

# CLINE WILLIAMS

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### **OSHA'S VACCINE-OR-TESTING RULE REINSTATED**

The Occupational Safety and Health Administration's (OSHA) vaccine-or-testing emergency temporary standard (ETS) is again in effect. Late Friday night, December 17, the Sixth Circuit Court of Appeals lifted the Fifth Circuit's prior stay on the ETS requiring businesses with at least 100 employees to ensure workers are either vaccinated or tested weekly and wear masks.

Following the Sixth Circuit's ruling, OSHA issued a litigation update on the ETS, stating:

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.

Shortly after the Sixth Circuit's decision was issued, multiple plaintiffs filed emergency applications for an immediate stay of the ETS with the U.S. Supreme Court. It is difficult to predict how quickly a ruling might come from the Supreme Court and whether it will take action sufficiently in advance of January 10, 2022, to give employers some certainty with respect to compliance.

The effect of the Sixth Circuit's decision and OSHA's litigation update means that the ETS requirements are effective once again, with revised compliance deadlines that have been moved to January and February 2022. Specifically:

- By January 10, 2022, covered employers must determine the vaccination status of each employee, keep records related to vaccination status, provide specific information about vaccines, and develop and implement written policies describing the requirements with regard to vaccinations and testing.
- By February 9, 2022, covered employers that permit employees to undergo weekly testing rather than be vaccinated must begin weekly testing of unvaccinated employees.

Furthermore, until a Supreme Court decision is issued:

- Employers may need to reconsider their position on whether to prepare for the ETS mandate in the event another stay of the ETS is not issued, the ETS is upheld, or the compliance deadlines are not further extended by OSHA or otherwise.
- A nationwide injunction remains in place for the federal vaccine mandates under Executive Order 14042 for certain federal contractors and subcontractors.
- The Sixth Circuit's decision should not affect most healthcare providers with 100 or more employees because they are covered instead by the OSHA Healthcare ETS, 29 C.F.R. § 1910.502, while it is in effect. Nor does the Sixth Circuit's decision affect healthcare providers in the 10 states (including Nebraska) covered by the CMS vaccination requirement recently subject to the preliminary injunction in the federal court in the Eastern District of Missouri. However, employers covered by the OSHA Healthcare ETS should consider whether they have any employees who may be covered by the OSHA ETS if they have employees who work in non-healthcare environments.

The full text of the OSHA ETS can be accessed [here](#).

For questions about the status of the OSHA ETS or its mandate requirements, please reach out to the authors of this update, [Tara Stingley](#), [Beau Bump](#), and [Jill Jensen](#), or another member of [Cline Williams' Labor and Employment Law Section](#).

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