

THE BUSINESS JOURNALS

Court reinstates mandate-or-testing rule for large employers, OSHA sheds light on enforcement timeline

By Ty West – Editor-in-Chief, *The Playbook*,
Dec 17, 2021, Updated Dec 19, 2021, 11:50am EST

A federal appeals court has lifted the temporary stay that blocked the [Occupational Safety and Health Administration's Covid-19 vaccine rule](#) that will require large employers to mandate the vaccine or require weekly testing of unvaccinated workers. Shortly afterward, OSHA shed new light on its enforcement plans.

The U.S. Court of Appeals for the Sixth Circuit on Friday in a 2-1 decision lifted the stay that was initially put in place by the Fifth Circuit on Nov. 6 – just days after the rule was announced in the form of an emergency temporary standard.

In its ruling, the Sixth Circuit found "the costs of delaying implementation of the ETS are comparatively high" relative to the claims of irreparable injury made by the plaintiffs, which include a host of attorneys general, business groups and others.

"We find that the factors regarding irreparable injury weigh in favor of the government and the public interest," read the majority opinion by Circuit Judge Jane B. Stranch.

After the ruling, a Department of Labor spokesperson said OSHA will exercise enforcement discretion with compliance dates for 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 Jan. 10, [2022], and will not issue citations for noncompliance with the standard's testing requirements before Feb. 9, [2022], so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard," the spokesperson said. "OSHA will work closely with the regulated community to provide compliance assistance."

The reversal adds another heavy dose of uncertainty to what employment attorneys were already calling an unprecedented situation for employers.

OSHA previously said it was suspending implementation and enforcement of the rule during the injunction, but it did not clarify what the stay meant for the rule's deadlines prior to the ruling on Friday.

The first major deadline for the Covid-19 vaccine emergency temporary standard was scheduled for Dec. 6. That's the deadline by which large employers would have been required to collect all the required vaccination information and documentation for its workforce; draft and distribute a policy consistent with the ETS requirements; and require masking of unvaccinated workers. The deadline to either mandate the vaccine or require weekly testing for unvaccinated workers was initially scheduled for Jan. 4, 2022.

Experts have said it's likely the ETS will face further appeals and legal challenges — potentially ending up in the U.S. Supreme Court — so more twists could be on the horizon.

When it was released in November, the emergency temporary standard, which applies to organizations with 100 or more employees, provided answers to some of the big questions that lingered since the Biden administration initially announced plans for the rule. But experts said it also necessitated some tough decisions for employers, such as whether to allow the testing option and, if so, who will be responsible for the cost of testing.

Attorneys have cautioned a lifting of the stay could lead to tight deadlines for employers, so the additional time to comply before potential citations is important.

Bob Nichols, a partner at Bracewell LLP, previously told The Business Journals he was advising large employers to continue taking steps to ensure they are positioned to comply with the rule by its established deadlines.

Experts have noted compliance with the ETS isn't something businesses can do overnight. They need to determine if they want to mandate the vaccine or if they will allow the testing option. If testing is permitted, they'll need to determine who will pay for the tests — a decision that could be shaped by state and local laws.

Employers will also need to determine the vaccination status of their workers — another potentially thorny scenario that's fraught with potential litigation risk.

"The most troubling aspect of this situation for businesses is that they face a great deal of work to come into compliance with this rule, and it is not even certain that the federal

courts will allow the rule to take effect," Nichols said. "For busy companies, the thought of putting a great deal of effort into a program that may ultimately not be necessary is very troubling."

Christina Janice, of counsel at Barnes & Thornburg, said many employers banked on the ETS being stopped by the courts and have not prepared for its implementation.

Janice said the litigation could take months to be completely resolved, by which time OSHA could follow its regulatory processes to create and publish a broader and permanent infectious disease standard. As we've noted, OSHA already extended the public comment period on the matter and has noted feedback could shape potential rules for small businesses down the road.

"Savvy employers should stay above the fray and communicate their commitment to worker and workplace safety, regardless of public regulations," Janice said.

©2021 American City Business Journals