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Sixth Circuit Lifts Stay of OSHA Vaccine / Testing Mandate; Justice Kavanaugh May Rule or Refer to Full Supreme Court

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On December 17, 2021, the Sixth Circuit Court of Appeals dissolved the stay previously imposed on OSHA's Emergency Temporary Standard ("ETS") by the Fifth Circuit Court of Appeals. The ETS implements a comprehensive "vaccinate-or-test" requirement for employers with 100 or more employees. Our summary of the ETS requirements is available [here](#).

In originally imposing the stay, the Fifth Circuit [reasoned](#) that private employers should not be "deputiz[ed]" into "participation in OSHA's regulatory scheme," exposing them to "severe financial risk" for noncompliance while threatening to "decimate their workforces (and business prospects) by forcing unwilling employees to take their shots, take their tests, or hit the road."

In a 2-1 decision dissolving the Fifth Circuit's stay, the Sixth Circuit [observed](#) that "[d]espite access to vaccines and better testing," the virus "rages on, mutating into different variants, and posing new risks." Thus, "employers and employees have sought new models for a workplace that will protect the safety and health of the employees who earn their living there." OSHA, "the federal agency tasked with assuring a safe and healthful workplace," had provided such a model via the ETS. Judge Gibbons wrote separately to concur fully in the opinion authored by Judge Stranch, but noted "the limited role of the judiciary in this dispute about pandemic policy." Finally, Judge Larsen authored a dissent stating that she would stay OSHA's emergency rule pending final review.

Following the Sixth Circuit's decision, OSHA announced that it would not issue citations for noncompliance with any of the ETS requirements before January 10, 2022, and would not issue citations for noncompliance with the ETS testing requirement before February 9, 2022, "so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard."

The petitioners have sought emergency stays from the Supreme Court of the Sixth Circuit's decision by filing motions with Justice Kavanaugh, so the future of the ETS continues to be uncertain. Justice Kavanaugh has asked the Biden administration for its response to the appeals of the Sixth Circuit decision by December 30, 2021. Under the Supreme Court rules, Justice Kavanaugh can rule on the motions as Circuit Justice, or refer the motions to the full Court.

In the meantime, employers are advised to review the ETS requirements and make good faith efforts at compliance while the legal challenges to the ETS proceed to final adjudication.

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