

## CAPABILITIES

COVID-19 Response Team

# OSHA SUSPENDS EMERGENCY TEMPORARY STANDARD ON COVID-19 VACCINATIONS AND TESTING FOR LARGE EMPLOYERS

Advisory

11.16.21

On Thursday, November 4, 2021 the Occupational Safety and Health Administration (OSHA) published an Emergency Temporary Standard (ETS) that establishes minimum COVID-19 vaccination and testing requirements for private employers with 100 or more employees throughout the United States.

Shortly after the ETS was published, several states and businesses sued to declare that the rule was unconstitutional and beyond OSHA's statutory authority. On November 6, 2021 the Fifth Circuit Court of Appeals (based in New Orleans) issued a very short preliminary ruling "staying" implementation of the ETS pending further briefing in the court. Then, on November 12, 2021 the Fifth Circuit entered a long opinion in which it has issued a preliminary stay of the law.

In doing so, the court signaled in the strongest of possible terms that it was poised to find that the rule does exceed OSHA's statutory authority in several ways and is unconstitutional.

In recognition of the court's ruling, the administration declared yesterday that OSHA has suspended all activities relating to the implementation and enforcement of the ETS pending further litigation. However, this is still a temporary ruling and will be appealed, most likely all the way to the Supreme Court, which would make the final decision.

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Although not expressly stated, this means that employers under the rule have a reprieve of the upcoming December 5, 2021 deadline, and likely the January 4, 2022 deadline as well, as the courts will take some time to provide much-needed clarity and a final decision.

This week, the Florida legislature is meeting in a special session in an effort to consider legislation that would countermand at least parts of the OSHA rule.

Businesses should stay tuned to see what, if any legislation, is passed by the Florida legislature, how the courts will ultimately decide on the fate of the OSHA rule, and how these two will play out if the courts determine that the OSHA rule is valid.

This court decision has no effect on vaccine mandates applying in healthcare settings or to federal contractors and subcontractors.