



## OSHA's COVID-19 Vaccination and Emergency Testing Standards (ETS) November 16, 2021 Update

By: [Karen Spaulding](#)

The Fifth Circuit Court of Appeals granted Petitioner's motion to continue the stay of the enforcement of the ETS Mandate pending judicial review of the underlying motion for permanent injunction, stating, "[H]ealth agencies do not make housing policy, and occupational safety administrations do not make health policy." The Fifth Circuit further ordered that OSHA take no further steps to implement the ETS until permitted to do so by further court order. See *BST Holding, LLC, et al. v. Occupational Health and Safety Administration, et al.*, No. 21-60845 (5th Cir. Nov. 12, 2021) Petition for Review. As a result of this Order which applies to the Petitioners and all related motions consolidated into this case, and the numerous other cases filed in other federal courts, on November 15, 2021, OSHA temporarily halted its implementation and the enforcement of the ETS.

Because there are similar lawsuits pending in all 12 of federal circuit courts, the Judicial Panel on Multidistrict Litigation held a lottery on November 16, 2021 to determine which circuit would review the propriety of the ETS mandated by OSHA under the emergency provisions of the Occupational Health & Safety Act ("Act"). The Sixth Circuit Court of Appeals "won" the lottery. Thus, a three-judge panel will decide whether OSHA exceeded its authority under the Act in implementing the ETS Mandate on November 5, 2021.

While the Sixth Circuit Court of Appeals contains many more judges appointed under Republican administrations than Democratic administrations, OSHA is confident that it has the emergency authority to protect the employees of private employers in an emergency situation such as COVID-19. The Sixth Circuit Court panel will likely reach its final decision whether to lift the Fifth Circuit's stay quickly, but until we know which three judges are appointed to the appellate panel, it is hard to predict if the outcome might follow the logic of the Fifth Circuit. The Sixth Circuit's decision will likely be appealed to the U.S. Supreme Court.

Since OSHA has temporarily halted implementation of the ETS, employers do not need to worry at this time about incurring enforcement penalties after December 5, 2021 for non-compliance.

For more information, please contact [Karen Spaulding](#).