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**SIXTH CIRCUIT REVIVES OSHA'S LARGE EMPLOYER VACCINE MANDATE;  
ELEVENTH CIRCUIT LEAVES NATIONWIDE INJUNCTION ON FEDERAL  
CONTRACTOR SAFER WORKFORCE GUIDELINES IN PLACE**

In the late afternoon of Friday December 17, 2021, a three-judge panel of the Sixth Circuit Court of Appeals lifted the nationwide stay imposed by the Fifth Circuit Court of Appeals on OSHA's enforcement of its vax-or-test mandate. (An oddity of the OSHA statute authorizing the agency to issue emergency temporary standards - ETSs - allows immediate review in the federal circuit courts of appeal, with those appeals then consolidated before a lucky lottery winner. In this case it was the Sixth Circuit, which has a normal geographic jurisdiction of Tennessee, Ohio, and Michigan).

**Immediate Impact Items:**

- OSHA has indicated that it will exercise its discretion and not issue any citations related to the mandate until January 10, 2022. It will not issue any citations related to the testing portion of the mandate until February 9, 2022. This basically recreates the slightly accelerated 30-day/60-day staggered time frame of the original ETS.
- As a brief reminder, the key feature of the Large Employer ETS is that it gives employers of 100 or more employees the option of choosing a policy that requires full employee vaccination against COVID-19 or offers employees the option to forego vaccination and undergo weekly testing instead. Our initial coverage of the Large Employer OSHA ETS is [here](#), just mentally replace the references to December 5 with January 10, and the references to January 4 with February 9. Remember also that [OSHA has a webpage with dedicated resources](#), including policy templates.

**What's the Outlook for Further Appellate Review?**

The next step for this litigation is U.S. Supreme Court review. Attorneys for two large contingents have already spent their weekend drafting and filing with the U.S. Supreme Court for an emergency application for stay of the Sixth Circuit Court's Order (*i.e.*, putting the Fifth Circuit's stay on OSHA back into effect). One group of litigants, including the lead plaintiff in the Fifth Circuit decision, requested relief by 2:00pm on Monday, December 20. However, Justice Kavanaugh gave the federal government until December 30 to respond to the emergency application, so it will almost certainly be 2022 before any decision is issued.

## What About the Other Mandates?

We will be updating a litigation tracker daily (or as close as we can manage) covering major, moving litigation. [See our Vaccine Mandate Litigation Tracker.](#)

Stays of other vaccine mandates aren't directly affected by the removal of the stay over the OSHA mandate. However, large employers (those with over 100 employees) that would have otherwise been subject to the CMS Omnibus Staff Vaccination Rule or the Federal Contractor (EO 14042) Guidelines may find themselves subject to the OSHA Large Employer ETS where and when those mandates are themselves stayed.

For instance, OSHA's Large Employer ETS doesn't specifically exclude Medicare/Medicaid-certified providers (*i.e.*, those covered by the CMS Omnibus Rule). It only specifically excludes those employers subject to the June 2021 OSHA Healthcare ETS, which wasn't so much a vaccine mandate as a vaccine-incentive plan, and which expires on December 21. (An ETS has a six-month lifespan, and it's an open question as to whether OSHA can extend/reimplement an ETS without going through formal administrative rulemaking). The Medicare/Medicaid certified providers who would've been subject to the CMS Omnibus Rule got to avoid the OSHA Large Employer ETS because of the CMS instructions to follow its rule primarily. While and where the CMS rule is stayed (24 states as of 12/17/2021), the OSHA Large Employer ETS would seem to govern.

The Large Employer ETS does exclude workplaces covered under the Safer Federal Workforce Task Force (EO 14042) Guidance. So, contractors operating where that Guidance is stayed would seem likewise to be subject to the OSHA Large Employer ETS. On Friday, the Eleventh Circuit denied the federal government's request for it to lift the effectively nationwide stay of the Task Force Guidance, and it entered an expedited briefing schedule.

If you have any questions, please contact [Al Vreeland](#) or [Whitney Brown](#).