

US Supreme Court Stays OSHA's COVID-19 Vaccine-or-Test Mandate

The stay means employers are currently not required to mandate vaccines or testing under OSHA rules.

Key Points:

- On January 13, 2022, the US Supreme Court stayed the vaccine-or-test emergency temporary standard (ETS) that the US Occupational Safety and Health Administration (OSHA) issued in November 2021.
- The stay will be in effect until the claims contesting the ETS' legality that are pending in the US Court of Appeals for the Sixth Circuit are fully resolved.
- At this time, employers do not need to comply with the ETS and OSHA cannot enforce it.

As Latham & Watkins reported in a previous [Client Alert](#), on November 5, 2021, OSHA published an [ETS](#) that requires covered employers to take affirmative steps to address COVID-19 safety in the workplace, including adopting a policy that requires employees to be fully vaccinated against COVID-19 or that gives employees a choice between being vaccinated against COVID-19 or being subject to COVID-19 testing and face-covering requirements.

Legal challenges quickly cast doubt over the ETS' future. On November 12, 2021, the Fifth Circuit issued a nationwide injunction staying the ETS in a case that was subsequently transferred to the Sixth Circuit and consolidated with other cases challenging the ETS. Following Latham's *Client Alert*, on December 17, 2021, the Sixth Circuit lifted the Fifth Circuit's stay. With the stay removed and little time to comply with the ETS, OSHA revised the ETS' enforcement deadlines, allowing covered employers until January 10, 2022, to develop and adopt a compliant vaccination policy and maintain a roster of each employee's vaccination status, and until February 9, 2022, to require regular testing of employees who are not fully vaccinated.

On January 7, 2022, the US Supreme Court heard oral arguments on whether to impose a stay on the ETS. On January 13, 2022, the Court issued a decision staying the ETS pending the outcome of the cases in the Sixth Circuit and any petitions for writs of certiorari to the Court, if sought. Thus, until the Sixth Circuit issues a final decision on the legality of the ETS, and the time for petitions for writs of certiorari have expired or any writ petitions have been disposed of, employers need not comply with the ETS, and OSHA may not enforce it.

Although the OSHA ETS is not in effect at this time, employers may be required under other laws to mandate vaccines (subject to accommodation obligations), such as under the federal vaccine mandate for healthcare workers and the [New York City Order](#) requiring vaccines. The vaccine mandate for federal contractors and subcontractors is currently not in effect as it was stayed by a court in December 2021.

Employers that are not required to mandate vaccines may still choose to do so, subject to applicable state or local laws restricting or banning vaccine mandates by employers, such as in Florida, Montana, Texas, and Utah. Employers mandating vaccines should be aware of their obligations to accommodate employees who are unable to get vaccinated due to disability, religion, or pregnancy.

Employers should reach out to the Latham & Watkins employment team with any questions about vaccine mandates and bans.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

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