Alert

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COZEN O'CONNOR

Sixth Circuit Court of Appeals Lifts OSHA's ETS Stay: What Now?

On December 18, 2021, the Sixth Circuit Court of Appeals lifted the Fifth Circuit's national stay of OSHA's general duty COVID Emergency Testing Standard (ETS) that covers private employers with 100 or more employees, except those covered by an OSHA state-approved plan. The next day, OSHA issued information to employers stating it would exercise enforcement discretion and would not issue citations for noncompliance with any ETS requirement before January 10, 2022, and would not issue citations for noncompliance with the testing requirements before February 9, 2022, provided employers are exercising reasonable, good faith efforts to come into compliance.

Not surprisingly, a petition has already been filed with the U.S. Supreme Court seeking an emergency stay of the ETS.

As a reminder, the January 10, 2022, deadline requires employers to comply with all parts of the ETS except the weekly testing option that includes: 1) requiring a written vaccination policy, 2) providing PTO for employees to get vaccinated, 3) removing COVID positive employees from the workplace, 4) requiring face coverings for unvaccinated employees, and 5) confirming the vaccination status of the workforce with an employee roster.

What should covered employers do now? The best answer will, as always, depend on an individualized analysis of each business. However, given the significant cost of weekly testing for covered employers (even if not imposed by the ETS itself) and particularly those with well over 100 employees, prudence might suggest a "wait and see" approach, at least in the short term, on whether the Supreme Court will address the stay issue on an expedited basis before actually ordering any testing kits or contracting with third-party vendors to comply with the required weekly testing. Given the current composition of the Supreme Court, it would not be surprising if the Court ultimately adopted similar reasoning of the Fifth Circuit when it implemented the stay and Judge Larsen's Sixth Circuit's dissenting opinion. Judge Larsen was extremely troubled by the majority's characterization of the rule as permitting employers to determine for themselves how to best minimize the risk of contracting COVID, stating that employer right "was the state of federal law before the rule, not after." Of course, this does not necessarily mean the Court will grant an emergency injunction even if it eventually rules against the ETS on the merits. Notwithstanding this fact, the fiscal burden on employers could justify waiting a little longer before incurring these testing and related costs.

As OSHA has specifically stated it will exercise enforcement discretion for employers attempting to comply with the ETS in good faith, all employers should take immediate steps to demonstrate such good faith efforts. As the most challenging administrative requirement of the ETS is most likely creating a roster of the vaccination status of all employees, businesses should certainly start complying with this process as part of its demonstrated good faith efforts. Of course, even if OSHA does cite a business before or after the expanded ETS deadlines, employers can still contest any such citation before the Occupational Safety and Health Review Commission that is a completely quasi-judicial agency and not part of OSHA or the U.S. Department of Labor.

The roller coaster ride for employers on the ETS is not over yet as all eyes turn to the Supreme Court.

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