KRIEG DEVAULT

Insights

Off-Again, On-Again: Sixth Circuit Lifts Stay on OSHA's Vaccination-or-Test Mandate

December 21, 2021

By: Shelley M. Jackson

Employers with 100 or more employees may feel whiplash as they once again prepare to pivot in connection with the Biden Administration's push to implement mandatory vaccination-or-test policies in the workplace. On Friday, December 17, 2021, the Sixth Circuit Court of Appeals **granted an emergency motion** to lift the **stay previously imposed** by the Fifth Circuit Court of Appeals regarding the U.S. Occupational Safety and Health Administration's ("OSHA") **Emergency Temporary Standard** ("OSHA ETS"). Read our prior alert regarding the OSHA ETS **here**.

The Sixth Circuit held that the plaintiffs were unable to demonstrate a likelihood of success on the merits for a variety of reasons, including the "wealth of information" provided in the OSHA ETS to establish existence of a grave danger in the workplace from COVID-19; available options for employers (i.e., vaccination or testing) and defenses to enforcement (e.g., affirmative defenses or a petition for variance); lack of merit of constitutional challenges; and Congress's intention that the Occupational Safety and Health Act ("OSH Act") regulate employers and preempt state and local standards.

Soon after the stay was lifted, OSHA posted the following litigation update to its **ETS website**:

> OSHA is gratified the U.S. Court of Appeals for the Sixth Circuit dissolved the Fifth Circuit's stay of the Vaccination and Testing Emergency Temporary Standard. OSHA can now once again implement this vital workplace health standard, which will protect the health of workers by mitigating the spread of the unprecedented virus in the workplace.
>
> 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.

(Emphasis added.)

Pursuant to OSHA's announcement, covered employers should continue (or begin) preparing to comply with the requirements of the OSHA ETS. At a minimum, covered employers should be prepared to comply with most provisions of the OSHA ETS by **January 10, 2022** (see our prior **alert** for specific requirements) and with the mandatory testing provision by **February 9, 2022**. Employees who are exempt from vaccination or who have not submitted adequate documentation of their vaccination status by the February 9, 2022 deadline must

participate in weekly testing. Covered employers may elect to require all employees not subject to an approved exemption to be vaccinated (and not offer a weekly testing option for those employees).

Healthcare industry employers with 100 or more employees currently subject to the **OSHA Healthcare Emergency Temporary Standard** ("Healthcare ETS") should take careful note: while employers that are subject to the Healthcare ETS are exempted from the OSHA ETS, the Healthcare ETS is scheduled to expire today, December 21, 2021, unless OSHA acts. As of this writing, OSHA has not issued a statement on whether it intends to preserve the provisions of the Healthcare ETS in some fashion. We are monitoring this situation and will issue a client alert once the fate of the Healthcare ETS becomes clear.

Likewise, federal contractors and subcontractors potentially subject to the **Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors** ("Federal Guidelines") are exempted from the OSHA ETS; however, the Federal Guidelines are currently stayed nationwide. Federal contractors and subcontractors with 100 or more employees should carefully monitor to determine their potential compliance obligations under the OSHA ETS if the Federal Guidelines do not go into effect. To date, OSHA has not issued any commentary or guidance on this issue.

As may be expected, the story does not end here. Within an hour after the Sixth Circuit's ruling, multiple plaintiffs filed an **emergency application for immediate stay** to the Supreme Court of the United States. The application asks that the Supreme Court either grant an immediate stay of the OSHA ETS or, alternatively, treat the application as a petition for certiorari and stay application of the OSHA ETS pending resolution of the petition. Justice Kavanaugh will review the emergency application.

Unless or until the Sixth Circuit reverses its own decision (which is extremely unlikely) or the Supreme Court issues a new stay, covered employers are obligated to prepare to comply with the ETS as described above. Employers should continue to move with diligence in establishing compliance with the OSHA ETS while also carefully monitoring for updates to relevant legal challenges. This new decision only impacts the OSHA ETS and does not change the current status of other federal vaccination mandates, such as the **mandatory vaccination rule** promulgated by the U.S. Centers for Medicare and Medicaid Services (the "CMS Rule") or the **standard** which applies to federal contractors and subcontractors.

Our attorneys will continue to monitor the status of the OSHA ETS and associated legal challenges. We are available to help clients navigate these ever-changing compliance scenarios. For more information on the OSHA ETS, mandatory vaccination-or-test programs, or other COVID-19 related compliance questions, please contact any member of Krieg DeVault LLP's **Labor and Employment** Practice.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.