

## CLIENT ALERT

### Sixth Circuit Allows OSHA to Resume Enforcement of Its Emergency Temporary Standard; OSHA Announces Delayed Enforcement

December 20, 2021

On Friday evening, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit decided in a split decision (2-1) to allow the Occupational Safety and Health Administration (OSHA) to resume enforcing its Emergency Temporary Standard (ETS) mandating large employers to require their employees either be fully vaccinated against COVID-19 or get tested weekly. The ETS originally went into effect on November 5 but was stayed the next day by a panel of the U.S. Court of Appeals for the Fifth Circuit, acting on one of many court petitions filed almost immediately to block the rule. By a lottery process prescribed by federal law, the many cases were subsequently consolidated in the Sixth Circuit, even while the Fifth Circuit's stay remained in effect. The decision issued Friday was in response to OSHA's motion to dissolve that stay, which the agency filed November 23. Earlier in the week, the full court declined to hear the case *en banc*, with eight judges dissenting from that decision and taking the opportunity to explain why they would leave the stay in place. The judge who dissented from the opinion Friday had been one of the eight who joined the earlier dissent from the denial of *en banc* review.

In response to the Friday decision, OSHA announced that it would resume implementing the ETS. By its terms, the ETS requires all covered employees, by January 4, 2022, either to have received the complete regimen of a vaccine or to have begun weekly testing. Furthermore, the deadline for compliance with all other aspects of the ETS was December 6, 2021, a date that came and went while the stay was in effect, during which time OSHA was not enforcing the rule's requirements. Given the uncertainty with compliance deadlines caused by the stay, OSHA said in guidance posted to OSHA.gov on Friday night that it would exercise enforcement discretion and, to that end, not issue citations for noncompliance with any requirements of the ETS before January 10, 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."

Meanwhile, multiple petitioners in the litigation pending in the Sixth Circuit have filed emergency applications to the U.S. Supreme Court to stay the ETS, with several applicants requesting the court to take the unusual step of granting certiorari before judgment in the circuit court. Justice Kavanaugh is the circuit justice for the Sixth Circuit and has discretion to act on the emergency applications alone or refer the requests to the full court. Justice Kavanaugh has directed responses to the emergency applications to be filed by Thursday, December 30.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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