

# What Now With OSHA's Vaccine Rules? Your Questions Answered

By Jessica Summers

The news has been abuzz with stories about the wave of legal challenges to OSHA's recently released Emergency Temporary Standard (ETS) on COVID-19. The ETS' first set of requirements were slated to go into effect on December 5, but now it is unclear where things will stand on that date. This has understandably left many employers confused and questioning what actions they should be taking at this time.

So let's try to break things down and get some clarity—

## **What rules are we talking about here?**

The subject of this discussion is the ETS which OSHA formally released on November 5, 2021. The biggest headlines from the ETS are that it requires employers with 100 or more employees (1) to ascertain employee vaccination statuses by December 5, and (2) to, at minimum, require that all employees be vaccinated or submit to weekly testing starting January 5. The ETS also requires employers to implement a range of other COVID related policies and practices.

Please see our earlier blog for a full breakdown of the ETS. While it is outside the scope of this blog, it is important to note that other federal vaccine mandates remain in effect in the healthcare industry and for federal contractors.

## **What is going on with the legal challenges to the ETS?**

OSHA's release of the ETS was met almost immediately by a flood of lawsuits challenging the action.

Cases challenging the ETS have now been filed in all 12 federal circuit courts. When this type of thing happens, the federal courts have a process for selecting a single court to handle all of the challenges. This prevents a situation where the same issue is being considered in multiple federal courts and potentially resulting in conflicting outcomes.

Just a day after the OSHA ETS was published, and before the federal courts had assigned a single court to handle the challenges, the Fifth Circuit Court of Appeals in New Orleans went ahead and issued an order temporarily staying the ETS. This stay did not have any immediate practical effect since the first parts of the ETS weren't slated to go into effect until December 5, but did start to raise questions about the future of the ETS. After receiving further briefs from the federal government and the challengers, on November 12, the Fifth Circuit issued a more detailed order reaffirming and continuing the temporary stay.

Although the Fifth Circuit was the first court to take a bite at the apple, this had no influence on which court was selected to handle the challenges. Rather, the selection was made using a true lottery system with the names of each federal circuit that had received at least one case challenging the ETS (which in this case was all the courts) being placed in the pool and one being drawn at random. The lottery was held on November 16 and the Sixth Circuit was selected to handle all of the consolidated cases.

So now it is up to the Sixth Circuit to decide whether to lift, modify or continue the stay issued by the Fifth Circuit and how to handle the case going forward. The Sixth Circuit, which typically oversees cases from Kentucky, Michigan, Ohio and Tennessee, is considered one of the more conservative circuits. While every case is different and outcomes can never be perfectly predicted, based on the Sixth Circuit's track record, we anticipate that the Court will keep some sort of injunction in place to prevent the rule from going into effect and maintain the status quo while the case is being handled.

With the number of cases involved and the issues at stake, it is almost certain that these challenges will end up at the Supreme Court. With the Sixth Circuit expected to favor the challengers, it is most likely that the federal government will end up being the party to take the appeal to the Supreme Court.

Ultimately, it is going to be a waiting game to see how fast the Sixth Circuit moves and how quickly the Supreme Court picks up any challenge. We should know in the coming days whether the Sixth Circuit is going to follow the Fifth Circuit's lead on the temporary stay. In all likelihood, the Sixth Circuit will keep some form of stay in place, and the matter won't be resolved by December 5. For its part, OSHA has said that it is suspending implementation and enforcement efforts while it waits to see what is going to happen.

### **Is there a chance the ETS requirements will still go into effect on December 5 and January 4 as scheduled?**

Yes, there is a chance, but it is unlikely, particularly as to the requirements that were slated to start December 5.

There are a few ways this could occur. First, the Sixth Circuit could decide to lift the temporary stay preventing the ETS from going into effect while it considers the cases – meaning the rule could go into effect while the challenge is still being considered. Alternatively, the Sixth Circuit could resolve the cases in the federal government's favor before December 5, and any appeal to the Supreme Court could still be pending. Both scenarios are unlikely.

Even if everything goes in the federal government's favor (which is a big if given the balance of the Sixth Circuit and the Supreme Court), it is more likely that it is the January 4 deadline that would not be impacted.

If the rule is upheld, employers should expect, and plan for, OSHA to be full steam ahead on enforcing the ETS on its original timeline. If things are not resolved until after January 4, OSHA may decide to hold off immediately enforcing the ETS or be more lenient to allow businesses to get into compliance once any challenges are resolved. However, as this rule has been issued as an emergency standard to address what OSHA sees as an immediate hazard, employers should not expect any leniency to last if the rules go forward.

### **What, if anything, should we be doing while we wait for the challenges to play out?**

As the discussion above illustrates, there are a lot of moving pieces and things could turn quickly. Accordingly, covered employers who don't start to plan now in case the ETS is upheld and goes into effect, risk finding themselves in a scramble for compliance.

One significant yet relatively simple step that employers can take towards compliance is to start collecting employee vaccination information. If the ETS goes into effect, employers will be required to collect this information. If the ETS never goes into effect, there is no harm in an employer having that information and it can help inform the employer's decisions on safety and other policy issues. For those employers that may have concerns about requiring employees to disclose their vaccination status before it is clear whether this will be necessary, an alternative approach would be to ask or encourage or even offer rewards for employees who have been vaccinated to voluntarily provide a copy of their vaccination care. From what we have seen thus far, most vaccinated employees are willing to voluntarily confirm their vaccination status and this will help reduce the number of employees that the business will need to get information from if the ETS does go into effect.

Employers should also begin considering and communicating with employees about whether they plan to allow employees who do not qualify for an accommodation due to a religious or medical reason to submit to testing instead of being fully vaccinated. Employers that are planning to simply implement a vaccine requirement for everyone who does not qualify for an accommodation (which the ETS encourages) should consider the fact that unvaccinated employees need lead-time if they are going to get vaccinated. Letting employees know what the company is thinking can help those employees plan ahead and understand that they may not want to wait for the ETS litigation to be resolved to start the vaccination process.

### **What are the potential consequences if the rules go into effect and we aren't in compliance on time?**

While, as noted above, OSHA may be more lenient at the beginning, the failure to follow the ETS if it goes into effect will be treated like any other OSHA violation.

With inflation adjustments, the maximum penalty for a single serious violation of an OSHA rule that is not willful or repeated is \$13,653 per violation. The big issue is that the ETS is silent on is how penalties will be calculated – specifically whether an employer’s violation of the ETS (for example, failing to ascertain vaccination status) would be considered and penalized as a separate violation as to each employee with whom the violation occurred. So, for example, whether an employer’s failure to ascertain all employees’ vaccine statuses would be treated as one single violation, or if there would be a separate violation as to each employee from whom the information wasn’t collected.

***The big takeaway from all of this is that employers with 100 or more employees should stay apprised of developments with the legal challenges and should take basic steps to make sure that they are not scrambling if the ETS does go into effect.***

Please do not hesitate to contact us if you have any further questions or need assistance navigating these challenging issues.