

U.S. Court of Appeals Puts Brakes on OSHA COVID-19 'Emergency Temporary Standard'

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It's a case of 'Get Ready, Get Set ... Wait!'

On Saturday, November 6, the U.S. Court of Appeals for the Fifth Circuit, in response to a lawsuit filed last Friday by various plaintiffs including the Attorney General of Louisiana, issued an order temporarily blocking the OSHA Emergency Temporary Standard ("ETS") that we wrote about on Friday.

The court's order is cryptic and brief. It explains its suspension of the ETS only by saying that the petition "gave cause to believe that there are grave statutory and constitutional issues with the mandate" (without saying what they are) and says that the ETS is "STAYED pending further action by this court."

Many legal scholars consider the Fifth Circuit as the most conservative federal court of appeals.

Many employers may conclude that they can safely ignore the ETS in light of the Fifth Circuit's stay.

Not so fast.

It is unclear how long the court's order will remain in effect.

If additional challenges are filed in multiple circuit courts of appeals, then the Fifth Circuit may lose jurisdiction to hear the case under an obscure "lottery" process that may ultimately result in the case being transferred to another court.

If that happens, then the United States Government will likely ask the court to which the case has been transferred to vacate the Fifth Circuit's stay.

If, however, the case remains with the Fifth Circuit, then the Government will likely ask the U.S. Supreme Court to intervene.

These next steps may (or may not) be revealed in the next few days. We will continue to monitor and provide updates about the status of all related legal proceedings.

In the meantime, employers must realize that the ETS has not been repealed; it has merely been suspended pending resolution in the courts.

For how long? Nobody knows. But we know this: it may be revived, perhaps with head-snapping speed, and it remains loaded with time-consuming requirements that employers with 100 or more employees must complete by specified dates, such as (for one of many possible examples) the requirement to determine the "vaccination status" of each employee, obtain acceptable proof of vaccinations, and maintain records and rosters of employees' vaccination status that, in accordance with the ETS, must be completed by December 5, 2021.

The fate of that imminent deadline is unknown. We, therefore, caution against waiting until the Supreme Court (or some other court) has revived the ETS-compliance process, as the deadlines issued by OSHA could remain in effect if courts rule in favor of OSHA.

The urge to relax and do nothing until the dust has settled is understandable, but that approach may put employers in a tight spot.

Author's Note: A special thanks to our partner Chris Edwards for his expertise on federal appellate rules related to the ETS challenges.

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