

COVID-19



## OSHA VACCINE-OR-TEST MANDATE FOR LARGE EMPLOYERS ACTIVE AGAIN

December 20, 2021

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On Friday, December 17, 2021, the U.S. Court of Appeals for the Sixth Circuit lifted the stay previously issued by the U.S. Court of Appeals for the Fifth Circuit blocking Occupational Safety and Health Administration (“OSHA”) from implementing and enforcing its Emergency Temporary Standard (“ETS”) that directs employers with 100 or more employees to mandate COVID-19 vaccinations or weekly testing. The three-judge panel that heard the government’s request to dissolve the stay said the harm in keeping the ETS in limbo outweighed any damage that would stem from letting it go into effect. The ETS requires certain private employers with 100 or more employees to require that its employees are either vaccinated for COVID-19 or undergo weekly testing as an alternative. The ETS requires employers to have a COVID-19 policy that also includes, among other things: keeping a roster of employees’ vaccination status; masking requirements; offering paid leave to employees to receive the vaccine; and procedures to remove employees who test positive from the workplace.

Originally, employers were to have policies in place by December 5, 2021, and require testing for unvaccinated employees by January 4, 2022. However, OSHA has announced that to account for any uncertainty created by the stay, and to provide employers with sufficient time to come into compliance, it will not issue citations for noncompliance with the general requirements of the ETS until January 10, and it will not issue citations for noncompliance with the testing requirements until February 9, “so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.” Accordingly, **employers should begin taking action now** to implement policies and procedures to ensure compliance with the OSHA ETS by the new deadlines.

The Court’s order applies only to the OSHA ETS. It does not apply to the separate vaccine mandates imposed on federal contractors and Medicare and Medicaid certified providers, which remain subject to temporary stays pending further court rulings in separate litigation.

An overview of the OSHA ETS requiring large employers to mandate vaccines or provide weekly testing is available [here](#).

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Employers should continue to monitor legal developments on this issue. The case remains pending in the Sixth Circuit for a full decision on the merits. In addition, opponents of the ETS have already petitioned the U.S. Supreme Court to prevent OSHA from enforcing the ETS.

## FOR MORE INFORMATION

If you have questions or want more information regarding the lift of the stay previously issued by the U.S. Court of Appeals for the Fifth Circuit blocking the OSHA ETS, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact **Don Berner** at 316.291.9738 or [dberner@foulston.com](mailto:dberner@foulston.com), **Boyd Byers** at 316.291.9716 or [bbyers@foulston.com](mailto:bbyers@foulston.com), or **Morgan Geffre** at 316.291.9577 or [mgeffre@foulston.com](mailto:mgeffre@foulston.com). For more information on the firm, please visit our website at [www.foulston.com](http://www.foulston.com).

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## RESOURCES

Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#). Sign up to receive these issue alerts straight to your inbox [here](#).

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- Employment & Labor
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