

# HRW CLIENT ALERT

December 20  
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## Federal Appeals Court Reinstates OSHA's COVID-19 Vaccine Mandate

On Friday, December 17, 2021, the U.S. Court of Appeals for the 6th Circuit lifted an injunction that had been blocking an Emergency Temporary Standard (“ETS”) issued by the Occupational Safety and Health Administration (“OSHA”) requiring private sector employers with at least 100 employees to ensure that their workers are either vaccinated against COVID-19 or tested weekly.

Across the country, religious, business, and political groups had filed lawsuits challenging OSHA’s authority to issue its rule. Enforcement of the rule was initially blocked in early November by an injunction issued by the 5th Circuit Court of Appeals. However, the various multi-district court challenges were consolidated, and the 6th Circuit Court of Appeals was randomly selected to decide the consolidated cases. Friday’s ruling by the 6th Circuit lifts the injunction and effectively reinstates OSHA’s vaccination / testing requirements.

The legal wrangling is not over. It is expected that the 6th Circuit’s ruling (a 2-1 split decision) will now be challenged in the United States Supreme Court.

In the meantime, OSHA has issued a statement allowing employers additional time to come into compliance with the ETS so long as the employer is exercising reasonable, good faith efforts to come into compliance. Specifically, the [announcement](#) provides:

*To account for any uncertainty created by the [injunction], 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.*

In light of the injunction being lifted and OSHA’s recent announcement, employers with 100 or more employees should prepare to come into compliance with the ETS by establishing and enforcing an ETS-compliant policy by **January 10, 2022**, and, if the employer permits testing in lieu of vaccination, to begin enforcing the testing requirement no later than **February 9, 2022**.

As a reminder, the key provisions of OSHA’s ETS establish various requirements for employers with 100 or more employees. These requirements mandate that such employers: (1) adopt either (a) a mandatory COVID-19 vaccination policy or (b) a policy requiring employees to either be vaccinated or tested weekly and wear face coverings at work; (2) allow certain paid time off allotments for employees to receive and recover from COVID-19 vaccinations; (3) maintain records of vaccination status and testing; (4) require their employees to inform the employer if they test positive for COVID-19; and (5) implement procedures addressing when an employee who tested positive

can be permitted to return. A summary of employer requirements under the ETS can be found at [HRW's previous client alert on the topic](#).

On a related note, on Wednesday, December 15, 2021, the 5th Circuit Court of Appeals ruled that a Louisiana federal court's nationwide injunction blocking the federal mandate requiring employees at Medicare- or Medicaid-funded healthcare facilities to be vaccinated was improperly imposed. The 5th Circuit ruling provided that the injunction would remain in effect for those 14 states involved in the case (Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, and West Virginia), but could not remain in effect for other states, effectively lifting the nationwide injunction and instituting a state-specific injunction for the aforementioned states.

The Federal Contractor Vaccine Mandate remains subject to an injunction issued by a federal court in Georgia on December 7, 2021, which blocked the implementation of the Biden administration's vaccine mandate for federal contractors nationwide.

### **For Questions/More Information**

If you have any questions, please contact:

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