

Bodman PLC

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Stay Lifted: OSHA Prepares to Enforce Its Vaccinate-or-Test ETS

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On Friday, December 17, 2021, the Sixth Circuit Court of Appeals dissolved the stay that previously barred the Occupational Safety and Health Administration (“OSHA”) from enforcing its Emergency Temporary Standard (“ETS”), which requires employers with 100 or more employees to implement COVID-19 vaccine mandates or otherwise subject unvaccinated employees to weekly testing.

The U.S. Department of Labor promptly issued a statement to clarify the timeline of OSHA’s renewed enforcement of the ETS requirements: “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.”

Though employers should ready themselves for implementation, the legal battle is not over. The Sixth Circuit’s ruling was appealed to the U.S. Supreme Court, which will make the ultimate decision as to whether OSHA may administer its much-discussed ETS.

In the meantime, covered employers must prepare to accomplish the following by January 10, 2022:

- Create and disseminate a written policy that establishes the vaccination requirements, masking rules, availability of paid leave, procedures for confirmed cases of COVID-19, protections against discrimination or retaliation, penalties for false vaccination representations, and disciplinary consequences for violations;
- Determine each employee’s vaccination status, securely store proofs of vaccination, and create a “roster” of vaccinated and unvaccinated employees;
- Necessitate that all employees who are not fully vaccinated wear a face covering when indoors;
- Abide by quarantine and isolation rules issued by the Centers for Disease Control and Prevention; and
- Commence record retention.

By February 9, 2022, covered employers must begin weekly testing of unvaccinated employees who perform in-person work. Such tests cannot be “both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.”

Bodman’s Workplace Law Group is monitoring for legal updates. A detailed summary of the ETS requirements can be found [HERE](#). Employers with compliance questions should contact any member of Bodman’s Workplace Law Group. Sample policies are available upon request. 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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