DECEMBER 18, 2021 | WORKPLACE SAFETY & HEALTH

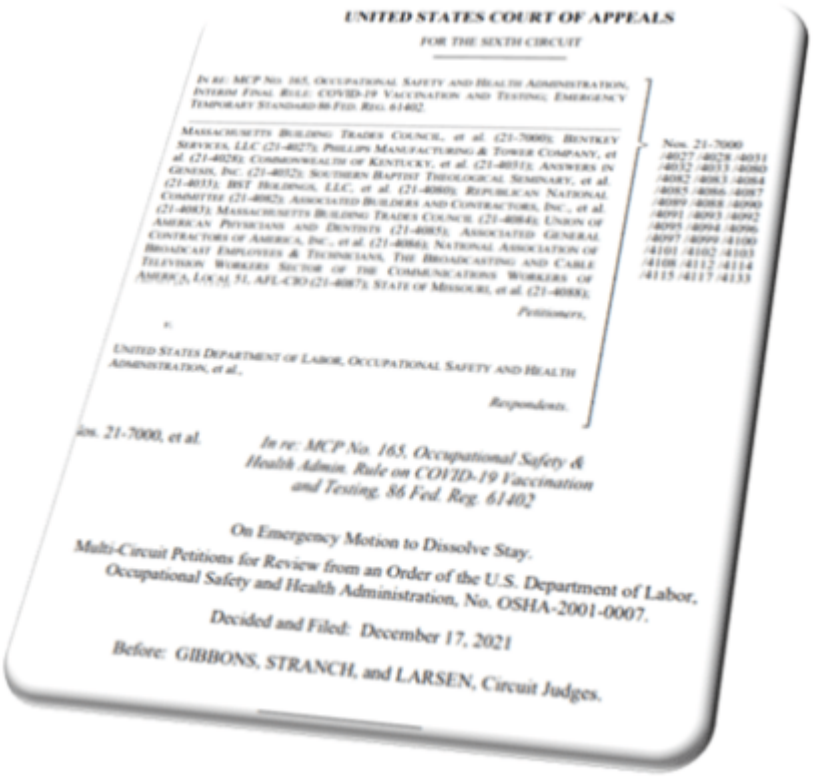
BREAKING – 6th Cir. Lifts Stay of OSHA's Vaccinate-or-Test Emergency Temporary Standard

By Conn Maciel Carey's COVID-19 Task Force

We apologize for interrupting what we hoped be a quiet, pre-holiday weekend for everyone, but we have very important and time sensitive news to share about the status of OSHA's Vaccination, Testing, and Face Coverings Emergency Temporary Standard (ETS). It was a very busy Friday night for everyone in the OSHA world. In a remarkable turn of events, at 6:50 PM yesterday evening (December 17th), the US Court of Appeals for the Sixth Circuit dissolved the nationwide stay of OSHA's Vaccination ETS that had been issued by the Fifth Circuit in November.

The Department of Labor and OSHA then immediately issued a statement that OSHA was moving forward with implementation and enforcement of the ETS, but also provided some enforcement relief for companies able to demonstrate good faith efforts to comply. Then, within an hour of the Sixth Circuit decision being released, numerous parties filed an emergency application and motion with the US Supreme Court requesting the Supreme Court reissue a stay of the ETS. And then, finally, shortly after midnight (approximately 1 AM last night), South Carolina along with 26 other State Attorneys General and a host of private entities also filed an emergency application for a stay. What a night.

We briefly summarize the Sixth Circuit's decision below and explain the lay of the land as it stands at this moment, what might occur next and, most importantly, what this means for employers across the nation. Bottom line is that events are moving fast, but as we said a few weeks ago, do not put a fork in the ETS, and continue to prepare to come into compliance with it. It is alive and well, at least until we hear from the Supreme Court.


UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Petitioners,

v.

Respondents.

In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing, 86 Fed. Reg. 61402

On Emergency Motion to Dissolve Stay.

Multi-Circuit Petitions for Review from an Order of the U.S. Department of Labor, Occupational Safety and Health Administration, No. OSHA-2001-0007.

Decided and Filed: December 17, 2021

Before: GIBBONS, STRANCH, and LARSEN, Circuit Judges.

Sixth Circuit Decision

In a 2-1 opinion written by Obama-appointee Judge Jane Stranch and, notably, joined by Bush appointee Judge Julia Gibbons, the Sixth Circuit rescinded the nationwide stay of OSHA's ETS that had been issued by the Fifth Circuit first an administrative stay on November 6th and then as a TRO on November 12th. The three-judge panel that heard the case consisted of one Obama appointee, one Bush (W.) appointee, and one Trump appointee. Judge Gibbons (the Bush appointee) joined Judge Stranch, but she also wrote a separate concurring opinion. Trump-appointee Judge Joan Larsen, who had purportedly been on a Trump's short-list of potential nominees to the Supreme Court, dissented.

In a nutshell, the Court's rationale for lifting the stay is that the ETS is *"an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs[.]"*

The Sixth Circuit addressed the long-established four-factor test to determine whether a stay pending judicial review is merited – that is:

1. whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
2. whether the applicant will be irreparably injured absent a stay;
3. whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

4. where the public interest lies.

Judge Stranch concluded that *"[t]he harm to the government and the public interest outweighs any irreparable injury to the individual petitioners who may be subject to a vaccination policy[.]"* OSHA had estimated that the ETS could save more than 6,500 lives and prevent over 250,000 hospitalizations in the six months that it would be in effect.

Additionally, and importantly, the Sixth Circuit recognized that:

"[t]he ETS does not require anyone to be vaccinated. Rather, the ETS allows covered employers—employers with 100 or more employees—to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces. Employers have the option to require unvaccinated workers to wear a mask on the job and test for COVID-19 weekly. They can also require those workers to do their jobs exclusively from home, and workers who work exclusively outdoors are exempt. The employer—not OSHA—can require that its workers get vaccinated, something that countless employers across the country have already done."

It also addressed arguments asserting that COVID-19 is no longer a grave danger and claims that OSHA's delay in promulgating the ETS is evidence that no grave danger exists. To this, Judge Stranch stated that:

"When the pandemic began, ['] scientific evidence about the disease[']and ['] ways to mitigate it were undeveloped.['] At that point, OSHA chose to focus on nonregulatory options, and crafted workplace guidance ['] based on the conditions and information available to the agency at that time,['] including that ['] vaccines were not yet available.['] The voluntary guidance, however, proved inadequate, and as employees returned to workplaces the ['] rapid rise to predominance of the Delta variant['] meant ['] increases in infectiousness and transmission['] and ['] potentially more severe health effects.['] At the same time, the options available to combat COVID-19 changed significantly: the FDA granted approval to one vaccine on August 23, 2021, and testing became more readily available. These changes, coupled with the ongoing risk workers face of contracting COVID-19, support OSHA's conclusion that the time was ripe for OSHA to address the ongoing danger in the workplace through an ETS."

That's the gist of it. The court essentially agreed with OSHA's position straight down the line. Bush-appointee Gibbons agreed, but also issued a short one-page concurring opinion noting the limited role of the judiciary in the dispute about pandemic policy. Stating that she agrees that the government's motion to dissolve the stay should be granted and that she "concurs fully" in Judge Stranch's opinion, Judge Gibbons went on to state that, although petitioners and various opinions discuss at length how OSHA could have handled the pandemic's impact on places of employment differently, and that reasonable minds may disagree on OSHA's approach to the pandemic, the Court does not substitute its judgment for that of OSHA, which has been tasked by Congress with workplace safety and health policymaking responsibilities. Rather, beyond constitutional limitations, the work of an agency, often scientific and technical in nature, is outside the Court's expertise. Judge Gibbons concluded: *"Our only responsibility is to determine whether OSHA has likely acted within the bounds of its statutory authority and the Constitution. As it likely has done so, I concur."*

In dissent, Trump-appointee Larsen vociferously disagreed with the majority ruling, stating that the petitioners have shown a likelihood of success on the merits of their challenge to the legality of the ETS. Judge Larsen takes pointed issue with the majority's characterization of the rule as permitting employers *"to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces,"* stating *"that was the state of federal law before the rule, not after."*

In support of the need to keep the stay in place, Judge Larsen appeared to be moved by the sheer number of legal theories under which the ETS has been challenged. She states that the challengers *"say, for example, that the mandate violates the non-delegation doctrine, the Commerce Clause, and substantive due process; some say that it violates their constitutionally protected religious liberties and the Religious Freedom Restoration Act of 1993."* To lift the stay she argues would require the court to *"conclude that not one of these challenges is likely to succeed. A tall task."* And she clearly accepts at least a number of the legal bases for the challenges, stating that it is clear to her that *"the Secretary of Labor lacks statutory authority to issue the mandate . . . that the Secretary made no finding that the emergency rule is 'necessary' in any sense even approaching 'indispensable.'"* Finally, Judge Larsen relies on OSHA's timing, stating that *"OSHA waited well over a year to respond to, in the agency's words, 'the biggest threat to employees in OSHA's more than 50-year history;'"* and argues that the data presented by OSHA does not support a finding that all covered employees have a high risk both of contracting COVID-19 and suffering severe consequences from it. Indeed, she states, *"the government's own data reveal that the death rate for unvaccinated people between the ages of 18 and 29 is roughly equivalent to that of vaccinated persons between 50 and 64."* The dissent concludes on a somewhat political note, echoing statements about freedom and choice: *"the mandate is aimed directly at protecting the unvaccinated from their own choices. Vaccines are freely available, and unvaccinated people may choose to protect themselves at any time."*

Suffice it to say, the dissent demonstrates a massive gulf between Judge Larsen's reasoning, and her dissenting opinion aligns well with the Fifth Circuit's original stay decision.

Perhaps most interesting about the Sixth Circuit's ruling is that it was issued by a politically balanced panel. While the Trump appointee dissented, the majority was balanced between a Democratic-appointed judge and a Republican-appointed one. It is too early to say whether this foreshadows political alliances that may form in the array of other legal challenges to the Administration's various vaccine mandates, but it is an interesting development.

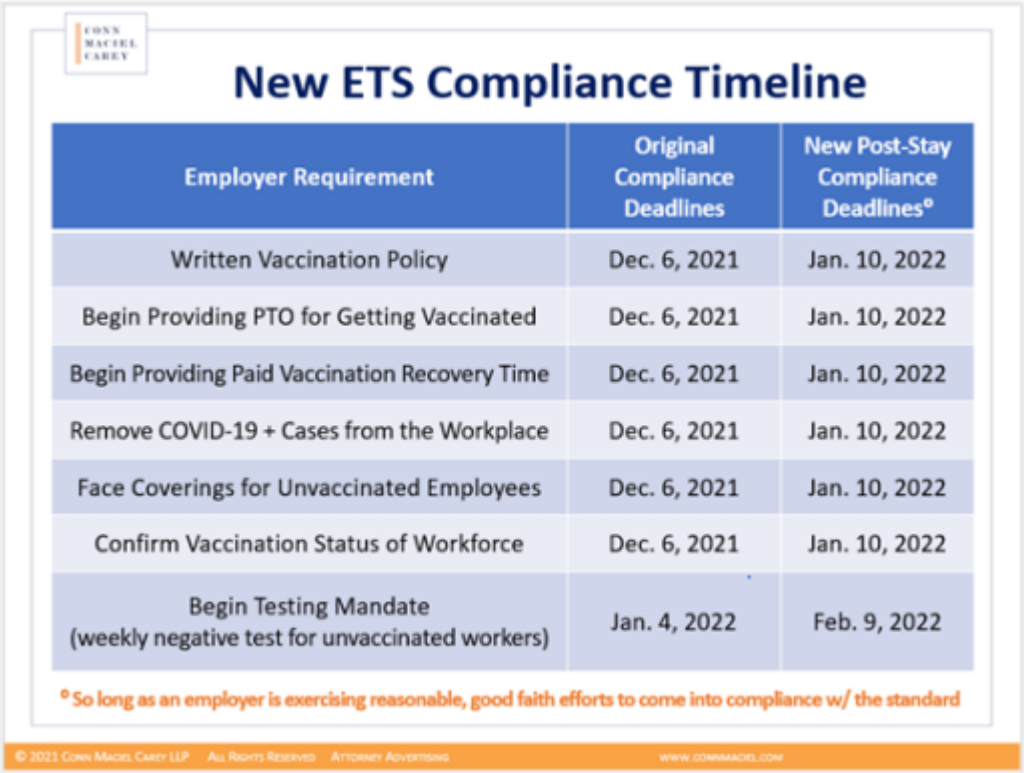
Deadlines for Compliance

Nearly immediately upon issuance of the Sixth Circuit decision, the Dept. of Labor issued this news release and OSHA updated its webpage about the Vaccination ETS with this snippet:

> **Litigation Update**
>
> OSHA is gratified the U.S. Court of Appeals for the Sixth Circuit dissolved the Fifth Circuit's stay of the Vaccination and Testing Emergency Temporary Standard. OSHA can now once again implement this vital workplace health standard, which will protect the health of workers by mitigating the spread of the unprecedented virus in the workplace.
>
> To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, 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. OSHA will work closely with the regulated community to provide compliance assistance.

Technically, all of the elements of the ETS are in effect right now, except for the requirement for unvaccinated workers to produce a weekly negative test to report to work. However, thankfully OSHA makes clear in its public statements since last night that it will use its enforcement discretion to not cite companies for a few additional weeks for non-compliance between now and a series of new January/February compliance deadlines ***if the employer can demonstrate that it has been making good faith efforts to come into compliance.*** Specifically, **the key first date by when employers must have everything but testing in place is January 9th followed by implementation of the testing program for unvaccinated workers by February 8th.**

Here is our updated compliance deadline chart:



Accordingly, we strongly recommend companies continue or reinstitute their efforts to develop the programs required by the ETS and move toward compliance. OSHA enforcement discretion will be offered only to those who can make a serious showing that they are making efforts towards compliance and program implementation.

Written Policy

In that regard, Conn Maciel Carey's OSHA Practice has been **helping dozens of companies develop tailored written COVID-19 Vaccination, Testing, and Face Coverings policies and the ancillary forms and materials required by the ETS.** We have a questionnaire that we work through with our clients to identify the specific issues and options employers must address (e.g., what cap will you set for paid recovery time; will you provide test kits to employees or require them to take tests offsite; how will you communicate to employees the information required to be shared under the ETS; etc.), and with those answers, we develop a customized written

program document that is required by the ETS. The policy package we deliver includes all the necessary related forms, such as:

- (Attachment A) – Form for Interactive Process to Address Religious/Medical Accommodations Exemptions
- (Attachment B) – Form for Employee Self-Attestation of Vaccination Status
- (Attachment C) – Confidential Employee Vaccination Status Roster
- (Attachment D) – OSHA COVID-19 Recordkeeping and Reporting Flowcharts
- (Attachment E) – Confidential Employee COVID-19 Testing Results Tracking Record
- (Attachment F) – OSHA COVID-19 Vaccination and Testing ETS Information Package (for the employee communication requirement)

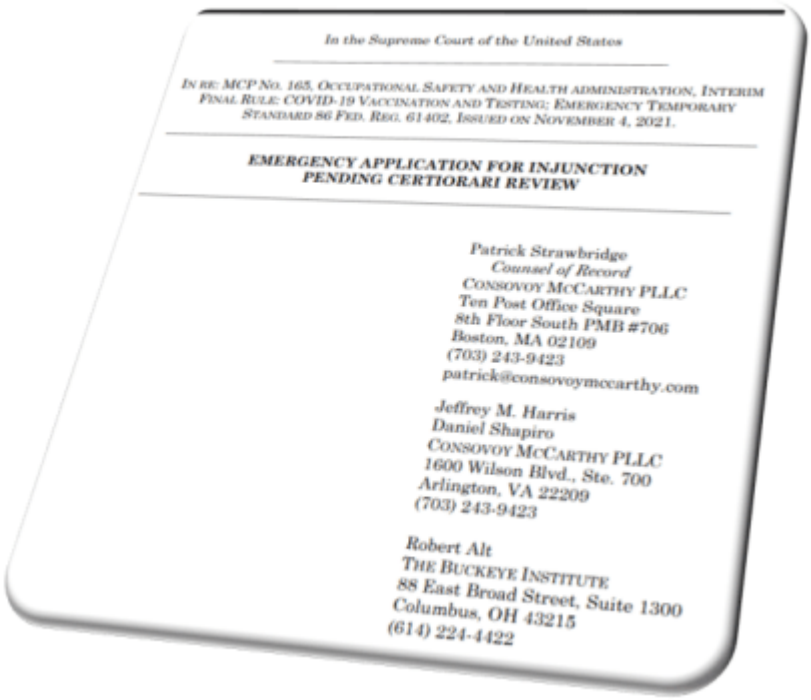
Under the circumstances and in light of the time urgency associated with this effort, we have been doing this work for a modest fixed fee rather than billing our clients' hourly fees. Critically, doing this upfront work, even if you are not prepared to fully implement the program by January 9, will put you in a very good position to benefit from the enforcement discretion and relief OSHA has indicated it will offer to companies working steadily to come into compliance. We will get on the phone with your safety or operations leaders to discuss the compliance options and then turn a program around very quickly.

If your organization would like help developing the written policy or with a gap assessment of one you have already developed, please contact Eric Conn, Chair of CMC's national OSHA Practice or any other member of CMC's COVID-19 Task Force.

What Comes Next

The ink was not dry on the Sixth Circuit's decision before a number of parties filed a joint emergency application and motion with the Supreme Court requesting the Court to, once again, stay the ETS. These parties essentially reiterated the myriad of arguments previously raised by petitioners challenging OSHA's authority to issue the

ETS applicable arguments under prior EO originally issued November. To summarize, they argue that compliance with the ETS would cause critical and exigent circumstances to arise resulting a potentially catastrophic disruptions of businesses across the land, massive labor shortages based of employees' refusal to become vaccinated and essentially cause the economy to come to a screeching halt. The parties also raise a series of legal arguments based on OSHA's authority to issue and emergency standard under the circumstances, and more broadly and fundamentally, OSHA's authority to regulate in this area *at all,* even in a non-emergency setting. And, they throw in the Gorsuch-favored non-delegation argument for good measure.



In the Supreme Court of the United States

IN RE: MCP NO. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402, ISSUED ON NOVEMBER 4, 2021.

EMERGENCY APPLICATION FOR INJUNCTION PENDING CERTIORARI REVIEW

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Red state attorneys general certainly earned their government salaries last night, working into the wee hours to prepare and file a second stay application with the Supreme Court. In that application, the position of South Carolina Attorney General Alan Wilson and his counterparts from 26 other states, as well as a long list of companies and organizations, is summed up as follows:

"Neither Congress nor the Executive Branch has been bashful about testing the limits of its authority. For that reason, a ['] lack of historical ['] precedent is often ['] the most telling indication ['] that Congress lacked the power to pass a law, or that an agency lacked the power to promulgate a regulation. This case involves a historically unprecedented administrative command. Relying on a decades-old statute pertaining to workplace dangers . . . OSHA promulgated a rule regulating the private healthcare decisions of tens of millions of Americans."

The State AGs further state that this case "does not present the question whether vaccines or vaccine mandates are wise or desirable. Instead, it presents the narrow questions whether OSHA had authority to issue the Mandate, and whether it lawfully exercised whatever authority it had. After all, ['] our system does not permit agencies to act unlawfully, ['] even during a pandemic and ['] even in pursuit of desirable ends. ['] "

So Now ...

It is up to the Supreme Court to decide the fate of the ETS, at least the fate of OSHA's ability to enforce the ETS until full legal briefing and hearing on the merits of the legal challenges to the ETS occurs. All of the challenges to date have been about whether the ETS should be stayed pending a full review of the legal challenges, which

could take numerous additional months to occur. Thus, the request before the Supreme Court is not whether the ETS is a valid regulation, but whether an emergency stay should be granted prohibiting OSHA from implementing and enforcing the ETS while the parties and courts prepare to argue the merits.

We will be on the edge of our seats – again – awaiting the Supreme Court's decision. The Court could simply take a pass and refuse to get involved, or it could hear and decide the stay motion immediately. While many speculate that the Supreme Court, with a solid 6-3 conservative majority, would take up and dispense with OSHA's ETS quickly, putting a new kibosh on the Administration's ETS, we are not as convinced of that outcome. Certainly that is a real possibility, However, over the past several months, the Supreme Court has been asked five times to issue emergency stays of statewide or employer-imposed "hard" vaccine mandates, and in each of those instances the Court has declined to stay those vaccine requirements. That does not mean the Court favors mandates or believe the federal government has authority to implement one, but it is a notable trend.

The Bottom Line is that we will need to wait and see what the Court decides to do, but in the meantime, in our view, it would be risky without a stay issued by the Court, for employers to remain in wait-and-see mode about moving toward compliance with the ETS. That does not mean you need to put an order in for test kits, but to be prudent, it does mean that you should move forward expeditiously to build the administrative process to support a vaccinate-or-test regiment at your workplaces, provide the required PTO and paid sick leave for getting vaccinated and recovering from it, and developing the written program documents required by the ETS.

Please let us know if you need any help at all on any front. We will update you all as soon as further developments arise.