

COVID-19: OSHA “SUSPENDS” ETS ACTIVITIES; NOW WHAT?

Nov 18, 2021

As employers eye the December 6, 2021 date for the first stage of compliance with the Occupational Safety and Health Administration’s “Emergency Temporary Standard” regarding COVID vaccination - including establishing a COVID policy on vaccination and collecting employee vaccination status information - two key developments occurred this week:

- The Sixth Circuit Court of Appeals, which is considered a conservative circuit court, won the lottery to determine which court would handle the collective challenges filed against the ETS; and
- OSHA announced that it, in light of the stay issued by the Fifth Circuit Court of Appeals on November 12, it has “suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.”

Notably, OSHA has *not* said that, if and when the stay is lifted, covered employers would automatically be granted extra time to be in full compliance with the ETS. Therefore, in order to avoid last minute scrambling, hastily written policies and communications, and the risk of costly fines for non-compliance, employers should continue to prepare for ETS compliance.

Recommended steps include:

- Decide on basic strategy – will the company implement a mandatory vaccination policy or a policy providing for a choice between vaccination or testing/masking – and prepare a policy consistent with that strategy;
- Develop a procedure for submitting and evaluating accommodation requests;
- Identify options for implementing weekly testing (where a choice policy has been elected); and
- Prepare for collection and retention of vaccination status information and test results.

So long as employers continue to prepare and position themselves to move quickly if it becomes necessary, we believe that formal implementation steps, such as adopting a policy and requesting proof of vaccination status, can be placed on hold for now.

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