

# Sixth Circuit Dissolves Stay of OSHA Vaccine-or-Test Mandate and OSHA Issues New Compliance Dates

## Related Professionals

David E. Dubberly  
803.253.8281  
ddubberly@nexsenpruet.com

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Employment & Labor Law

## Article

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On Dec. 17, 2021, a divided three-judge panel of the U.S. Court of Appeals for the Sixth Circuit ruled that the Occupational Safety and Health Administration (OSHA) can enforce its emergency temporary standard (ETS) to mitigate the spread of COVID-19 in the workplace through its vaccine-or-test mandate for employers with 100 or more employees. Following the Sixth Circuit ruling, several parties filed emergency applications for an immediate stay of the ETS with the U.S. Supreme Court. Also, OSHA announced that it will not issue citations for noncompliance with the ETS before Jan. 10, 2022, and will not issue citations for noncompliance with 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 Sixth Circuit decision follows a ruling on Nov. 12, 2021 from the U.S. Court of Appeals for the Fifth Circuit granting a stay barring OSHA from enforcing the ETS. The Fifth Circuit found that OSHA exceeded its authority and did not show the requisite “grave danger” to allow the agency to issue an emergency rule. But on Nov. 16, 2021, the Judicial Panel of Multidistrict Litigation consolidated all petitions for review of the ETS (including the Fifth Circuit’s stay of the ETS) before the Sixth Circuit, giving that court the authority to rule on the validity of the ETS and to affirm or dissolve the Fifth Circuit’s stay.

In dissolving the stay and allowing the mandate to go forward, the Sixth Circuit’s majority noted that OSHA has the “authority to regulate infectious diseases and viruses,” even those “that are not unique to the workplace.” According to the court, OSHA provided a “wealth of information ... to justify its finding that workers face a grave danger in the workplace.” The court added, “It is not appropriate to second-guess [OSHA’s] determination considering the substantial evidence, including many peer-reviewed scientific studies, on which it relied.”

The Sixth Circuit concluded that the harm caused by keeping the ETS blocked outweighs any damage that would stem from letting it go into effect. The court's majority opinion stated:

Fundamentally, the ETS is an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs. In a conservative estimate, OSHA finds that the ETS will "save over 6,500 worker lives and prevent over 250,000 hospitalizations" in just six months.... A stay would risk compromising these numbers, indisputably a significant injury to the public.

The Supreme Court is expected to rule on the validity not only of the ETS but also of the other two federal government initiatives to increase workplace vaccination rates: the vaccine mandates for federal contractors and sub-contractors and for healthcare employers. The Court has already denied emergency requests to stop vaccination requirements imposed by Maine and New York on healthcare workers, by New York City on public school employees, and by at least one hospital system on its employees. But it remains to be seen if the Supreme Court will uphold the ETS and other federal mandates.

Regardless of the outcome at the Supreme Court, employers are required by the Occupational Safety and Health Act to provide a safe workplace for employees. This has already prompted some employers to impose a COVID-19 vaccination requirement for at least some employees. Other employers have implemented alternative precautions to keep employees from being infected at work. As mentioned above, OSHA has stated it will delay issuing citations under the ETS "so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard." We have written previously about steps employers can take that would show good faith efforts to comply.

The Nexsen Pruet employment and labor law group will continue to monitor and report on developments involving COVID-19 and workplace safety and health requirements. If we can be of assistance in the meantime, please let us know.