

# Update on the OSHA ETS and a Recommendation for Covered Employers

November 9, 2021

A federal appeals court issued a stay this weekend on the Emergency Temporary Standard (“ETS”) issued late last week by OSHA. The ETS would require public employers with 100 or more employees—company-wide—to implement policies requiring employees to be vaccinated or to provide weekly proof of a negative Covid-19 test. The stay and related legal wrangling has many potentially covered employers questioning what, if anything, they should be doing until the legal challenges are resolved.

The stay order was issued by the Fifth Circuit Court of Appeals in one of several lawsuits filed across the country challenging whether the ETS exceeds the scope of OSHA’s authority. Several similar lawsuits were filed in other federal appeals circuits across the country. We expect a Multi-Circuit Litigation process to begin in the next week to consolidate and resolve the issue of whether the ETS will be allowed to stand. There is also the possibility the United States Supreme Court could resolve the issue.

Until the legal questions are answered, a potentially covered employer’s most prudent course of action is to familiarize itself with the requirements of the ETS, and prepare to implement those requirements if the emergency rule is revived before the initial ETS deadlines. Holding off on preparing to implement the mandate while awaiting a final court ruling is not an excuse that OSHA’s enforcement team will be required to recognize, unless the designated Multi-Circuit Litigation appeals court, or the Supreme Court, extends the deadlines.

For further guidance on whether your business will fall under the OSHA ETS, and details regarding a covered employer’s responsibilities and options, please contact your Hall Estill Attorney directly.