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Labor & Employment Alert

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Biden's "shot or test" mandate is back (at least for now)

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The Sixth Circuit lifted the stay on Fed/OSHA's enforcement of its "shot or test" ETS—here's what employers need to know.



What's the Impact?

- / Fed/OSHA pushed back *enforcement* of the ETS's requirements generally to January 10, 2022, with the weekly testing requirements for unvaccinated employees pushed back to February 9, 2022
- / Challengers have already requested an emergency stay of the ETS from the Supreme Court

On December 18, the three-judge panel of the United States Court of Appeals for the Sixth Circuit assigned to review the federal Occupational Safety and Health Administration's (Fed/OSHA) Emergency Temporary Standard (ETS) for Large Employers, which requires employers to require employees to be vaccinated against COVID-19 or be tested for COVID-19 weekly (among other requirements), [lifted the stay](#) blocking its enforcement. In the decision, the panel cited Fed/OSHA's "broad authority" to take measures to protect workers in the workplace and Fed/OSHA's prior efforts to address the "extraordinary and exigent circumstances presented by this unprecedented pandemic" through voluntary compliance. According to the panel, Fed/OSHA "demonstrated the pervasive danger that COVID-19 poses to workers—unvaccinated

workers in particular—in their workplaces,” and cited the fact that the mandate offers a testing option and accordingly does not require anyone to get the vaccination in reasoning that the potential harm caused by not enforcing the ETS outweighed the potential harm of letting the ETS go into effect. The court accordingly lifted the stay on the mandate and paved the way for Fed/OSHA to resume its enforcement.

This decision was immediately appealed to the United States Supreme Court with a request for another emergency stay of the ETS. This request is now pending before Justice Brett Kavanaugh, a Trump nominee, who oversees the Sixth Circuit. Notably, the Supreme Court has declined all requests for similar emergency stays of vaccination mandates to date.

Immediately after the Sixth Circuit issued its decision, Fed/OSHA issued a [statement](#) that it will not issue citations for noncompliance with the ETS generally before January 10, 2022, or for noncompliance with the ETS testing requirements specifically before February 9, 2022, *as long as the employer is making reasonable good faith efforts to comply with the ETS.*

Assuming Justice Kavanaugh does not grant the emergency stay, steps employers can, and should, begin taking (or continue taking) now to demonstrate efforts at good faith compliance are:

- / Inform employees of the requirements and the need to get vaccinated or be required to test weekly as a condition of employment
- / Survey employees on their vaccination status, and note their status as vaccinated or unvaccinated in a roster. Under the ETS, employers must maintain this roster (deeming any employees who refuse to respond as unvaccinated), and keep copies of the proof of vaccination
- / Provide paid time off for employees to get the COVID-19 vaccine and/or to recover from effects of the vaccine
- / Develop and implement a COVID-19 policy that mandates vaccination against COVID-19 or requires employees who are not vaccinated to get tested weekly and wear a proper face covering in the workplace or when with other employees for work purposes, such as traveling in a car together. This plan should also include screening protocols for non-employees who enter the workplace
- / Enforce necessary isolation periods for employees who test positive for COVID-19
- / Where testing will be used as an option, begin procuring tests and/or exploring local options for testing that may be used and begin implementing the testing option on or before February 9, 2022

For more information on the ETS requirements, please review our prior [alert](#) or view a recording of our webinar, [Breaking Down the Federal COVID-19 Vaccine Mandates for Employers](#), which covered the Fed/OSHA ETS in detail.

Where the federal contractor mandate and the Centers for Medicare and Medicaid vaccination mandates are currently stayed and not in force, employers should move forward with compliance with the Fed/OSHA ETS unless and until other such federal mandates come into force.

Our Nixon Peabody team is continuing to monitor the status of the federal vaccination mandates and other COVID-19 developments, and will continue to provide [updates](#) and solutions to assist employers in navigating these chaotic times.

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