

Federal 'Vaccinate or Test' Mandate Stayed Pending Legal Challenge

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As anticipated, the U.S. Department of Labor's Occupational Safety and Health Administration's (OSHA) "vaccinate" or "test and mask" rule for large private employers, issued as an emergency temporary standard (ETS), came under immediate challenge across the country after it was officially published in the *Federal Register* last Friday, November 5, 2021. The ETS generally requires private employers with 100 or more employees to mandate COVID-19 vaccination or weekly testing along with continuous masking for their employees (a summary of the ETS's primary requirements is available from the Lowndes Labor & Employment Law team).

The State of Florida, along with Alabama, Georgia, and several private parties, are challenging the ETS and petitioned the Eleventh Circuit Court of Appeals to review the ETS, arguing it exceeded OSHA's statutory authority and conflicted with the First Amendment of the U.S. Constitution and with the Religious Freedom Restoration Act. The State of Florida and the other petitioners have also filed an emergency motion asking the Eleventh Circuit to stay the ETS pending the outcome of the court's review.

The petitioners argue that the ETS "is neither a workplace standard nor is it a response to an emergency" but is, instead, "a backdoor attempt to dictate the personal health decisions of millions of ordinary Americans, many of whom have deeply personal reasons to decline to be vaccinated." The Eleventh Circuit has set a Friday, November 12, 2021, deadline for OSHA's response in opposition to the motion for stay.

In addition, two petitions challenging the ETS were filed in the Eleventh Circuit by private parties, including construction industry trade associations.

Concurrently, the State of Texas, along with Louisiana, Mississippi, South Carolina, Utah, and several private parties filed several petitions in the Fifth Circuit Court of Appeals seeking review of the ETS. Some of the private parties also filed a motion for emergency stay of the ETS and asked for expedited review. The Fifth Circuit responded by issuing a temporary stay

of the ETS, blocking its enforcement unless and until the stay is lifted by the court.

The Fifth Circuit noted the petitions led it to believe the ETS presented “grave statutory and constitutional issues” and stayed the ETS (which the court styled a “mandate”) pending further action by the court. OSHA was given until Monday, November 8, 2021, to respond to the private petitioners’ motion, and the court gave the petitioners until Tuesday, November 9, 2021, to reply.

OSHA filed its response and argued no stay was needed because the testing requirement would not take effect until January 2022, and because the Judicial Panel on Multidistrict Litigation had yet to consolidate the numerous challenges to the ETS in one circuit court of appeals pursuant to federal law.^[1] Whether the Fifth Circuit will take any further action before all the various petitions across circuits are consolidated remains to be seen.

The ETS is also under challenge in the Eighth Circuit Court of Appeals (with a November 5, 2021, petition filed by eleven states—Alaska, Arizona, Arkansas, Iowa, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming—along with four private petitioners), the Sixth Circuit Court of Appeals (courtesy of a petition and motion to stay filed by seven states—Kansas, Kentucky, Idaho, Ohio, Oklahoma, Tennessee, and West Virginia), the Seventh Circuit Court of Appeals (by the State of Indiana), and the D.C. Circuit Court of Appeals (by the Republican National Committee).

For now, and to avoid the potential for a shortened planning window, employers should consider preparing as if the ETS will go into effect. This is especially so since the first deadline for compliance is December 5, 2021, and the “vaccinate or test” requirement takes effect January 4, 2022. Given the issues involved, it seems likely this matter eventually will be litigated before the U.S. Supreme Court.

Lowndes will keep you updated as to legal developments and remains available to help impacted employers prepare for compliance.

^[1] Under 28 U.S.C. §2112(a), because the ETS has come under legal challenge in at least two circuit courts, with the ETS challenged in the Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuit Courts of Appeal, the judicial panel on multidistrict litigation must randomly designate one of those circuit courts of appeal and consolidate all the petitions for review in that randomly selected circuit court.