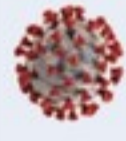


OSHA emergency temporary standard on COVID-19 in legal limbo

 WASHINGTON – At press time, the fate of OSHA’s emergency temporary standard on COVID-19 vaccination, testing and masking remained uncertain, with at least one more court decision yet to be handed down.

The 6th U.S. Circuit of Appeals, based in Cincinnati, was selected via a lottery to weigh in on a consolidated challenge to the ETS; a hearing date was still pending at press time.

Conducted by the Judicial Panel on Multidistrict Litigation on Nov. 16, the lottery was needed because 27 petitions for review of the temporary rule were filed in 12 appeals courts. That included the New Orleans-based 5th Circuit, which halted the implementation and enforcement of the ETS, granting a stay Nov. 12. In its 22-page opinion, a three-judge panel wrote that the agency’s decision to make the ETS applicable to only workplaces with 100 or more employees “belies the premise that any of this is truly an emergency.”

Among other considerations, the panel ruled that the promulgation of the ETS “grossly exceeds OSHA’s statutory authority.” The judges contend that the Occupational Safety and Health Act of 1970, which established the agency, wasn’t intended for OSHA “to make sweeping pronouncements on matters of public health” and that SARS-CoV-2 – the virus that causes COVID-19 – is an airborne virus that is “widely present in society (and thus not particular to any workplace).”

On its website, OSHA says that although it remains “confident in its authority to protect workers in emergencies,” it has suspended activities related to the ETS “pending future developments in the litigation.” The agency has extended until Jan. 19 the comment period on the ETS, saying the move allows stakeholders additional time for review and to collect information and data necessary for comment.

Publication

OSHA published the ETS in the Nov. 5 *Federal Register*, giving employers with 100 or more employees 30 days to develop, implement and enforce a mandatory COVID-19 vaccination policy – or provide a policy that gives workers the choice to get vaccinated or undergo weekly COVID-19 testing.

Covered employees had an initial deadline of Jan. 4 to become fully vaccinated, or begin weekly testing and wear a face covering while indoors or in a vehicle “with another person for work purposes.”

The ETS directed employers to provide paid time off to receive a vaccine – up to four hours for each dose – and paid leave for any side effects from vaccinations. According to an OSHA fact sheet, the ETS would not apply to employees who work from home permanently, who work “exclusively outdoors” or who report to a workplace where other individuals aren’t present.

During a Nov. 4 press conference, OSHA Deputy Assistant Secretary Jim Frederick said many employers already are complying with the requirements of the ETS. He noted that the agency chose the 100-employee threshold because employers with that many workers typically have the “administrative capacity” to implement the requirements of the ETS “promptly.”

OSHA estimates that two-thirds of private-sector workers, or around 84 million, would be covered under the ETS.

Legal action

The ETS was immediately challenged in the courts, with the 5th Circuit on Nov. 7 granting a temporary stay. That decision stemmed from the same petitioners involved in the Nov. 12 decision: Louisiana, Mississippi, South Carolina, Texas, Utah, businesses, and religious and advocacy groups.

On Nov. 30, watchdog group Public Citizen filed a friend-of-the-court brief with the 6th Circuit on behalf of three former OSHA administrators, offering support for the ETS.

Among the former agency heads is Gerard Scannell, who filled the role during the George H.W. Bush administration (1989-1992) and is a former president and CEO of the National Safety Council. The others are Charles Jeffress (1997-2001) and OSHA’s longest-serving assistant secretary, David Michaels (2009-2017).

In a press release, Public Citizen contends the 5th Circuit decision is “contrary to the plain language” of the OSH Act, which “gives OSHA broad authority to prevent workplace illnesses and diseases caused by exposure to ‘harmful physical agents,’ including viruses.”

In a Nov. 30 tweet, Michaels said he was “proud to be among former OSHA directors filing a bipartisan brief explaining how [OSHA] works – and what the 5th Circuit got wrong.”

Ultimately, the fate of the ETS is likely to be decided by the Supreme Court.