

Federal Appeals Court Lifts Stay of OSHA's Vax-or-Test/Mask Mandate for Employers with 100+ Employees

OSHA sticks to Emergency Temporary Standard (ETS) compliance dates but is “exercising enforcement discretion” for up to eight weeks before issuing citations, depending on employer “reasonable, good faith” compliance efforts

December 2021

The Sixth Circuit Court of Appeals on December 17, 2021, dissolved the stay issued in November by the Fifth Circuit Court of Appeals that prevented the Occupational Safety and Health Administration (OSHA) from enforcing the ETS issued by OSHA on November 5, 2021.

OSHA's ETS mandate requires that companies with at least 100 employees require their employees by January 4, 2022, either to be vaccinated against the coronavirus or face weekly testing. The ETS also ordered those employers to require their unvaccinated employees to wear masks at the worksite starting December 5, 2021. The Sixth Circuit's three-judge panel held in a 2-1 decision that OSHA had the legal authority to issue the ETS mandate and that legal challenges against the mandate were likely to fail.

In an [announcement](#) published on its website on December 17, 2021, OSHA did not adjust any of the original compliance dates to account for the month-long stay. Instead, OSHA issued the following statement regarding OSHA's “enforcement discretion”:

“To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.”

The decision and OSHA's enforcement guidance gives employers roughly eight weeks to avoid the possibility of compliance citations, which could run as much as \$13,653 per violation and higher in the case of willful violations.

The following chart outlines the current state of litigation on the vaccine mandates issued by various agencies of the federal government:

Vaccine Mandate	Applies to	Court Order and Action	Impact on Employers
OSHA ETS	Employers with 100+ employees	Sixth Circuit Court of Appeals dissolves stay of ETS mandate (December 17)	OSHA maintains compliance dates, delays enforcement until January 10 (any ETS noncompliance) and February 9 (testing noncompliance)
CMS	Health care providers that participate in Medicare or Medicaid	Stay issued by: Eastern District of Missouri (11/29); Western District of Louisiana (11/30); revised by Fifth Circuit (12/15); Northern District of Texas (12/15)	Affects employers in 10 states* under first stay; 14 states** under second stay; Texas under third stay
Executive Order	Federal Contractors	U.S. District Court issued stay on December 7	Nationwide

*Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.

** Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, and West Virginia.



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