

# Should Employers Keep Preparing for the COVID-19 ETS?

By Allen Smith, J.D.

November 15, 2021

**W**ith another ruling against the Biden administration's COVID-19 vaccine-or-testing directive on Nov. 12 and the Occupational Safety and Health Administration (OSHA)'s suspending implementation of the emergency temporary standard (ETS) to fight COVID-19 in the workplace, employers are wondering whether they should keep preparing to comply with the directive. Many legal experts recommend that employers prepare to follow the requirements of the ETS while litigation continues. However, some employers are taking a wait-and-see approach.

"Employers do not want to find themselves in a position where they are not ready if the ETS survives," said Ashley Cuttino, an attorney with Ogletree Deakins in Greenville, S.C.

Corbin Carter, an attorney with Mintz in New York City, said, "The Supreme Court may ultimately weigh in. But employers likely cannot await a court ruling on the new rule's fate before properly engaging in the appropriate tasks—convening stakeholders, reviewing the relevant rules, assessing options—given the rule's tight timeline."

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Nonetheless, OSHA stated that it "has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation," although it "remains confident in its authority to protect workers in emergencies." OSHA noted that the court ordered it to take no steps to implement or enforce the ETS until further court order.

"OSHA's course of action should give some comfort to employers taking a wait-and-see approach," said Kyle Johnson, an attorney with Frost Brown Todd in Louisville, Ky., Jeff Shoskin, an attorney with Frost Brown Todd in Cincinnati, and Catherine Burgett and Anne Duprey, attorneys with Frost Brown Todd in Columbus, Ohio, in a firm legal update. "Because the future of the order is uncertain, employers should keep apprised of the status of the legal challenges ahead and have a plan to comply with the ETS should the order be modified or dissolved."

We've gathered articles on the news from *SHRM Online* and other outlets.

## 5th Circuit Reaffirms Stay of OSHA Vaccine-or-Testing Requirement

OSHA's new rule requiring vaccinations or weekly testing for all employees at companies with at least 100 workers was blocked again by the 5th U.S. Circuit Court of Appeals in New Orleans, which called the new rule a "mandate" and added that it "grossly exceeds OSHA's statutory authority." The Justice Department said, "Today's decision is just the beginning of the process for review of this important standard. The department will continue to vigorously defend the standard and looks forward to obtaining a definitive resolution following consolidation of all of the pending cases for further review."

Feedback

(SHRM Online ([www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Federal-Appeals-Court-Reaffirms-Stay-of-OSHA-Vaccine-Requirements.aspx?\\_ga=2.189581805.758116163.1636722727-1102745045.1615925853](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Federal-Appeals-Court-Reaffirms-Stay-of-OSHA-Vaccine-Requirements.aspx?_ga=2.189581805.758116163.1636722727-1102745045.1615925853)))

### Financial Burden and Potential Constitutional Violation

The 5th Circuit justices said the rule imposes a financial burden on businesses and potentially violates the commerce clause of the Constitution. The directive "imposes a financial burden upon them by deputizing their participation in OSHA's regulatory scheme, exposes them to severe financial risk if they refuse or fail to comply, and threatens to decimate their workforces—and business prospects—by forcing unwilling employees to take their shots, take their tests or hit the road," they wrote. OSHA officials spent weeks drafting the policy, aware of the legal challenges it would face but believing the order was within the U.S. Department of Labor's power to keep workplaces free of grave dangers in times of emergency.

(The Washington Post (<https://www.washingtonpost.com/business/2021/11/12/biden-vaccine-mandate-court-ruling/>))

### What Does the Ruling Mean for the ETS?

The order reaffirms the court's initial stay on Nov. 6 and will remain in place "pending adequate judicial review of the petitioners' underlying motions for a permanent injunction." A "further order" will eventually come from the appellate court that gets assigned the consolidated petitions for review of the ETS pending in 11 of the 12 U.S. circuit courts of appeals. On Nov. 16, the U.S. Judicial Panel on Multidistrict Litigation will conduct a statutorily required random selection to decide which circuit will hear the consolidated cases from across the nation. The circuit court that hears the consolidated cases may end the stay or leave it in place.

(Ogletree Deakins (<https://ogletree.com/insights/fifth-circuit-again-stays-oshas-ets-for-now/>))

### Future of the ETS Is Uncertain

"The future of the ETS remains uncertain due to pending legal challenges. While the final result is unknown, it will take weeks of planning for employers to comply with the ETS's deadlines," said Andrew Metcalf and Stephen Woods, attorneys with Ogletree Deakins in St. Louis and Greenville, S.C., respectively, after the initial stay. "Accordingly, employers may want to continue preparing for the ETS as if it is going to take effect while litigation continues."

(SHRM Online ([www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Employers-Should-Plan-for-Vaccine-or-Testing-Rule-While-Litigation-Ensues.aspx?\\_ga=2.189581805.758116163.1636722727-1102745045.1615925853](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Employers-Should-Plan-for-Vaccine-or-Testing-Rule-While-Litigation-Ensues.aspx?_ga=2.189581805.758116163.1636722727-1102745045.1615925853)))

### Directive Issued Earlier This Month

OSHA released its ETS earlier this month, publishing it in the *Federal Register* on Nov. 5. "Employers have two months now to figure out what path they want to choose: mandate the vaccine for all or allow for testing," noted Daniel A. Schwartz, an attorney with Shipman & Goodwin in Hartford, Conn. Employers will have to weigh the pros and cons of each choice for their particular business, he said.

(SHRM Online ([www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/OSHA-Issues-COVID-19-Workplace-Vaccine-and-Testing-ETS.aspx?\\_ga=2.182093153.758116163.1636722727-1102745045.1615925853](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/OSHA-Issues-COVID-19-Workplace-Vaccine-and-Testing-ETS.aspx?_ga=2.182093153.758116163.1636722727-1102745045.1615925853)))

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