

Publications

OSHA ETS Stay Lifted (For Now)

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CLIENT ALERT | 12.18.2021

The legal battle over the Occupational Safety and Health Administration's emergency temporary standard on COVID-19 (the ETS) took another dramatic twist on Friday night. Mere days after the Sixth Circuit Court of Appeals [declined to hear the matter *en banc*](#), a three judge panel dissolved the stay previously entered by the Fifth Circuit Court of Appeals.

In a 2-1 decision issued on the evening of December 17, 2021, authored by Judge Stranch, the panel majority concluded that the ETS likely passes constitutional and statutory muster, and that a continued stay would be inappropriate. Judge Gibbons joined this opinion and also authored a brief concurrence in which she emphasized her view that the judiciary has a very narrow role to play in addressing disputes over pandemic policy. Judge Larsen dissented, in an opinion reminiscent of Chief Judge Sutton's dissent in response to the denial of *en banc* review.

On the heels of the Sixth Circuit's decision to lift the stay, OSHA almost immediately provided employers with some much needed clarity and breathing room regarding the timing for enforcing the ETS requirements. On December 18, 2021, [the agency announced](#) that it "will not issue citations for noncompliance with any requirements of the ETS before **January 10, 2022**, and will not issue citations for noncompliance with the standard's testing requirements before **February 9, 2022**, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard."

As anticipated, the challengers to the OSHA ETS also acted promptly, and have already filed multiple emergency applications to the U.S. Supreme Court.

Employers should prepare to comply with the ETS requirements in accordance with OSHA's new timeline, while at the same time realizing that the U.S. Supreme Court could re-instate the stay in the coming days.

We will continue to keep you updated on the status of the ETS as developments warrant.

