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THE OSHA VACCINE MANDATE IS BACK ON....STAY TUNED

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The United States Supreme Court has scheduled oral arguments as part of a special hearing scheduled for Friday, January 7, 2022, regarding the enforceability of the OSHA ETS.

On Friday, December 17, 2021, the United States Court of Appeals for the Sixth Circuit breathed new life into the Biden Administration's COVID-19 vaccine mandate for employers with 100 or more employees. The 6th Circuit's ruling was immediately appealed to the United States Supreme Court but, for now, the decision means that the **Emergency Temporary Standard on Vaccination and Testing** (the "Vaccine ETS") issued by the Occupational Safety and Health Administration ("OSHA") is back in effect.

OSHA originally published the Vaccine ETS in the Federal Register on November 5th. Please see our previous **summary** of the new emergency rules. The most significant part of the new ETS is a requirement for employers with 100 or more employees to require COVID-19 vaccinations or negative COVID-19 tests as a condition of employment. The Vaccine ETS also imposes various other obligations on covered employers, including masking requirements for unvaccinated employees, paid time off to receive vaccines and paid sick leave to recover from adverse side effects following each dose.

The Vaccine ETS originally went into effect on November 5th, but only in those states where OSHA has primary authority to **oversee health and safety laws**. To allow employers time to prepare for the new requirements, OSHA provided certain grace periods for compliance with the Vaccine ETS, with most requirements of the Vaccine ETS (including employer confirmation of employee vaccination status) not becoming mandatory until December 5, 2021. OSHA also gave covered employers until January 4, 2022 to begin enforcing the vaccine requirements or to begin verifying weekly employee testing for COVID-19.

The Vaccine ETS was immediately subject to numerous legal challenges, with the 5th Circuit Court of Appeals issuing a nationwide injunction on November 12th, effectively blocking enforcement throughout the country. In response to this injunction, OSHA stated publicly on November 16th that it was temporarily suspending enforcement of the Vaccine ETS, pending resolution of the 5th Circuit stay. That same day, the various court challenges to the ETS were consolidated and the 6th Circuit Court of Appeals was selected to hear the consolidated challenges.

With the 6th Circuit lifting the injunction on Friday, the Vaccine ETS is now back in effect. Because the new rules had been subject to an injunction for over a month, OSHA issued a statement on Saturday updating the original ETS implementation deadlines. Now, covered employers must comply by January 10th with all requirements of the Vaccine ETS other than the vaccination and testing requirements, which now must be in place by February 9th.^[1]

Many states, like North Carolina, have been delegated authority to operate the OSHA program. Each of these states^[2] (known as "state lead programs") typically has up to 30 additional days to either adopt new OSHA rules "as is" or to adopt its own, modified version. This originally meant that the Vaccine ETS would not go into effect in North Carolina until as late as December 5, 2021, with an initial compliance deadline of up to 30 days later. At this time, it is unclear whether OSHA's updated compliance deadlines will apply to both state-lead programs and those states where federal OSHA administers the program. As of today, OSHA has not spoken to the issue of grace periods for state-lead programs.

Some states will likely assert the right to a completely new 30-day grace period, but it remains to be seen how OSHA will address this issue. If OSHA takes the position that the 30-day grace period has already expired and that position is upheld by the courts, covered employers in states like North Carolina will need to abide by the updated ETS compliance deadlines: January 10, 2022 for most of the Vaccine ETS and vaccination or testing by February 9, 2022. Although it is possible that covered employers in North Carolina will ultimately receive some additional time beyond these deadlines, for the time being employers should be guided by the new OSHA deadlines as they prepare for compliance.

The Commissioner of the North Carolina Department of Labor ("NCDOL") previously expressed significant concerns about worker shortages and his Department's ability to staff enforcement for both the Vaccine ETS and more typical workplace safety issues. The Commissioner also indicated at one point that North Carolina would not adopt or enforce the Vaccine ETS as long as all relevant litigation was ongoing. Since the stay was lifted, NCDOL has indicated only that it is again reviewing the new ETS and determining appropriate actions to take in response. Covered employers in North Carolina will need to pay close attention to how NCDOL responds to the ETS, since it may elect to adopt a modified version. Covered employers should also be mindful of the possibility that state-lead program intransigence on enforcement of the new ETS could prompt OSHA to exercise its enforcement authority in those states. Although this is an unlikely proposition, OSHA has warned of this possibility in the past. At bottom, covered employers should not bank on unsanctioned state-lead program enforcement delays to somehow excuse any failures to comply with the updated OSHA directives.

Continued challenges to the Vaccine ETS are expected and, as noted above, some plaintiffs have already appealed the 6th Circuit panel decision to the Supreme Court. The 6th Circuit did not rule on the merits of the new ETS itself; the decision on Friday only lifted the nationwide injunction while challenges continue to the rules themselves. It is possible that the 5th Circuit's stay could be reimposed by the Supreme Court pending a final decision on the ETS itself. Consequently, the ultimate viability of the Vaccine ETS remains uncertain, including final implementation deadlines.^[3]

However, in the absence of a new stay, a successful challenge or clarification from OSHA on grace periods for state lead programs, covered employers will be facing the fast-approaching initial compliance deadline of January 10th. Accordingly, covered employers should begin preparing for compliance, including development of a vaccination policy as well as protocols for the following: identifying unvaccinated employees; collecting proof of vaccinations; management of vaccination and testing records; reviewing negative test results; evaluating

accommodation requests; and removal of non-compliant employees from the workplace. Developing these measures will help employers show good faith efforts at compliance should they fail to achieve full compliance by the January 10th deadline. In addition, working on these measures will allow covered employers to progress towards full compliance while monitoring further developments and to be ready for full compliance on short notice.

[1] OSHA did not explicitly say it was "resetting the deadlines," but rather that the agency recognized possible confusion over the stay's impact on the original deadlines, and that it "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."

[2] <https://www.osha.gov/stateplans>

[3] Also uncertain is whether OSHA will deem the Vaccine ETS to be applicable to employers subject to the **federal contractor vaccine mandate** or OSHA's **previous ETS** for the healthcare industry while those rules are stayed under separate legal challenges. Such employers were expressly exempted from the Vaccine ETS given that they were subject to vaccine mandates under other rules. To date OSHA has not spoken to this issue, but employers subject to the other mandates should monitor developments in this area.

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