

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

DECEMBER 20, 2021

Is OSHA's Vax Or Test Mandate Here To Stay?

On Friday, December 17, 2021, the U.S. Court of Appeals for the Sixth Circuit lifted the Fifth Circuit's stay order on the Occupational Safety and Health Administration's (OSHA) COVID-19 Vaccination or Test and Mask Emergency Temporary Standard (ETS). The ETS applies to employers with 100 or more workers and impacts over 80 million workers in the United States. Under the rule as issued, employers have one of two choices. The first option is to mandate and verify that all of their employees are vaccinated against COVID-19. Employers not enacting the first option would be required to test unvaccinated employees weekly for COVID-19 and ensure these employees wear masks in the workplace. OSHA has announced it will begin issuing citations for noncompliance with the ETS' administrative requirements after **January 10, 2022**, and the ETS' testing requirements after **February 9, 2022**.

As background, the Fifth Circuit had stayed implementation of OSHA's Vax or Test ETS since November 6, 2021, citing "grave statutory and constitutional issues." Due to several lawsuits in multiple jurisdictions, the cases were consolidated, and the Sixth Circuit was selected randomly via a lottery to hear the case. In dissolving the Fifth Circuit's stay order, a divided three-judge panel of the Sixth Circuit stated that "the ETS is an important step in curtailing the transmission of a deadly virus," and that keeping the stay order would "indisputably" cause a "significant injury to the public." However, plaintiffs have already petitioned the Supreme Court for an emergency stay of the ETS. Things are likely to move quickly, so stay tuned!

Here are three things to do now:

1. Review Bond's November 4, 2021, blog post, available at this [link](#), for a summary of the ETS' requirements. Keep in mind that the new deadlines announced by OSHA are January 10, 2022, for implementation of the ETS' administrative requirements and February 9, 2022, for implementation of the standard's testing requirements.
2. Review OSHA's model Vax or Test policy templates found at this [link](#). If the Supreme Court does not grant another stay to stop implementation of the rule, you will want to involve your company's decision makers and legal counsel to develop, implement and enforce the policy option that works best for your company.
3. Don't panic! Justice Kavanaugh, to whom the Emergency Application for an Administrative Stay and Stay of Administrative Action was made, has set December 30, 2021 as the deadline to file opposition to the application. The Court will rule shortly thereafter, providing certainty to employers regardless of how it rules.

If you have any questions or need Bond's help, please contact [Michael D. Billok](#), [Nihla F. Sikkander](#), any attorney in Bond's [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.



Bond has prepared this communication to present only general information. This is not intended as legal advice, nor should you consider it as such. You should not act, or decline to act, based upon the contents. While we try to make sure that the information is complete and accurate, laws can change quickly. You should always formally engage a lawyer of your choosing before taking actions which have legal consequences. For information about our firm, practice areas and attorneys, visit our website, www.bsk.com. Attorney Advertising. © 2021 Bond, Schoeneck & King PLLC.



Bond, Schoeneck & King, PLLC



BondLawFirm



Bond, Schoeneck & King



bondlawfirm