

# OSHA Advisory

## It's Back On: OSHA'S Vaccine or Test ETS Freed From Stay

In the latest twist in the ongoing back and forth on workplace COVID-19 measures, the 6<sup>th</sup> Circuit Court of Appeals on Friday gave the Occupational Safety and Health Administration (“OSHA”) the go-ahead to implement and enforce its [vaccine or test emergency temporary standard](#) (“ETS”). The ETS had been immediately challenged and ultimately [stayed](#) by the 5<sup>th</sup> Circuit Court of Appeals. In light of the 5<sup>th</sup> Circuit’s decision, OSHA announced it had “temporarily suspended activities related to the implementation and enforcement of the ETS.” While the battle in the 5<sup>th</sup> Circuit brewed, the myriad of challenges to the ETS were [consolidated into one case](#) in the 6<sup>th</sup> Circuit Court of Appeals. Before the 6<sup>th</sup> Circuit, the government sought to dissolve the 5<sup>th</sup> Circuit’s stay. On December 17, the [Court ruled](#): the stay is dissolved **and the ETS can take effect as planned.**

In a lengthy 2-1 opinion, the court noted that the ETS is not, strictly speaking, a vaccine mandate:

The ETS does not require anyone to be vaccinated.... Employers have the option to require unvaccinated workers to wear a mask on the job and test for COVID-19 weekly. They can also require those workers to do their jobs exclusively from home, and workers who work exclusively outdoors are exempt.... The employer—not OSHA—can require that its workers get vaccinated, something that countless employers across the country have already done.

The 6<sup>th</sup> Circuit also disagreed with the 5<sup>th</sup> Circuit’s reasoning that OSHA cannot regulate what is mostly a public health (as opposed to an employment) issue, stating that OSHA has the authority to regulate infectious disease regardless of whether the same hazards exist outside the workplace. The 6<sup>th</sup> Circuit went on to note that the ETS is not a novel expansion of OSHA’s power; rather, “it is an existing application of authority to a novel and dangerous worldwide pandemic.”



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Having found no threshold issue that OSHA exceeded its authority under the statute, the court reviewed the challenges to the ETS itself. In doing so, it relied heavily on the ETS' preamble. The court deferred to OSHA's finding that COVID-19 infection, and the presence of unvaccinated workers, presents a grave danger, "as opposed to easily curable and fleeting effects on [] health." While OSHA need not show the ETS is "necessary to alleviate" the grave risk, noted the court, lackluster voluntary containment measures by employers meant OSHA needed to act. The 6<sup>th</sup> Circuit's opinion noted that while the ETS may indeed be overinclusive and under inclusive with respect to the 100 employee threshold, as the 5<sup>th</sup> Circuit had held, neither observation warrants a stay of the ETS.

The court then turned to the constitutional challenges. It rejected Commerce Clause-based challenges citing to the breadth of that provision of the Constitution. Similarly, the court rejected challenges that claimed OSHA had not been delegated the power, by Congress, to act as it has, citing to the scope of the OSH Act and OSHA's broad authority to regulate workplace safety and health. Finally, the court held that ETS challengers could not show irreparable harm if the ETS is not stayed because they "have not shown that any injury from lifting the stay outweighs the injuries to the Government and the public interest."

Several motions for an emergency stay already have been filed with the Supreme Court, and Justice Kavanaugh, the Supreme Court Justice assigned to the 6<sup>th</sup> Circuit, is tasked with deciding what to do with the motions. Regardless, as of now employers need to come into compliance with the ETS, and soon. In the wake of the 6<sup>th</sup> Circuit decision OSHA [announced](#):

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.

The bottom line is that employers covered by the ETS need to take immediate measures to implement vaccine mandates and/or weekly testing. Intentional disregard of the ETS could subject employers to significant penalties. Please see our previous [advisory](#) for guidance on how to comply with the ETS.