

UPDATE: Sixth Circuit Will Hear Legal Challenges to OSHA's Mandatory Vaccination and Testing Standard

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On November 5, 2021, OSHA published its [Emergency Temporary Standard \("ETS"\)](#), requiring private employers with 100 or more employees to establish, implement, and enforce a written mandatory vaccination or testing policy.

Since then, at least 34 lawsuits challenging the ETS have been filed in U.S. Courts of Appeals across the country. One of those challenges was filed in the U.S. Court of Appeals for the Fifth Circuit (which hears federal appeals from Texas, Louisiana, and Mississippi). The Fifth Circuit recently issued and later reaffirmed a Stay, temporarily barring the ETS from coming into effect and ordering OSHA to stop all implementation and enforcement activities.

On Tuesday, November 16, 2021, the U.S. Court of Appeals for the Sixth Circuit (which hears federal appeals from Ohio, Michigan, Kentucky, and Tennessee) was selected by lottery to hear legal challenges raised against the ETS. Under the rules governing multi-circuit litigation, all the petitions now will be consolidated and reviewed by the Sixth Circuit, which will decide whether to uphold or overturn the ETS and may also decide whether to lift or affirm the Fifth Circuit's Stay.

After the Sixth Circuit issues its decision, the litigation might proceed to the U.S. Supreme Court, which would have the final say about whether the ETS survives. But the Supreme Court can decide whether it wants to become involved; at this point, it is not possible to say when, or whether, that might happen.

While the litigation proceeds, employers would be well-advised to continue their efforts to create policies and procedures to comply with the ETS. The ETS calls for covered employers to determine the vaccination status of its employees and enforce a mask mandate by December 6, 2021, then ensure by January 4, 2022, that unvaccinated employees are tested weekly. Waiting for clarity from the courts may leave little time to prepare and meet the compliance deadlines, should the ETS survive.

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