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PRIVATE EMPLOYER VACCINE MANDATE MOVES FORWARD AS SIXTH CIRCUIT DISSOLVES FIFTH CIRCUIT'S OSHA ETS STAY

by Sara Jodka, Christy McDonald, Jeffrey Beemer, Aaron Burrell, D. Samuel Coffman, Dave Deromedi, Kathryn Wood, and Angelina Delmastro

On December 17, 2021, the United States Court of Appeals for the Sixth Circuit, which was chosen via lottery as the federal appellate court to decide whether the OSHA ETS, *i.e.*, the private employer vaccine mandate, would go into effect, dissolved the stay that the United States Court of Appeals for the Fifth Circuit had issued, allowing the vaccine or test mandate to move forward. [Massachusetts Building Trades Council, et al. v. OSHA \(6th Cir. Dec. 17, 2021\)](#).

As background, which you can also read about in our [previous blog detailing the OSHA ETS](#), the OSHA ETS is the private employer vaccine mandate that applies to employers with 100 or more employees. Under the mandate, an employer has to implement *either* a mandatory vaccine policy for its employees *or* a vaccine or weekly testing and face covering policy for those employees who choose not to get vaccinated. While the original deadlines for employees to get vaccinated and employers to begin weekly testing of unvaccinated workers in the original ETS can no longer be met, this decision means that the clock will start ticking again, requiring employers to pick up their pencils and finalize their policies. **Specifically, employers will have to draft their policies and comply with the notice and documentation provisions of the OSHA ETS by January 10 and implement vaccine or vaccine/testing requirements by February 9.**

As for the merits of the decision itself, Judge Stranch delivered the opinion of the court and first addressed the scope of OSHA's statutory authority. OSHA has the authority to issue an emergency standard if necessary to protect workers from a "grave danger" by "exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c)(1). The court disagreed with the Fifth Circuit's interpretation of the phrases "substances or agents," "toxic or physically harmful," and "grave danger," and noted that the meanings of the phrases must be given a "holistic view of the language that Congress chose to include in its statutory authorization to OSHA." The court determined that an "agent" could include a "virus" and cited numerous statutes demonstrating OSHA's authority over infectious diseases.

Once the court decided OSHA had not exceeded its authority by issuing the ETS, it turned to the individual challenges to the OSHA ETS. OSHA is permitted to issue an emergency temporary standard, which takes "immediate effect" and serves as a "proposed rule" for a notice-and-comment rulemaking if it determines: (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) that a standard "is necessary to protect employees from such danger." 29 U.S.C. § 655(c).

The court disagreed with the Fifth Circuit's position that the ETS was not prescribed on an emergency basis because it was not issued at the

outset of the pandemic. In disagreeing, the court noted the progressive steps of the pandemic since its inception and the later availability of the vaccine and other effective tools to address the virus. Given the fact that COVID-19 "continued to spread, mutate, kill, and block the safe return of American workers to their job," the court found that the situation presented the required emergency.

The court then found that the pandemic presented the required "grave danger" and scolded the Fifth Circuit's reasoning on the issue, noting that under the Fifth Circuit's view, no situation could ever rise to the level of a grave danger. While most of the court's analysis was based on data OSHA presented, the court did tackle the sticky issue of COVID-19 existing outside the workplace. The court found that OSHA regulates hazards inside and outside the workplace and noted the voluminous evidence demonstrating that all workplaces, regardless of industry, were impacted by the pandemic and presented a heightened risk of exposure.

Next, the court found that the ETS was "necessary to protect employees from" the grave danger. The court reasoned that the necessity element exists because prior actions to curb the pandemic did not work and sadly noted:

With nothing left at his disposal to curb the transmission in the workplace, the Secretary issued the ETS....

Vaccinated employees are significantly less likely to bring (or, if infected, spread) the virus into the workplace. And testing in conjunction with wearing a face covering "will further mitigate the potential for unvaccinated workers to spread the virus at the workplace." ... Based on the evidence relied on by OSHA, these measures will "protect workers" from the grave dangers presented by COVID-19 in the workplace. And OSHA is required to minimize a grave danger, even if it cannot eliminate it altogether.

The court found no issue with the "100 or more employees" requirement noting that the ETS "will reach the largest facilities, where most deadly outbreaks of COVID-19 can occur" and that the threshold is consistent with other size thresholds in similar congressional and agency decisions, including standards issued by the Equal Employment Opportunity Commission and under the Affordable Care Act.

One of the strongest arguments raised was the argument that the ETS was both "overinclusive" and "underinclusive," but the court found that neither applied because "OSHA may lean 'on the side of overprotection rather than underprotective" when promulgating an ETS." The court found that OSHA was not overinclusive because it excluded workplaces where the risk was significantly lower, e.g., employees working exclusively outdoors, remotely from home, or where the employee does not work near others, and not underinclusive because it was focused first on the companies most capable of compliance.

The last challenge was a constitutional challenge claiming that the

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ETS violated the Commerce Clause. The Fifth Circuit had focused on the impacts to individuals and held that it fell within the States' police power. The court found that the Fifth Circuit "miss[ed] the mark" because the ETS regulates employers, not individuals"...and employers clearly engaged in commercial activity.

With respect to the last element, the court found that the "Petitioners had not shown that any injury from lifting the stay outweighed the injuries to the Government and the public interest."

With that, the Sixth Circuit has lifted the stay allowing the over 100 employee private employer vaccine mandate to move forward. The next challenge almost definitely will be to the Supreme Court.

Key Takeaways for Employers: While there is still more to be done before the OSHA ETS gets the full green light, including Supreme Court review, this is a surprising step. Surprising because both the federal contractor and health care mandates are stayed in some fashion, though all three mandate challenges are winding through the courts and will all likely end up before the Supreme Court.

Most importantly, employers must step into action as the clock on compliance is ticking, with the January 10 deadline right around the corner. In fact, just before midnight the evening the decision was rendered, OSHA updated its website after the ruling and noted that it:

[W]ill not issue citations for non-compliance 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.

This means that, at a minimum, employers should develop their COVID-19 workplace policy, notify employees of it, begin to document and track proof of employee vaccination status, and begin to determine how they are going to implement mask and test (if the employer opts for the hybrid option). In addition to the vaccine or vaccine/test policy that covered employers will have to implement, they will also have to determine how to implement the paid and unpaid time off requirements because employers must give employees paid time off to allow employees to get vaccinated and to recover from any vaccine side effects. Employers will also have to determine out how they are going to track, document, and retain all required information, including proof of vaccine status, weekly testing results, exemption status, reasonable accommodation status, interactive process dialogue/documentation, and infection/removal/quarantine status.

Should you have any questions or concerns about your compliance obligations, please contact one of our Dickinson Wright COVID-19 labor and employment attorneys.

KEY CONTACTS



Sara H. Jodka is a Member in Dickinson Wright's Columbus office. She can be reached at 614.744.2943 or sjodka@dickinsonwright.com.



Christina K. McDonald is a Member in Dickinson Wright's Grand Rapids office. She can be reached at 616.336.1039 or cmcdonald@dickinsonwright.com.



Jeffery M. Beemer is a Member in Dickinson Wright's Nashville office. He can be reached at 615.620.1719 or jbeemer@dickinsonwright.com.



Aaron V. Burrell is a Member in Dickinson Wright's Detroit office. He can be reached at 313.223.3118 or aburrell@dickinsonwright.com.



D. Samuel Coffman is a Member and leader of the Labor and Employment Practice Group in Dickinson Wright's Phoenix office. He can be reached at 602-285-5029 or scoffman@dickinsonwright.com.



David R. Deromedi is a Member in Dickinson Wright's Detroit office. He can be reached at 313.223.3048 or dderomedi@dickinsonwright.com.



Kathryn S. Wood is a Member in Dickinson Wright's Detroit office. She can be reached at 313.223.3115 or kwood@dickinsonwright.com.



Angelina R. Delmastro is an Associate in Dickinson Wright's Detroit office. She can be reached at 313.223.3126 or adelmastro@dickinsonwright.com.