

# CLIENT | ALERT



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November 22<sup>nd</sup>, 2021

## OSHA Suspends COVID ETS Enforcement; Ultimate Fate of the ETS Now in the Hands of the Sixth Circuit

The saga of OSHA's recent COVID Vaccination and Testing ETS ("OSHA ETS" or "COVID ETS") continues! On Friday, November 12, 2021, (shortly before losing its authority over the issue), the Fifth Circuit Court of Appeals made permanent its temporary stay of OSHA's ETS. OSHA thereafter announced that it would suspend implementation and enforcement of the ETS pending resolution of existing litigation. Just a day or two later, on Tuesday, November 16, all cases challenging OSHA's ETS (including the Fifth Circuit case in which a stay was entered) were consolidated before the Sixth Circuit, who now has the sole authority to decide the validity of the ETS. OSHA could, and likely will, seek review of the existing stay order before the Sixth Circuit.

So what should an employer do? While the outcome of the issue is unclear, the OSHA COVID ETS may still be found valid. As noted above, the Sixth Circuit is not bound by the Fifth Circuit's earlier ruling. The timing of the litigation in the Sixth Circuit is unclear, and either party could appeal the Sixth Circuit's decision to the Supreme Court.

Despite the current stay, OSHA does not appear to have given up on the OSHA COVID ETS, but rather has announced it remains confident in "its authority to protect workers in emergencies." Cautious employers may want to continue preparations for possible compliance, while keeping an eye on the court proceedings.

In addition, employers who are federal contractors or health care providers should not rely on the stay applicable to OSHA's COVID ETS. Federal contractors and health care providers are governed by different COVID vaccination federal mandates: the President's executive order for federal contractors and the CMS Medicare Omnibus Staff Vaccine Mandate Interim Rule. While both of those mandates are being challenged, neither have been stayed.

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