

## THOUGHT LEADERSHIP

### LEGAL UPDATES

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### Services

Labor & Employment  
Workplace Safety & Health

### Professionals

BARBARA A. GRANDJEAN  
DENVER:  
303.892.4458  
BARBARA.GRANDJEAN@  
HUSCHBLACKWELL.COM

ALLISON MINICKY  
KANSAS CITY:  
816.983.8217  
ALLISON.MINICKY@  
HUSCHBLACKWELL.COM

BLAKE R. ARMSTRONG  
ST. LOUIS:  
314.345.6278  
BLAKE.ARMSTRONG@  
HUSCHBLACKWELL.COM

## Sixth Circuit Lifts ETS Stay - OSHA Delays Noncompliance Citations

Employers are facing yet another twist in the ongoing saga of the vaccine mandates issued by the Biden Administration earlier this year. On Friday, December 17, 2021, the Sixth Circuit dissolved the Fifth Circuit's stay of the Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration (OSHA) in a two-to-one ruling. As we explained, on November 12, 2021, the Fifth Circuit stayed the ETS pending judicial review, forecasting that the ETS faced statutory and constitutional issues. The Government subsequently moved to dissolve the stay and the Sixth Circuit sided with the Government.

OSHA originally issued the ETS on November 5, 2021. The ETS is a soft mandate that requires employees to either be fully vaccinated or wear protective face coverings and undergo weekly testing. The ETS is limited to employers with 100 or more employees, and employers are given discretion to choose the policy to implement the requirements that best suit their workplace.

The Sixth Circuit, reviewing the stay *de novo*, held that OSHA did not exceed its authority under the Occupational Safety and Health Act (OSH Act) in issuing the ETS. The Court stated that the language, structure, and Congressional approval of the OSH Act gives OSHA the authority to regulate viruses and infectious diseases that are not unique to the workplace.

The Sixth Circuit then addressed challenges to the ETS itself. By statute, OSHA is permitted to issue an ETS if it determines: (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful for from new hazards," and (2) that a standard "is necessary to protect employees from such danger." 29 U.S.C. § 655(c). The Court determined that substantial evidence existed in the record to support OSHA's determination that the ETS addressing the spread of COVID-19 was

warranted under the statutory requirements. The Court also held that there was no showing that any injury caused by lifting the stay outweighed injuries to the Government and the public interest.

The Sixth Circuit granted the Government's motion to dissolve the stay issued by the Fifth Circuit. Because of the uncertainty created by the stay, the Department of Labor announced that OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. OSHA **will not** issue citations for noncompliance with any of the requirements of the ETS before January 10, 2022, and will not issue citations for noncompliance with the standard's testing requirements before February 9, 2022, so long as an employer is exercising reasonable, good faith efforts to comply with the ETS.

Petitioners are seeking an emergency appeal to the United States Supreme Court to reinstate the stay. The Supreme Court has ordered the Government to respond to the emergency appeal by 4:00 p.m. on December 30, 2021.

All employers with 100 or more employees, including those that may also be subject to the Centers for Medicare and Medicaid Services Interim Final Rule regarding COVID-19 Health Care Staff Vaccination (CMS rule) and the federal contractor mandate (both of which are fully or partially stayed and are not affected by the Sixth Circuit's decision), should continue to watch the legal developments regarding the ETS closely.

### **What this means to you**

Although the stay of OSHA's ETS has been lifted, at least for the time being, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10, 2022, and will not issue citations for noncompliance with the standard's testing requirements before February 9, 2022, as long as an employer is exercising reasonable, good faith efforts to come into compliance.

### **Contact us**

If you have questions about the best course of action for your workplace as a result of this update, contact Barb Grandjean, Chris Ottele, Allison Minicky, Blake Armstrong or your Husch Blackwell attorney.

### **Your comprehensive COVID-19 legal resource**

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.