

A Legal Traffic Jam: OSHA Forced to Pause Implementation of Its Vaccine Mandate and CMS's Vaccine Rule May Not be Far Behind

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The Occupational Safety and Health Administration (“OSHA”) issued its [Emergency Temporary Standard](#) (“ETS”) for vaccine mandates on November 4, 2021. Our previous [client alert](#) detailed the requirements that OSHA sought to implement and enforce, also explaining the short timeline with which employers were expected to comply. But the ETS was short-lived. A legal traffic jam occurred since the ETS’s release, as states and employers all sought a stay of the rule in nearly every federal circuit.

The Fifth Circuit jumped out ahead of the other circuits when just two days after OSHA issued the ETS, a three-judge panel [granted a stay of enforcement](#), pending further briefing and review. Upon further review, a [subsequent opinion](#) published less than a week later, expressed that the vaccine mandate was “a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in workplaces.” The court indicated, but did not decide, that the vaccine mandate would not pass “constitutional muster” because “it is nonetheless fatally flawed on its own terms.” The Fifth Circuit ordered “that OSHA take no steps to implement or enforce the [ETS] until further court order.” In effect, the Fifth Circuit issued a nationwide stay of enforcement, stripping OSHA of its ability to enforce its new rule without fear of sanctions in that court for violating the court order.

OSHA has now acknowledged the limits that the Fifth Circuit’s order places on the agency and [stated](#) that it “suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.”

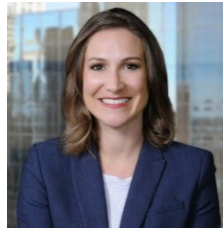
With the ETS stuck in a legal quagmire of challenges across the country, a lottery took place to assign one federal circuit to decide the ETS challenges. Yesterday, the Sixth Circuit won that lottery. It will now decide the fate of OSHA’s ETS, though Supreme Court review is likely to be sought regardless of the outcome at the circuit level.

Employers can now take a breath until the Sixth Circuit decides the fate of the Fifth Circuit’s stay. Even with this slight reprieve, though, employers should not scrap any plans or policies drafted in preparation for the ETS. Because the stay could be lifted at any time, employers should remain alert and know what steps they must take next in regard to the ETS.

And, as a reminder, the stay of OSHA’s ETS does not block two other looming federal vaccine mandates. One is imposed on federal contractors by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, so this stay does not alter obligations stemming from Executive Order 14042. The other has been imposed by the Centers for Medicare and Medicaid Services (“CMS”), which [was issued](#) simultaneous with the OSHA ETS. That said, litigation challenging it is intensifying. One of the first challenges involves more than 10 states in the United States District Court for the Eastern District of Missouri. You can view the complaint [here](#).

The Oklahoma Attorney General [announced](#) yesterday that it has joined litigation challenging the CMS rule in the United States District Court for the Western District of Louisiana, which is part of the Fifth Circuit. The CMS rule could soon be forced to pump the brakes as well.

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