CLIENT ALERTS & INSIGHTS

# Fifth Circuit Court of Appeals Temporarily Stays OSHA's Vaccine Rule

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On November 6, 2021, the Fifth Circuit Court of Appeals granted an emergency motion to stay OSHA's Emergency Temporary Standard (the "ETS") regarding vaccines and testing for employers with at least 100 employees (see our summary of the ETS here). The motion was filed by more than two dozen companies and the states of Texas, Louisiana, Utah, and South Carolina. The stay is temporary, pending further judicial review. OSHA has been directed by the Fifth Circuit to file its opposition to the petitioners' motion for a permanent injunction by 5:00 P.M. on Monday, November 8.

**What Does This Mean?** Until further court action, enforcement of the ETS is stayed. However, the Fifth Circuit's stay is temporary and can be lifted-the Fifth Circuit has not made a decision on whether or not the challenge to the ETS has merit. Further, the earliest the ETS requires compliance with any of its provisions is December 5, 2021, and employees have until January 4, 2021 to be vaccinated or begin regular testing, meaning that the stay has no immediate practical effect.

**What Happens Next?** The Fifth Circuit is one of 13 appellate courts that sit below the Supreme Court. On the date that the ETS was published, challenges were filed in 4 different circuits by separate coalitions of states. In addition to the Fifth Circuit challenge, actions have been filed in the Sixth, Eighth, and Eleventh Circuits. The Fifth Circuit was the first to issue a stay. The rules of the Judicial Panel on Multidistrict Litigation provide for a lottery to determine which circuit hears the merits of a challenge to a federal agency decision when challenges are filed in multiple circuits. Challenges filed within 10 days of OSHA's publication of the ETS are included in the lottery. All challenges will be consolidated and heard in the circuit selected by the lottery. The circuit selected-if not the Fifth-can lift the Fifth Circuit's stay. And, of course, decisions of the courts of appeals may be reviewed-and reversed-by the Supreme Court.

**What Should Employers Do Now?** Challenges to the ETS were expected, and the Fifth Circuit has become the first court to take action. However, this is far from the last word in litigation over the enforceability of the ETS. Employers should closely monitor for future developments and continue reasonable contingency planning should the ETS ultimately survive challenge.

**Please reach out to Benesch's Labor & Employment Practice Group for more information.**

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