

Bodman PLC

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Fifth Circuit Continues Its Stay of the OSHA ETS

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On November 6, 2021, the Fifth Circuit Court of Appeals temporarily stayed the vaccinate-or-test Emergency Temporary Standard (“ETS”), published by the Occupational Safety and Health Administration (“OSHA”). After additional briefing, on November 12, 2021, the Fifth Circuit continued its preliminary stay, finding that the “petitioners’ challenges to the Mandate are likely to succeed on the merits” for “a multitude of reasons,” including statutory and constitutional bases.

In particular, the Fifth Circuit questioned the extent to which COVID-19 poses a “grave danger” to employees and the effectiveness of the ETS in mitigating the proclaimed danger, both of which OSHA must prove when issuing an emergency standard – an “unusual” and “exceptional” measure. The Fifth Circuit concluded that: the ETS is both overinclusive and underinclusive because it does not take into consideration the varying levels of risk posed to employees in different workplaces; OSHA waited nearly two years to take action and nearly two months to draft the standard itself; and, “the Mandate flunks a cost-benefit analysis.”

The stay will continue while the Fifth Circuit conducts “adequate judicial review” of the petitioners’ claim for a permanent injunction, and while other federal courts juggle the multitude of similar cases. Tomorrow, on November 16, 2021, a “lottery” will select the Circuit Court to which all pending litigation regarding the OSHA ETS will be transferred. That Circuit Court may modify, revoke, or extend the Fifth Circuit’s stay. The U.S. Supreme Court will likely be tasked with ultimately resolving the matter.

For now, OSHA is ordered to “take no steps to implement or enforce the Mandate until further court order.”

Bodman’s Workplace Law Group is monitoring updates on the enforcement of the OSHA ETS. Employers can contact any member of Bodman’s Workplace Law Group to discuss their compliance with OSHA’s ETS and the creation of the requisite written policy. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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