

**Alert | Health Emergency Preparedness Task Force:  
Business Continuity Amid COVID-19**



December 2021

## **A Not So Happy New Year for Employers? 6th Circuit Dissolves Stay of OSHA COVID-19 ETS**

On Dec. 17, a three-judge panel for the United States Court of Appeals for the Sixth Circuit, by a 2-1 vote, **dissolved** the Fifth Circuit's stay of the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS) regarding COVID-19 vaccination and testing. [See Nov. 4 GT Alert for a summary of the ETS requirements.](#)

In response, OSHA announced the ETS will go into effect Jan. 4, 2022 (barring any additional stays). To account for uncertainty created by the stay, however, OSHA announced it would exercise enforcement discretion with respect to the ETS's stated compliance deadlines. To provide employers with sufficient time to comply, OSHA announced it would not issue citations for noncompliance with any requirements of the ETS before Jan. 10 and would not issue citations for noncompliance with the ETS's testing requirements before Feb. 9, so long as an employer had made reasonable, good faith efforts to comply with the ETS.

### **How We Got Here**

On Nov. 4, 2021, OSHA published a nearly 500-page Interim Final Rule and ETS. As justification for the ETS, the Final Rule included a more than 150-page Preamble that cited, among other things, scientific studies and data regarding COVID-19, COVID-19 transmission in the workplace, and the severity of COVID-19.

Almost immediately, states and employers filed lawsuits seeking to stay enforcement of the ETS. On Nov. 6, the Fifth Circuit temporarily enjoined the enforcement of the ETS. One week later, in a lengthy opinion, the Fifth Circuit issued a preliminary injunction order, staying the implementation and enforcement of the ETS until further order. In entering its nationwide preliminary injunction, the Fifth Circuit held, among other things, the ETS exceeded OSHA's statutory authority, COVID-19 likely did not qualify as an emergency, and OSHA failed to establish workers were exposed to a "grave danger" or that the ETS was necessary to eliminate the "grave danger."

In response, OSHA announced it was suspending implementation and enforcement of the ETS pending further litigation developments.

Because challenges to the ETS were filed in virtually every court of appeals, as required by federal law, the U.S. Judicial Panel on Multidistrict Litigation conducted a lottery to select which federal circuit would hear all of the legal challenges. The Sixth Circuit "won" the lottery and the U.S. Judicial Panel on Multidistrict Litigation consolidated all challenges to the ETS in the Sixth Circuit. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, 86 Fed. Reg. 61402, Nos. 21-7000, et al. (6th Cir.).

### 6th Circuit Dissolves 5th Circuit Stay

Judge Jane B. Stranch authored the Sixth Circuit opinion dissolving the stay. Among other things, the court ruled:

- Petitioners are not likely to succeed on their merits of proving OSHA exceeded its statutory authority by issuing an ETS related to a ubiquitous virus because OSHA has the authority to regulate infectious diseases even though such infectious diseases are not unique to the workplace.
- Petitioners are not likely to succeed in demonstrating OSHA failed to establish the requirements necessary to issue an emergency temporary standard under the OSH Act: (1) the existence of an emergency; (2) that employees are exposed to a "grave danger" from a new substance, agent, or a new hazard; and (3) the standard is necessary to protect workers from the danger. The court relied heavily on the data, information, and statements from the 150-page Preamble to the Final Rule in reaching this conclusion.
  - OSHA likely established the existence of an "emergency" because the record shows "COVID-19 has continued to spread, mutate, kill, and block the safe return of American workers to their jobs." The court explained that OSHA's failure to issue an ETS earlier in the COVID-19 pandemic does not establish the absence of an "emergency."
  - OSHA likely established COVID-19 exposes employees to a "grave danger" because OSHA demonstrated "the pervasive danger that COVID-19 poses to workers – unvaccinated workers in particular – in their workplaces." The court approvingly cited the Preamble and the numerous referenced studies regarding COVID-19 transmission in the workplace and the evidence of the severity of harm from COVID-19 to conclude OSHA established employees were exposed a "grave danger."
  - OSHA likely established the ETS's requirements, and specifically the vaccination and routine testing and masking requirements, are necessary to reduce worker exposure to the "grave danger" associated with COVID-19, and specifically the Delta variant (and now the Omicron variant). The court rejected petitioners' argument that the ETS was both overinclusive and underinclusive. The court explained that OSHA may "lean on the side of overprotection rather than underprotection when promulgating an ETS." The court also explained that to the extent petitioners argue the ETS

is underinclusive, such an argument suggests OSHA has not done enough to eliminate the “grave danger” facing workers and that OSHA should do more to protect employees, not less.

- Petitioners’ constitutional arguments regarding the Commerce Clause and non-delegation doctrine are not likely to succeed.
  - The ETS likely does not violate the Commerce Clause because the ETS regulates employers with 100 or more employees (not individuals). And these employers engage in commercial activity that Congress has the power to regulate. The court explicitly rejected petitioners’ argument that the ETS exceeds the federal government’s authority under the Commerce Clause because it regulates noneconomic activity, which falls within the states’ powers.
  - The non-delegation doctrine is inapplicable here because Congress delegated significant authority to OSHA to regulate workplace safety when Congress passed the OSH Act.
- Finally, petitioners did not establish that lifting the stay would cause irreparable harm, because the injuries petitioners asserted are “entirely speculative.”
  - Some petitioners argued the cost of compliance was too high, but the court rejected this, citing OSHA’s detailed economic analysis which found the cost of compliance was about 0.02% of an employer’s revenue. Other petitioners argued they would have to fire or suspend employees, or face employees who quit due to the ETS, and specifically its vaccination requirement. The court rejected that too because such an argument failed to address the “accommodations, variances, or the mask-and-test option the ETS offers.”
  - The court also found the cost of further delaying the ETS was high and that 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.”

### **To the Supreme Court? Yes.**

Many of the petitioners have already appealed the Sixth Circuit’s ruling to the United States Supreme Court. Emergency appeals – like a request for a stay the Sixth Circuit’s ruling – go to the Justice assigned to that circuit, who in this case is Justice Brett Kavanaugh. Justice Kavanaugh may distribute the application to the full court to consider or decide the request on his own.

### **KEY TAKEAWAYS**

It is not clear what, if anything, the Supreme Court will do in response to the requests for its review. But until it decides, the Sixth Circuit’s decision is the law, and prudence suggests that, pending the Supreme Court’s response, employers with more than 100 employees and workplaces in any of the 29 states where federal OSHA has jurisdiction should re-start their plans to comply with the ETS’s requirements to meet the Jan. 10 compliance deadline. Specifically, employers must: (1) decide whether to implement a mandatory vaccination policy or a policy that allows employees an option of vaccination or submitting to mandatory weekly COVID-19 testing consistent with the ETS; (2) develop a system to track and log employees vaccination status and/or the results of weekly COVID-19 testing, if an employer chooses the vaccinate-or-test option; and (3) establish a policy and system to address reasonable accommodation requests, if any, that comply with governing regulations promulgated by the Equal Employment Opportunity Commission.

Under normal circumstances, the 22 states with approved state occupational safety and health plans, so-called “State Plan States,” have 30 days after OSHA promulgates an ETS to adopt it or a more protective

emergency temporary standard. To date, only California has implemented a more protective ETS, and several State Plan States have vowed not to adopt OSHA's ETS, putting their State Plan charter at risk (if the charter is revoked, federal OSHA retains jurisdiction over workplace safety in the state). It is unclear whether the stay, in effect from Nov. 12 to Dec. 17, tolled the 30-day deadline. Employers in these states should carefully monitor their state's occupational safety and health agency's website for updates.

Finally, although OSHA has expressly stated the ETS preempts any conflicting state or local laws, and even state OSHA plans are subject to federal approval, employers must still be mindful of any state and local laws and ordinances, including executive orders, that may contradict the ETS's requirements. Though the Sixth Circuit lifted the stay, it has not decided the merits of the case, including whether the ETS preempts state or local laws that purport to restrict or impact an employer's ability to mandate vaccination and/or testing requirements.

For more information and updates on the developing situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#) and [Business Continuity Amid COVID-19](#) page.

## Authors

This GT Alert was prepared by:

- [Michael T. Taylor ‡](#) | +1 703.749.1387 | [taylormt@gtlaw.com](mailto:taylormt@gtlaw.com)
- [Amelia A. Esber](#) | +1 602.445.8408 | [esbera@gtlaw.com](mailto:esbera@gtlaw.com)
- [Adam Roseman](#) | +1 215.988.7826 | [rosemana@gtlaw.com](mailto:rosemana@gtlaw.com)

‡ Admitted in the District of Columbia. Not admitted in Virginia. Practice in Virginia limited to federal OSHA and proceedings before federal agencies.

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.~ Houston. Las Vegas. London.\* Los Angeles. Mexico City.+ Miami. Milan.\* Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.\* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. \*Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¢Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimbengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2021 Greenberg Traurig, LLP. All rights reserved.*