



OSHA COVID-19 ETS STATUS UPDATE

WEBINAR PRESENTATION

GISLASON & HUNTER LLP
ATTORNEYS AT LAW

EMPLOYER PREP & LEGAL CHALLENGES

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Presented in partnership with
Greater Mankato Growth



Welcome and Overview

Looking Beyond the ETS Requirements

- Status of ETS Legal Challenges
- Potential Outcomes & Recommended Preparation
- ETS Permanent Rulemaking
- Q & A

Status of ETS Legal Challenges

Timeline

- **November 4, 2021:** OSHA Issues ETS; Proposed Rule for Notice and Comment
- **November 5, 2021:** 5th Cir. Stays Enforcement of ETS
- **November 12, 2021:** 5th Cir. Reaffirms Stay; OSHA Cannot Issue Citations on ETS
 - *BTS Holdings, L.L.C., et al. v. OSHA, et al.*, 17 F.4th 604 (5th Cir. 2021)
 - 46 Petitioners – including States of TX, MS, LA, SC, and UT
- **November 16, 2021:** Consolidated 27 ETS challenges (12/13 federal circuits)
- **December 10, 2021:** Briefing ends on OSHA's Motion to Dissolve Stay
- **December 15, 2021:** Petitioner for Initial *en banc* Hearing denied
- **December 17, 2021:** Stay Lifted; OSHA discretion on enforcement
 - *In re: MCP No. 165, OSHA Rule on COVID-19 Vaccination and Testing*, 86 Fed. Reg. 61402, Nos. 21-7000 & 21-4080 (6th Cir. Dec. 17, 2021)
- **December 17, 2021 (1hr. Later):** Application for Emergency Stay Filed with US Supreme Court
 - Filed December 17, 2021 (within 1 hour of 6th Cir. Decision)
 - Justice Brett Kavanaugh to review (oversees 6th Cir.)

Status of ETS Legal Challenges

- 6th Cir. Lifted Stay December 17, 2021
 - Reasonable, good faith efforts of compliance required immediately
 - OSHA Delayed Enforcement

Requirement	January 10, 2022	February 9, 2022
Mandatory Vaccination/ Testing Policy + Inform Employees about ETS, anti-discrimination/retaliation protections, criminal penalties for providing false documents	X	
Vaccination status, records, roster, and payment for side effects recovery + OSHA inspection	X	
Require notice of COVID-19 positive test and diagnosis + removal from workplace	X	
Face coverings for Unvaccinated	X	
OSHA Reporting work-related COVID-19 fatalities (8hrs) + in-patient hospitalizations (24hrs)	X	
Testing (every 7 days; within 7 days before returning to work)		X

Status of ETS Legal Challenges

Inside the 6th Cir. Decision Lifting Stay

- Reviewing 5th Cir. Decision Issuing Stay
- OSHA Authority to Issue ETS (Limited)
 - Employees are exposed to grave danger from exposure to substances/agents determined to be toxic or physically harmful or from new hazards; and
 - ETS is necessary to protect employees from the danger
- Factors Analyzed for Stay (Temporary Injunction of Enforcement)
 1. Did Petitioners' show strong likelihood of success on the merits?
 2. Would Petitioners be irreparably harmed without stay?
 3. Would OSHA be substantially injured by stay?
 4. What is the public's interest?

Status of ETS Legal Challenges

Inside the 6th Cir. Decision Lifting Stay

cont.

BTS Holdings, L.L.C., et al. v. OSHA, et al., 17 F.4th 604 (5th Cir. 2021)

1. Exceeded Authority

1. *COVID-19 is airborne therefore not toxic/physically harmful agent substance, agent; Not new*
2. *Unconstitutional – Commerce Clause; Major Questions Doctrine*

2. Great Likelihood Challengers Succeed on Merits

1. *No Emergency*
2. *Not Grave Danger*
 - *No evidence: COVID+ employees @ all covered employers*
 - *Vaccination effectively protects v. severe illness & death = over 82% US pop. ≥ age 12 fully/partially vaccinated*
3. *Not Necessary – Both overbroad and underinclusive*
 - *OSHA's prior position: All employer ETS = Superfluous and counterproductive*

3. Irreparable Harm to Covered Employers without Stay

1. *Costs for compliance/noncompliance*
2. *Potential loss of employees (choice between work v. freedom of independent health decisions)*

Status of ETS Legal Challenges

Inside the 6th Cir. Decision Lifting Stay

cont.

1. ETS Appropriate Exercise of OSHA's Authority

a. Commerce Clause (Constitutional Challenge)

- ETS regulates employers with 100/+ employees; not individuals
- "It is indisputable that those employers are engaged in commercial activity that Congress has the power to regulate when hiring employees, producing, selling and buying goods, etc." Opinion at 33.

b. OSHA Act; Constitutional Challenge under Non-Delegation Doctrine

- Congress directly authorized OSHA, with passage of the OSHA Act, to promulgate ETS when "employees are in grave danger from exposure to a workplace hazard and that standard is necessary to protect employees from such danger" even when such danger is an infectious disease in the workplace

Status of ETS Legal Challenges

Inside the 6th Cir. Decision Lifting Stay

cont.

2. Challengers NOT Likely to Succeed on the Merits

- a. Emergency: Traditional nonregulatory efforts inadequate
 - New variants; Highly transmittable & prevents safe return to workplace
 - Now FDA-approved vaccines, widespread testing available
- b. Grave Danger: 5th Cir. Holding “simply wrong”
 - Evidence that hazard present in all workplaces NOT required to = grave danger
 - OSHA may error on the side of overprotection, rather than under protection

Status of ETS Legal Challenges

Inside the 6th Cir. Decision Lifting Stay

cont.

2. Challengers NOT Likely to Succeed on the Merits

- c. Necessary: OSHA showed ETS “necessary to alleviate a grave risk of worker deaths”
- Rejects Overinclusive & Underinclusive argument
 - Virus transmission may occur across all industries
 - Larger employers: (1) greater equipped to implement policies; (2) heightened risk of exposure based on sheer #s; and (3) greatest step at protecting workforce based on #s
- d. ER’s Will Not be Irreparably Harmed
- OSHA estimated compliance cost of \$11,298 per entity
 - If cost true impossibility – assert affirmative defense v. citation
 - Mass Employee Exodus of employees – vaccination exemptions, mask & testing alternative, availability of variance

Potential Outcomes – Legal Challenges

1. NO Action before January 10, 2022: OSHA Enforces ETS
2. ETS Stayed Again Before January 10, 2022 or February 9, 2022
3. Permanent Rule *mirroring* ETS Published on March 18, 2022

Potential Outcome 1: NO Action before Jan. 10, 2022

OSHA Enforces ETS

Requirement	January 10, 2022	February 9, 2022
★ Mandatory Vaccination/ Testing Policy + Inform Employees about ETS, anti-discrimination/retaliation protections, criminal penalties for providing false documents	x	
Vaccination status, records, roster, and payment for side effects recovery + OSHA inspection	x	
Require notice of COVID-19 positive test and diagnosis + removal from workplace	x	
Face coverings for Unvaccinated	x	
OSHA Reporting work-related COVID-19 fatalities (8hrs) + in-patient hospitalizations (24hrs)	x	
Testing (every 7 days; within 7 days before returning to work)		x

★ Informing employees about ETS includes Employer’s obligation to provide employees with the CDC’s “Key Things to Know About COVID-19 Vaccines,” available here.

Potential Outcome 2: US Supreme Court Stays ETS *before* January 10 or February 9, 2022

- Possibility:
 - 10 ETS issued by OSHA in 50 years
 - 1 of 6 ETS survived legal challenges < 17% success rate
 - Both 6th Cir. decision (2-1)
 - Emergency Applications for before only Justice Kavanaugh
- If Stayed:
 - OSHA would be prohibited from enforcing all or part of the ETS
 - ETS could be reinstated anytime thereafter
 - Employers should continue to prepare for compliance

Potential Outcome 3: Permanent Rule *mirroring* ETS Published on March 18, 2022

- ETS published *proposed* rule on November 5, 2021
- Comment period extended to January 19, 2022
 - Comments may be submitted here docket OSHA-2021-0007
 - Employers encouraged to submit comments
- Objections to proposed rule filed with Secretary of Labor for hearing
 - Hearing on objections published w/n 30 days of final submission date
- Final Rule issued w/n 60 days of comment close or hearing on objections
 - March 18, 2022



Q & A Session

Thank you!

- Contact *bking-asamoa@gislason.com*; 507.387.1115
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