CLIENT ALERTS & INSIGHTS

Stay of OSHA ETS Vaccine-or-Test Mandate Lifted; OSHA Revises Deadlines

DECEMBER 18, 2021

On December 17, 2021, the Sixth Circuit Court of Appeals lifted a nationwide stay of OSHA's Emergency Temporary Standard (ETS) which requires employers with 100 or more employees to mandate vaccination or regular testing of their workforces. Multiple challengers have already filed requests for an emergency stay of the ETS with the Supreme Court. However, unless and until the Supreme Court grants such requested interventions, the ETS is once again effective, albeit with deadlines modified by OSHA. As of the writing of this article, here is a summary of what we know—and do not know—about the ETS' implementation:

What We Know

- Shortly after the stay of the ETS was dissolved, OSHA announced that it was "exercising enforcement discretion" with respect to the ETS' original deadlines and would not issue citations before modified deadlines (see below) "so long as an employer is exercising reasonable, good faith efforts to come into compliance" with the ETS.

- OSHA will enforce most key provisions of the ETS beginning **January 10, 2022** as to covered employers, including:

    - Paid time off must be provided to support employee vaccination, specifically: (a) up to 4 hours of paid time off for each vaccination dose, with any additional required time unpaid but protected, and (b) "reasonable" paid time off to recover from any symptoms or side effects resulting from the vaccination.
    - A written policy consistent with the ETS' requirements must be established. (OSHA has published sample policies-employers should consult with counsel and tailor their policies for the dynamics of their respective businesses).
    - The vaccination status of each employee must be determined, with acceptable proof of vaccination retained.
    - Employees who are not fully vaccinated must wear masks when indoors (unless in a completely enclosed office with a door that is shut) or when in a vehicle with another person for work purposes.
    - Employees must be provided with a print or electronic copy of "Key Things to Know About COVID-19 Vaccines."

- And, as of **February 9**, **2022**, covered employers must ensure that employees who are not fully vaccinated are tested for COVID-19 at least once every 7 days (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer).

What We Don't Know

- Although challengers have requested an emergency stay from the Supreme Court, we do not know when, and how, the Supreme Court will rule on these motions. The ETS expires on May 4, 2022 regardless, so the Supreme Court would have to act quickly, possibly through the emergency or shadow docket with little or no briefing or oral argument.

Employers are strongly encouraged to closely monitor for further litigation and enforcement developments with regards to the ETS. For further information, see our article discussing the ETS' requirements in further detail. We will update this article as further information becomes available.

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

Corey Clay at cclay@beneschlaw.com or 216.363.6196.

Johanna Fabrizio Parker at jparker@beneschlaw.com or 216.363.4585.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.