

COURT OF APPEALS STAYS OSHA ETS

On Saturday, Nov. 6, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a temporary stay stopping the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS). The [ETS, published on Nov. 4, 2021](#), requires employers with 100 or more employees to develop, implement and enforce a policy requiring its employees to either (1) become fully vaccinated against COVID-19, or (2) undergo COVID-19 testing on at least a weekly basis and wear a face covering when at work.

A three-judge panel of the Fifth Circuit, which is the federal appellate court presiding over the states of Texas, Louisiana and Mississippi, issued the temporary stay. Citing "grave statutory and constitutional issues" with the ETS, the Court ordered the government to submit a response to the motion by 5 p.m. CT on Monday, Nov. 8. The Court gave the petitioners, a group of employers and several GOP-controlled state governments, until Tuesday, Nov. 9, at 5 p.m. CT to respond.

This is just the beginning of the legal battle involving the ETS. The government may yet prevail, either with the ETS as written or by limiting its scope or narrowing its mandate in some way; however, for now, enforcement of the ETS has been halted by the Fifth Circuit's stay.

Challenges to the ETS are pending in other Courts, including the Sixth, Eighth and Eleventh Circuits Courts of Appeals. Under federal rules governing multidistrict litigation, the challenges to the ETS will be consolidated and heard in a federal appellate court to be determined by random draw.

It will take time to sort this out and to learn whether the ETS will be upheld—either in its current form or with modifications. In the meantime, given that compliance will take considerable planning by employers, it may make sense to begin preparing for the ETS in the possibility that the current stay will eventually be lifted, allowing the ETS to be enforced.

In light of these developments, Armstrong Teasdale has decided to postpone its webinar, The Race to Compliance: What You Need to Know About OSHA's ETS. To express interest in our upcoming event, please email at@atllp.com. Additional information will be shared upon rescheduling. We will continue to monitor for and issue updates related to the ETS. Should you have any questions specific to your organization and potential implications in the meantime, please contact your regular Armstrong Teasdale attorney or one of

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