

# **Fifth Circuit Stays OSHA’s Vaccine or Testing Emergency Temporary Standard – What’s Next?**

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On November 5, 2021, [OSHA released an Emergency Temporary Standard \(“ETS”\)](#) requiring large employers—those with 100 or more employees—to implement a vaccination policy mandating that their employees either be vaccinated or submit to weekly testing. The ETS gave employers until December 5, 2021 to comply with the bulk of the ETS’s requirements, and until January 4, 2022 to begin testing employees who have not yet been fully vaccinated. Several legal challenges ensued.

## **The Fifth Circuit’s Order**

On November 12, 2021, just one week after OSHA released its ETS, the U.S. Court of Appeals for the Fifth Circuit issued an order staying enforcement and implementation of the ETS pending further judicial review. Reviewing the ETS, the Fifth Circuit concluded that the COVID-19 virus is not the sort of “substance” or “agent” that poses such a “grave danger” as to allow OSHA to take emergency action. The Fifth Circuit further criticized the scope of the ETS, characterizing it as a “one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in workplaces (and workers) that have more than a little bearing on workers’ varying degrees of susceptibility” to the virus. Thus, the Fifth Circuit concluded that the ETS’s challengers are likely to succeed on the merits, and therefore issued a stay requiring OSHA to suspend activities related to the implementation and enforcement of the ETS pending future developments in the litigation.

## **Next Steps for the ETS: “The Lottery”**

Though the Fifth Circuit was the first to issue a decision addressing the ETS, it is not the only Circuit where appeals are pending. Challenges to the ETS are making their way through virtually every circuit court of appeals, including the Second Circuit. Given the large number of similar appeals, they

will be consolidated and assigned to a single circuit court using a lottery system orchestrated by the Judicial Panel on Multidistrict Litigation. Notably, the Circuit that ultimately hears the challenge will have the power to modify or nullify the stay issued by the Fifth Circuit. In other words, the Fifth Circuit's stay may or may not be short-lived.

## Practical Implications for Employers

It is important to note that the Fifth Circuit's stay does not mean, or even suggest, that employer-instituted vaccine mandates are themselves unlawful. [To the contrary, the EEOC has already taken the position that, so long as they allow for reasonable accommodations consistent with Title VII and the ADA, such policies do not violate federal law.](#) Accordingly, while the Fifth Circuit has prohibited OSHA from implementing and enforcing the ETS until further notice, and OSHA has announced it will comply with the Fifth Circuit's mandate, employers remain free to institute compliant vaccine or testing policies of their own choosing. Moreover, for federal contractors, vaccine mandates are still required – all employees must be fully vaccinated by January 18, 2022 pursuant to President Biden's Executive Order and its implementing guidance.

For now, employers should stay tuned for updates, as the status of the ETS is subject change rapidly. Given the rapid pace of developments, employers would be wise to continue preparations to comply with the ETS in the event it survives ongoing judicial scrutiny.

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