours following an appellate court victory on the ETS before the U.S. Court of Appeals for the Sixth Circuit. As noted on the agency's website "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."

By way of background, OSHA's ETS requires covered employers to develop, implement, and enforce a mandatory vaccination policy requiring employees to either: (1) get vaccinated or (2) wear a face covering at work and undergo weekly COVID-19 testing. The ETS imposes many additional safety protocols, recordkeeping, and disclosure requirements for covered employers and employees beyond mandatory vaccination and testing.

After OSHA issued the ETS on November 4, a variety of private parties and states filed legal challenges in judicial circuits. And on November 12, the U.S. Court of Appeals for the Fifth Circuit stayed implementation of the ETS while legal challenges were proceeding. All of the legal challenges were consolidated in the Sixth Circuit federal appellate court which lifted the stay on Friday, December 17, in a 2-1 decision. *IN RE: MCP NO. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402.*

Distilled to its essence, the Sixth Circuit determined that OSHA had acted within its statutory authority granted by Congress under the provisions of the OSH Act and also within the bounds of the U.S. Constitution. More specifically, the appellate court concluded that substantial evidence existed for OSHA to conclude that employees are exposed to grave danger from COVID-19 and an ETS was "necessary to protect employees from such danger."

KEY TAKEAWAYS

Although emergency briefing and motions have already been filed seeking intervention by the U.S. Supreme Court to stay OSHA's ETS, large employers need to carefully monitor the status of the ETS and not assume an injunction will issue. OSHA's victory before the Sixth Circuit means the ETS is in effect immediately and requires employers to adopt mandatory vaccinate or test requirements. The agency, however, has advised employers with 100 or more employees that OSHA will exercise enforcement discretion and not issue citations for noncompliance before January 10, as long as the employer is working in good-faith to satisfy the ETS.

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