

SHERMAN & HOWARD ADVISORY

5th Circuit Blocks Biden Rule — More to Come and What to Do



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While challenges to [Biden's vaccine or test rule](#), implemented by OSHA's [Emergency Temporary Standards \(ETS\)](#) published late last week, were expected, an emergency stay has come with astounding speed.

On Friday, the Fifth Circuit [granted an emergency motion](#) to stay enforcement of the ETS. The Court explained there is "cause to believe there are grave statutory and constitutional issues with the [ETS]." The Court ordered the Department of Labor to respond to the motion for a permanent injunction by 5:00 p.m. today. Petitioners are to respond by 5:00 p.m. on Tuesday.

There is widespread speculation on the enforceability of the ETS. Employers must be cautious of misinformation.

Q: Does the Fifth Circuit's ruling mean I don't need to comply with the ETS?

A: For now, no. The emergency stay does not definitively invalidate the ETS; it merely halts it for the time being.

Q: Does the Fifth Circuit's ruling impact the ETS' enforceability in other jurisdictions?

A: It's not yet clear. The Fifth Circuit did not indicate in its order whether it intended the stay to apply nationwide. The stay is only temporary; another circuit court could reach a different conclusion about the enforceability of the mandate on a temporary or permanent basis. Also, challenges to the ETS have been filed in multiple jurisdictions. The rules for challenging an OSHA regulation require that all the challenges be decided in one jurisdiction selected by lottery. A lottery has not yet taken place. Thus, it is unknown at this time which court, be it an appeals court or the U.S. Supreme Court, will be tasked with making a final decision on the enforceability of the mandate.



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Q: How does this affect my business planning?

A: Because developing policies and plans to come into compliance with the ETS will take weeks, employers should not take a "wait and see" approach to begin planning. If the ETS is upheld and takes effect as planned on January 4, 2022, employers will need to have provided several weeks' advance notice to allow employees ample opportunity to get vaccinated.

Q: What should I be watching?

A: Dozens of states and businesses have already sued. An employer with employees and/or operations across state lines should be attentive to all applicable jurisdictions. You should watch cases in your circuit, consult experienced counsel, and continue to prepare for the ETS to take effect. Remember, temporary stays are just that, temporary. Unless there is a permanent nationwide decision, employers are well advised to continue on course.