

# NEWS BRIEF

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## OSHA Suspends Implementation and Enforcement of the Vaccination and Testing ETS

The Occupational Safety and Health Administration (OSHA) published on their [website](#) on Nov. 16, 2021, that the COVID-19 vaccination and testing emergency temporary standard (ETS) is being put on hold due to pending litigation.

The OSHA ETS went into effect on Nov. 5, 2021, and was set to have two compliance dates: one date for employers to finalize their policies on vaccine mandates or weekly testing requirements and another date for the weekly testing to begin. Keep reading to learn more about what's next for the ETS.

### The 5<sup>th</sup> Circuit Court of Appeals Ruling

On Nov. 12, 2021, the 5<sup>th</sup> Circuit Court of Appeals ruled to extend the stay of the OSHA ETS, stating the ETS imposes financial burdens on private employers. The court also claimed that the ETS fails to account for the different elements present between workplaces. Overall, the court raised substantial questions on whether OSHA has proven that COVID-19 presents a "grave danger" to workers and if the ETS is "necessary."

### Circuit Court Lottery

Even though the 5<sup>th</sup> Circuit Court of Appeals ruled to extend the stay of the OSHA ETS, all other petitions from parties across the nation were due by Nov. 16, 2021, to consolidate the lawsuits concerning the ETS for all Circuit court districts. On Nov. 16, 2021, the Judicial Panel on Multidistrict Litigation randomly determined through a "lottery drawing" which Circuit court would review the ETS arguments. From there, the 6<sup>th</sup> Circuit Court of Appeals was selected. It is not

certain when this court will make a ruling on the arguments.

### OSHA's Statement

In response to the 5<sup>th</sup> Circuit Court of Appeals ruling to extend the ETS stay, OSHA released a statement on its website. The statement reads:

"On Nov. 12, 2021, the U.S. Court of Appeals for the 5th Circuit granted a motion to stay OSHA's ETS, published on Nov. 5, 2021 (86 Fed. Reg. 61402). The court ordered that OSHA 'take no steps to implement or enforce' the ETS 'until further court order.' While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS, pending future developments in the litigation."

### What's Next

Employers should continue to monitor OSHA ETS updates to determine if there are any changes in its status. At this point, employers should understand the requirements of the ETS in case it survives the upcoming litigation.

Employers should also remember that regardless of the ETS being on hold, OSHA still can cite employers under the General Duty Clause. In other words, employers still have a continued duty to make their workplaces safe for their employees.

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