

OSHA Issues Mandatory Vaccination and Testing Standard, But One Federal Court of Appeals Has Already Issued a Stay

Article By:

Rodney L. Bean

Ashley Faulkner

The Occupational Safety and Health Administration (“OSHA”) published on November 5, 2021, its emergency temporary standard (“ETS”) requiring most private employers with 100 or more employees to establish, implement, and enforce a written mandatory vaccination or test policy. The ETS requires covered employers to mandate employees be either fully vaccinated or provide proof of regular COVID-19 testing and wear face coverings while at work. Employers will be required to provide up to four hours paid time to allow for employees to receive their primary vaccine dose and allow for reasonable time and paid sick leave to recover from any side effects resulting from each dose.

The ETS includes two important deadlines for employers. By December 5, 2021, employers must comply with all requirements of the ETS, excluding the weekly testing requirement. This means that by December 5, 2021, all unvaccinated employees must begin wearing face coverings while at work, unless certain conditions apply. After January 4, 2022, unvaccinated employees must provide weekly proof of negative COVID-19 test results.

Following OSHA’s issuance of the ETS, several states and private employers have filed petitions for review in the Fifth, Sixth, Eighth, and Eleventh U.S. Circuit Courts of Appeals. On November 6, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a temporary stay to enforcement of the ETS, as part of an expedited review. The Government is required to respond to the Petitioners’ motion for permanent injunction by today, November 8, 2021, by 5 p.m. The Fifth Circuit temporarily suspended enforcement because the petitions gave cause “to believe there are grave statutory and constitutional issues” associated with the ETS. The Fifth Circuit’s jurisdiction includes Texas, Louisiana, and Mississippi.

While the litigation over the ETS is ongoing, employees would be well-advised to continue creating the policies and procedures necessary to comply with the ETS. While no one knows at this point whether the ETS will survive the legal challenges, compliance deadlines are coming quickly. Waiting for clarity from the courts may leave little time to prepare policies and practices if the ETS is upheld.

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