

Legislative Update DECEMBER 2021*

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FEDERAL APPEALS COURT APPROVES OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION'S RULE MANDATING COVID-19 VACCINATION OR TESTING

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published an emergency temporary standard (ETS) rule requiring businesses with 100 or more employees to ensure workers are vaccinated against COVID-19 or wear a mask and undergo weekly testing.

On November 6, 2021, the ETS rule was temporarily suspended by the U.S. Court of Appeals for the 5th Circuit. However, on December 17, 2021, the U.S. Court of Appeals for the 6th Circuit reversed the 5th Circuit's ruling and dissolved that Court's temporary suspension of the ETS rule.

OSHA has effectively reset the ETS's compliance deadlines to January 10 and February 9, 2022:

- All unvaccinated workers must begin wearing masks by January 10, 2021 and provide a negative COVID-19 test on a weekly basis beginning February 9, 2022;
- Employers must pay employees for the time it takes to get vaccinated and recover from any side effects that prevent them from working; and
- Companies are not required to pay for or provide the tests unless they are otherwise required to by state or local laws or by labor union contracts.

OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS: "To provide employers with sufficient time to come into compliance, OSHA 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 with the standard. OSHA will work closely with the regulated community to provide compliance assistance."

It is certain that the 6th Circuit's ruling will be appealed to the U.S. Supreme Court. However, it is uncertain whether the Supreme Court will quickly hear the case and, even if it does, it is uncertain whether the Court will strike down or otherwise modify the ETS rule. Therefore, employers covered by this rule should plan to comply with the rule by no later than January 2022.

Source: SHRM External Affairs

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