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SIXTH CIRCUIT REINSTATES OSHA'S VACCINE MANDATE – WHAT STEPS SHOULD EMPLOYERS TAKE NOW?

Those following the large employer vaccine mandate saga will recall that, on November 6, 2021, OSHA issued its long-awaited Emergency Temporary Standard (“ETS”) requiring employers with 100 or more employees to implement vaccination policies mandating that their employees either be vaccinated or submit to weekly testing and wear face coverings. On November 12, 2021, however, **the United States Court of Appeals for the Fifth Circuit issued an order** staying the enforcement and implementation of OSHA’s ETS pending judicial review. Since then, employers have been in limbo anxiously awaiting a decision from the Sixth Circuit—where the case was consolidated for further review—on whether the ETS will be enforced and, if so, when. The Sixth Circuit finally weighed in on Friday, and here is what you need to know.

The Decision

A three-judge panel of the Sixth Circuit considered OSHA’s motion to dissolve the Fifth Circuit’s stay. In a 2-1 decision authored by Judge Jane Stranch, the majority concluded that the ETS does not exceed OSHA’s statutory authority to regulate “grave dangers” presented

by “exposure to substances or agents determined to be toxic or physically harmful or from new hazards.” More specifically, the court observed that “COVID-19 has continued to spread, mutate, kill, and block the safe return of American workers to their jobs. To protect workers, OSHA can and must be able to respond to danger as they evolve.” Accordingly, the Sixth Circuit dissolved the Fifth Circuit’s stay. A number of appeals have already ensued.

New Compliance Deadlines

Shortly after the Sixth Circuit issued its decision, OSHA updated its website to address the ETS’s deadlines, which previously required employers to comply with the bulk of requirements by December 5, 2021, and to begin the weekly collection of employee test results by January 4, 2022. OSHA has given employers some leeway in meeting the compliance deadlines, stating: “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

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testing requirements before **February 9** so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.”

In order to take advantage of the “reasonable, good faith efforts” compliance deadline extension, employers must begin actively preparing to comply with the ETS, if they haven’t already. In other words, although a number of appeals have been filed and it remains to be seen whether the Supreme Court will weigh in, employers cannot wait for further judicial review to begin their compliance efforts.

Next Steps for Employers

Employers should act now to begin their reasonable, good faith efforts to comply with the ETS by January 10:

- **Develop a Policy.** First and foremost, employers should develop the written policy required by the ETS. The development and implementation of this policy serves as evidence of compliance efforts. The policy must require vaccination for all employees, other than those (i) for whom a vaccination is medically contraindicated, (ii) for whom a medical necessity requires a delay in vaccination, (iii) who are otherwise entitled to a reasonable accommodation under the ADA or Title VII; or (iv) unvaccinated employees who undergo weekly COVID-19 testing and wear a face covering at the workplace. OSHA has published policy templates [here](#).
- **Adjust Leave Policies.** The ETS requires employers to provide employees “reasonable time,” including up to four hours of paid time, to receive each vaccination dose. This time may not be deducted from an employee’s accrued sick or personal time.
- **Educate Employees.** Once the relevant policies are in place, the next step will be to communicate the following information to employees in a language and at a literacy level the employees understand:
 - Information about the requirements of the ETS and workplace policies and procedures established to implement the ETS;
 - The CDC document “Key Things to Know About COVID-19 Vaccines”;
 - Information about protections against retaliation and discrimination; and
 - Information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

Employers must also allow reasonable time and paid sick leave to recover from side effects experienced following each dose. Unlike the actual vaccination time, however, employees may be required to use their accrued sick leave when recovering from vaccination side effects. Employers may set a “reasonable cap” on the amount of leave available to employees for vaccination recovery.

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Though not required by the ETS, employers should consider including the foregoing information directly within the written policy, distributing the policy to each employee, and obtaining a signed acknowledgment of each employee's receipt and understanding of the policy.

■ **Ascertain Vaccination Status.**

Employers should begin considering how to inquire about and collect vaccination status information as soon as possible, as the information must be collected by January 10, 2022. After the policy has been communicated to the workforce, employers should begin obtaining acceptable proof of vaccination status, and creating a roster to record each employee's vaccination status. Keep in mind, however, that vaccine information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA. Employees who decline to provide acceptable proof of vaccination or decline to respond to an employer's inquiry about vaccine status must be treated as an unvaccinated employee.

■ **Face Coverings.** Those employees who fail to provide acceptable proof of vaccination, confirm that they are unvaccinated, or decline to respond to an employer's inquiry about vaccine status must wear face coverings while in the workplace. Employers should begin establishing protocols to ensure

that these employees are in fact wearing face coverings at work before January 10, 2022.

■ **Prepare to Implement Testing Requirement for Unvaccinated Employees by February 10.**

By February 9, 2022, employers must implement a testing requirement for unvaccinated employees. Employees who frequent the workplace on a weekly basis must be tested weekly, while those who have been away for a week or more must provide a negative test result within 7 days before returning to work. If an employee fails to provide proof of a negative test, they must be excluded from the workplace until they do. Though they may elect to do so, employers are not required to pay for costs associated with testing unless mandated by other laws or an applicable collective bargaining agreement. Employers are required, however, to maintain a record of each test result.

■ **Make Records Available to OSHA and Employees Upon Request.**

Employers should also prepare to respond promptly to requests for vaccine-related information from OSHA and employees.

■ Employees may request their own vaccine and testing records and information regarding the aggregate number of vaccinated employees in the workplace.

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This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

■ Employers will have four business hours to provide OSHA with its written policy, and until the next day to provide all other records that must be maintained, including proof of employees' vaccination status and test results for unvaccinated employees. As a practical matter, this requirement means that employers should prepare a system to maintain vaccination-related documents in an organized and accessible manner to facilitate

compliance with the tight turnaround for OSHA information requests.

The Sixth Circuit's reinstatement of the ETS requires immediate attention to ensure compliance by OSHA's extended deadlines. Failure to undertake compliance efforts now could result in costly fines. Employers should stay tuned for updates, particularly further guidance from OSHA, as the agency has promised to "work closely with the regulated community to provide compliance assistance."