

# PUBLICATION

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## Legal Challenges to OSHA's "Vaccine or Test" ETS: Your Questions Answered

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### **Update: December 15, 2021**

As we summarized in our previous alerts, OSHA's "Vaccine or Test" ETS was released on November 4 and published on November 5, 2021. It was met with an avalanche of lawsuits, and by November 6, the Fifth Circuit Court of Appeals issued a preliminary nationwide stay of the ETS. On November 12, after additional briefing and arguments, the Fifth Circuit continued its preliminary stay, **and ordered that OSHA take no steps to implement or enforce the ETS until further court order.**

Challenges to the ETS were filed not only in the Fifth Circuit, but also in the Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits. Because similar lawsuits challenging the ETS were filed in a number of circuits, specific procedural rules required the selecting of a single circuit to determine which circuit would ultimately decide the cases. On November 16, the Sixth Circuit Court of Appeals was selected to hear all legal challenges to the OSHA ETS.

A three-judge panel from the Sixth Circuit will now be randomly assigned to hear the cases. On November 23, the Sixth Circuit entered a scheduling order with the following deadlines:

- November 30 for any and all additional filings either (i) joining in the pending motions for hearing en banc or OSHA's motion to dissolve the Fifth Circuit's stay or (ii) any other motion asking the Sixth to modify, revoke, or extend the Fifth's stay;
- December 7 for any and all responses to then-pending motions filed by November 30; and
- December 10 for any and all replies.

Additionally, on December 3 the Sixth Circuit entered an order denying all motions to transfer the case and denying any motion to stay the case until resolution of the motions for hearing en banc, which were denied on December 15. The Sixth Circuit also denied as moot any motion asking the Sixth Circuit to stay/enjoin the OSHA ETS. Rather, the Sixth Circuit will decide OSHA's motion to dissolve the Fifth Circuit stay, leaving it in place in the interim. We do not have a timetable for that decision, but we expect it in the next few weeks. Baker Donelson's Labor & Employment Team will be watching for developments in the coming weeks.

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### **Original Publication: November 15, 2021**

As we [summarized last week](#), OSHA's "Vaccine or Test" ETS was released on November 4 and published on November 5, 2021. It was met with an avalanche of lawsuits, and by November 6, the ETS had been stayed by the Fifth Circuit Court of Appeals. Is this a nationwide stay? Is it a temporary stay? What does this mean going forward? We answer these questions and more below.

## Is This a Nationwide Stay?

Yes, the Fifth Circuit has stayed the ETS in its entirety pending expedited judicial review of the ETS and OSHA's justifications for it. This is a nationwide stay.

## Expedited Judicial Review: How Long Will That Take?

The review won't take long, likely just a matter of days. The Fifth Circuit has already set an extremely fast briefing schedule. Briefing usually takes months to complete. The Fifth Circuit, for the ETS, has ordered all briefs to be filed by 5:00 p.m. CST on Tuesday, November 9. We then anticipate a decision from the Fifth Circuit in a matter of days, likely before November 16.

## In the Meantime, Will the Stay Remain in Place?

Yes, the stay will remain in place until the Fifth Circuit considers the briefing and issues its decision.

## Why is the Fifth Circuit Moving So Quickly?

This is an interesting question. The ETS, as of this publication, still has an initial compliance date of December 4, 2021. The Fifth Circuit could be working to stay ahead of this deadline. It might also be working to get ahead of the anticipated date for the multi-circuit lottery, which, as of this publication, is set to take place by November 16.

## What is the Multi-Circuit Lottery?

The multi-circuit lottery is a random drawing to decide which circuit court hears and decides the various (but largely identical) legal challenges to the ETS. As of this publication, challenges have been filed in the Fifth Circuit, as well as the Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits. By rule, an entry for each circuit court is put into a drum and from that drum, one circuit court is selected. All legal challenges are then transferred to that circuit court, consolidated, and decided by the one circuit court.

## Can a Circuit Court Get More Than One Entry in the Lottery?

No; regardless of how many challenges are pending in any given circuit court, there is only one lottery entry for each circuit court. There is no way to influence the lottery, for example, by filing multiple challenges in any one circuit court. But there must be at least one challenge for a circuit court to be included in the lottery. Currently, for example, there is no challenge before the Ninth Circuit. Should one be filed before the lottery, the Ninth Circuit would then be included in the drawing.

## What About District Courts, Are They Included in the Lottery?

No, district courts are not included in the lottery for challenges to the ETS. For the ETS and similar regulations, legal challenges are filed with a circuit court of appeals, like the Fifth Circuit, not a trial court, which are known as district courts in the federal system. So this is not a situation in which a district court can make one ruling, only for a circuit court to reverse it. For the ETS, legal challenges will be heard only by one or more circuit courts, and possibly the Supreme Court.

## If the Fifth Circuit Rules Before the Lottery, Is That Ruling Final?

Whether such a ruling is final depends on the lottery's outcome. Say, for example, the Fifth Circuit decides to keep its stay in place. Then, at the lottery, the Fifth Circuit is selected as the circuit court that will hear and decide all challenges to the ETS. In this situation, the lottery is rendered moot (at least as a practical matter) because we already know how the Fifth Circuit will decide the challenges. But if a different circuit court is selected, there might be a different result. Say, for example, the D.C. Circuit wins the lottery. The D.C. Circuit, as the lottery winner, has the power to modify, revoke, or extend the Fifth Circuit's stay of the ETS. So even if

the Fifth Circuit rules before the lottery, its ruling is not final. It is the lottery winner that will decide whether the ETS should be stayed or allowed to take effect.

## What About the Supreme Court? Will it Weigh in on the ETS?

It is too soon to tell whether or when the Supreme Court will be involved. The Supreme Court, to date, has been unwilling to get involved in "vaccine mandate" cases, declining to hear a number of emergency petitions on the subject. Moreover, as of this publication, the Biden Administration has suggested that it will let the lottery process play out. So for now, our focus is on the Fifth Circuit and the lottery.

## What Should We Do in the Meantime?

We know that all of this is extremely frustrating for impacted employers. Covered employers should continue to assess their compliance obligations and whether to take steps toward compliance while the legal challenges are being decided. If you have any questions about the ETS, compliance, or its legal challenges, please contact one of the authors or any member of Baker Donelson's [Labor & Employment Team](#).