

CRISIS MANAGEMENT FOR COVID 19

Phase 50: Court Decisions & Vaccine Mandate Updates!

*Presented by:
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INTRODUCTIONS



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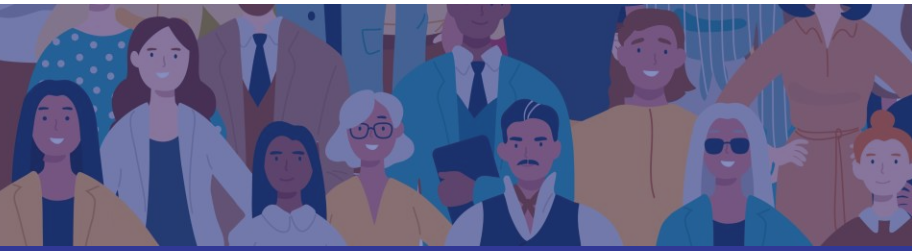


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WHAT WE'LL COVER

1 Appellate Court Confusion!

2 Business Leaders Share



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Sixth Circuit Circus and Fifth Circuit Confusion!



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Three Different Federal Mask/Vaccine Mandates have been issued:

1. OSHA Emergency Temporary Standard (ETS) affecting employers with more than 100 employees
 2. Safer Federal Workforce Task Force Mandate any employer issuing into contracts with the United States
 3. The Centers for Medicare and Medicaid Services' (CMS) interim final rule requiring vaccination of employees working in facilities receiving Medicare or Medicaid funding
- On December 15, 2021, an “equally divided” Sixth Circuit refused to hear the nationwide mask mandate *en banc* (full 28 judge panel)
 - On December 15, 2021, the Fifth Circuit Court of Appeals issued a CMS Mandate Injunction for 14 different Plaintiff States, which included Kentucky
 - On December 17, 2021, the Sixth Circuit set aside the Fifth Circuit ETS Mandate

- The majority of a three-judge panel consisting of Judge Stranch (Obama), Gibbons (G.W. Bush), and Larsen (Trump) upheld the Vaccine/Mask ETS that had been stayed since November 6. Stranch wrote the opinion; Gibbons concurred; Larsen dissented.
- The majority found OSHA “requires OSHA to issue an [ETS] if necessary to protect workers from a ‘grave danger’ presented by ‘exposure to substances or agents determined to be toxic or physically harmful or from new hazards.’”
- The majority also noted that OSHA has previously regulated infectious diseases (HIV, hepatitis B, and hepatitis C), and to control illness not isolated to the workplace
- “Congress expressly included funding for OSHA in the American Rescue Plan that is to be used ‘to carry out COVID-19 related worker protection activities.’”
- Multiple plaintiffs filed emergency applications for an immediate stay of the ETS with the SCOTUS, to be reviewed by Justice Brett Kavanaugh
- Supreme Court will most likely take action in advance of 1/10/22, to give employers certainty as to implementation, etc.

OSHA immediately posted a statement saying it was “gratified” by the decision, which allows OSHA to “once again implement this vital workplace health standard.”

OSHA is delaying enforcement for noncompliance with the ETS (one of which expired on December 6, and the other, requiring “full vaccination” expires in 15 days), stating:

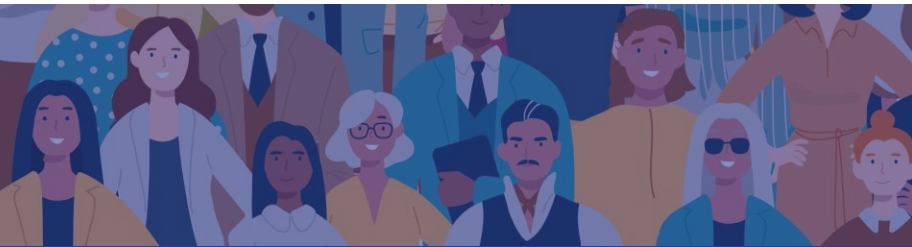
To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 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.

- Critically, the statement does NOT “extend” deadlines, but delays enforcement of the deadlines until January 10 for policies and February 9 for implementation

What Are Employers Required to Do?

- The ETS requires covered employers with 100 or more employees:
 - Determine and maintain records of the vaccination status of each employee
 - Provide specific information about vaccines
 - Develop and implement written policies describing vaccine/testing requirements
- Employers must now complete those steps by January 10, 2022.
- The ETS allows covered employers to permit employees to undergo weekly testing rather than be vaccinated.
- Weekly testing and full vaccination implementation mandate must begin on or before February 9, 2022.

- On December 15, 2021, Fifth Circuit affirmed the 11/30/21 CMS Injunction in all 14 states challenging the mandate
- On the same date, a Texas District Court granted a preliminary CMS injunction
- The Fifth Circuit and Texas decisions, along with the 11/29/2021 Missouri Injunction,, mean that the CMS mandate is currently enjoined in **24 states**:
 - Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, **Kentucky**, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming.
- On December 16, 2021, the United States applied to SCOTUS



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Business Leaders Share



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