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OSHA Will Require Compliance with Vaccination ETS in January 2022

On December 17, 2021, the Sixth Circuit Court of Appeals lifted the stay on the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS), finding that OSHA justified its finding that workers face a grave danger in the workplace as a result of COVID-19. The ETS requires that employers with more than 100 employees either mandate the COVID-19 vaccination or implement a vaccination or weekly testing program. We discussed employer obligations under the ETS in our prior alert.

In response to the Sixth Circuit's decision, OSHA announced on December 18, 2021, that it would exercise enforcement discretion and not issue citations for noncompliance prior to January 10, 2022. Moreover, OSHA will not issue citations for noncompliance with the testing requirements prior to February 9, 2022, as long as an employer can demonstrate that it is "exercising reasonable, good faith efforts to come into compliance with the standard."

Employers should ensure they have their plan ready: either a mandatory COVID-19 vaccination policy or a policy allowing employees to get vaccinated or undergo weekly COVID-19 testing and wear a face covering at the workplace. If employers have not determined the vaccination status of their employees and retained copies of that proof, that should be the first step. Employers who plan to permit testing in lieu of vaccination should also determine the requirements of the testing program and document efforts to come into compliance with the ETS requirements.

The Sixth Circuit's ETS decision is not the end of the legal process. Within an hour of the decision, 26 business associations filed an Emergency Application for Immediate Stay of Agency Action Pending Disposition of Petition for Review with the U.S. Supreme Court. However, until we have an update from the Supreme Court, employers should prepare to comply with the ETS by OSHA's January 10 deadline.

If you have questions regarding compliance with the ETS, or if we can help you draft and implement ETS-compliant policies and procedures, please contact Brittany Lopez Naleid, Shannon (Toole) West or your Reinhart attorney.

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