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OSHA Suspends Implementation and Enforcement of Vaccine-or-Test Mandate in Response to Fifth Circuit Order

On Friday, November 12, the Fifth Circuit Court of Appeals issued an order reaffirming its November 6, 2021 initial stay and issued a further order forbidding the Occupational Safety and Health Administration (OSHA) from implementing or enforcing the Emergency Temporary Standard (ETS). In a sharp and stinging 22-page rebuke, the Fifth Circuit called the ETS “fatally flawed” because it “is 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 supposedly ‘grave danger’ the [ETS] purports to address.”

The Fifth Circuit’s order (“Order”) gives employers subject to the ETS at least a temporary reprieve from compliance with the vaccinate-or-test mandate. We stress “temporary” because nothing is certain about the longevity of the Order. The legal challenges to the ETS filed across 11 different courts will be entered into a multi-circuit lottery where one appeals court will be chosen to hear all ETS challenges. The lottery is expected to occur the week of November 15. Accordingly, there is only a 1 in 11 chance the Fifth Circuit will be selected to hear the consolidated challenges. The selected court can allow the Order to remain in effect, modify it, or dissolve it in its entirety.

For the time being, however, OSHA (somewhat surprisingly) has agreed to comply with the Order on a nationwide basis. OSHA issued the following statement regarding the Order: “While OSHA remains confident in its authority to protect workers in emergencies, **OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.**” (emphasis added). OSHA’s course of action should give some comfort to employers taking a wait-

and-see approach.

Nevertheless, employers should remain cautiously mindful that the ETS imposes many administrative and recordkeeping burdens. These burdens are substantial, time consuming, and include the adoption of a written policy, collecting vaccination records, announcing policy requirements to employees, developing and maintaining a vaccine roster, implementing a plan to address medical and religious accommodation requests, among many others. Our comprehensive summary of the ETS's requirements can be [found here](#). Because the future of the Order is uncertain, employers should keep apprised of the status of the legal challenges ahead and have a plan to comply with the ETS should the Order be modified or dissolved.

Frost Brown Todd will closely monitor the impending and various legal challenges to the ETS and will apprise you of all relevant future developments. For more information, please contact [Kyle Johnson](#), [Jeff Shoskin](#), [Catherine Burgett](#), [Anne Duprey](#), or any other attorney in Frost Brown Todd's [Labor and Employment](#) practice group.

Read more of our analysis as it relates to COVID-19 and vaccine mandates.

- [Must State and Local Governments Follow OSHA's Vaccine and Testing Mandate?](#)
- [OSHA Releases COVID-19 Vaccination and Testing Emergency Temporary Standard](#)
- [Nursing Homes: Spread of COVID and Vaccine Mandates](#)
- [Conflicting Orders: Can State Laws Thwart Federal Vaccine Mandates?](#)
- [EEOC COVID-19 Vaccine Mandate FAQ Updates Address Religious Objections](#)
- [Mandatory Vaccines Update: OSHA Sends Draft ETS to White House](#)
- [Thinking About Implementing a Mandatory COVID 19 Vaccine Policy? Here Is What to Consider](#)
- [Maintaining Employee Medical Information and COVID-19](#)

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