Published on *The National Law Review* https://natlawreview.com

Sixth Circuit Dissolves the Stay of OSHA's COVID-19 Emergency Temporary Standard and OSHA Issues New Compliance Deadlines

Article By:

Melissa A. Bailey

John F. Martin

On December 17, 2021, a three-judge panel of the Sixth Circuit Court of Appeals dissolved the stay of the Occupational Safety and Health Administration's (OSHA) COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). Shortly thereafter, OSHA posted new compliance dates on its website. Covered employers must now comply with the provisions of the ETS by January 10, 2022. If an employer opts to permit employees to test in lieu of vaccination, then testing of unvaccinated employees must begin on or before February 9, 2022.

The Decision

Several states, employers, trade associations and religious groups filed challenges to the ETS in multiple federal circuit courts of appeal. When challenges are filed in multiple circuits, the federal courts use a lottery system to consolidate the challenges in one circuit court. Before the circuit court was chosen, the Fifth Circuit Court of Appeals issued an injunction staying the ETS. After the Fifth Circuit's decision, the challenges were consolidated before the Sixth Circuit Court of Appeals. On November 23, 2021, OSHA filed a motion asking the Sixth Circuit to lift the stay issued by the Fifth Circuit.

A three-judge panel of the Sixth Circuit considered OSHA's motion, and each judge on the panel wrote a separate opinion. Judge Jane Stranch authored the majority opinion in the 2–1 decision, which held that OSHA did not exceed its statutory authority in issuing the ETS because the Occupational Safety and Health (OSH) Act "requires OSHA to issue an emergency standard if necessary to protect workers from a 'grave danger' presented by 'exposure to substances or agents determined to be toxic or physically harmful or from new hazards.'" The majority concluded that regulating an "agent that causes bodily harm"—including a virus—is squarely within OSHA's authority.

The majority also noted that OSHA has regulated infectious diseases, including protecting employees from exposure to HIV, hepatitis B, and hepatitis C through promulgation of the Bloodborne Pathogens

Standard, 29 C.F.R. 1910.1030:

Given OSHA's clear and exercised authority to regulate viruses, OSHA necessarily has the authority to regulate infectious diseases that are not unique to the workplace. Indeed, no virus—HIV, HBV, COVID-19—is unique to the workplace and affects only workers. And courts have upheld OSHA's authority to regulate hazards that co-exist in the workplace and in society but are at heightened risk in the workplace.

Longstanding precedent addressing the plain language of the Act, OSHA's interpretations of the statute, and examples of direct Congressional authorization following the enactment of the OSH Act all show that OSHA's authority includes protection against infectious diseases that present a significant risk in the workplace, without regard to exposure to that same hazard in some form outside the workplace.

(Internal citations omitted.)

With regard to COVID-19, the majority wrote, "Congress expressly included funding for OSHA in the American Rescue Plan that is to be used 'to carry out COVID-19 related worker protection activities.'"

Given its finding that Congress had expressly authorized OSHA to issue a standard, the majority easily dispatched the plaintiffs' constitutional arguments. Specifically, the "seldom-used major questions doctrine" requires "clear congressional authorization" when a government agency implements a regulatory scheme that poses issues of "vast economic and political significance." According to the majority, Congress expressly authorized OSHA's issuance of the ETS, and it is "not an enormous expansion of its regulatory authority."

The majority declined to second-guess OSHA's finding that COVID-19 constitutes an "emergency" that poses a "grave danger." Similarly, the majority held OSHA had adequately explained its reasoning in limiting coverage of the ETS to employers with 100 or more employees: larger employers have the resources to implement the standard, the "coverage threshold is sufficiently expansive" to curb COVID-19 transmission rates, and the ETS "'will reach the largest facilities, where the most deadly outbreaks of COVID-19 can occur.'"

"Based on the wealth of information in the 153-page preamble, it is difficult to imagine what more OSHA could do or rely on to justify that workers face a grave danger in the workplace," the majority wrote, and OSHA is not required to demonstrate "scientific certainty" in issuing an ETS. The majority found, moreover, that OSHA was required to navigate a rapidly changing landscape that included regulatory approval of vaccines to address the virus and variants.

Judge Julia Gibbons filed a short concurrence, noting the "limited role of the judiciary in this dispute about pandemic policy." "Reasonable minds may disagree on OSHA's approach to the pandemic, but we do not substitute our judgment for that of OSHA, which has been tasked by Congress with policy-making responsibilities," Judge Gibbons wrote.

Judge Joan Larsen's dissent took issue with OSHA's decision to make the testing/masking option "less palatable" to employers and employees than vaccination, and found that OSHA could not show that the ETS was necessary or that COVID-19 posed a "grave danger." She also wrote that OSHA had exceeded its statutory authority because "Congress has clearly marked the perimeter of OSHA's authority: the workplace walls." Given that COVID-19 "exists everywhere an infected

person may be—home, school or [the] grocery store, to name a few," Judge Larsen asked, "how can OSHA regulate an employee's exposure to it?"

OSHA's Response

On December 17, 2021, OSHA posted a statement to its website saying that the agency was "gratified" by the Sixth Circuit's decision, which allows OSHA to "once again implement this vital workplace health standard." OSHA also amended the compliance dates for the ETS as follows:

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.

What Are Employers Required to Do?

The ETS requires covered employers with 100 or more employees to determine the vaccination status of each employee and keep records related to vaccination status, provide specific information about vaccines, and develop and implement written policies describing the requirements with regard to vaccinations and testing. Employers must now complete those steps by **January 10, 2022**. The ETS allows covered employers to permit employees to undergo weekly testing rather than be vaccinated. If employers take that option, weekly testing of unvaccinated employees must begin on or before **February 9, 2022**.

What Happens Next?

Shortly after the decision was issued, multiple plaintiffs filed emergency applications for an immediate stay of the ETS with the Supreme Court of the United States. Those applications will be reviewed by Justice Brett Kavanaugh, who is assigned to hear petitions from the Sixth Circuit Court of Appeals.

Justice Kavanaugh has several options. He has the authority to grant the petitioners' applications and stay the ETS pending review of the entire Court. Or, given OSHA's decision to delay compliance dates, he could refer the applications to the full Court for a decision. Justice Kavanaugh could also take no action on the applications pending review of the full Court.

The Supreme Court will presumably be mindful of the resources necessary for employers to implement the ETS and will try to avoid a scenario in which employers would take steps to implement the ETS only to have it invalidated later. Although it is always difficult to predict how quickly a ruling might come, the Supreme Court will most likely take action in advance of January 10, 2022, to give employers some certainty.

National Law Review, Volume XI, Number 353