



Insights: Alerts

Despite Fifth Circuit Stay, Large Employers May Still Have Legal Requirements to Satisfy by December 6 Pursuant to Emergency Temporary Standards

November 15, 2021

Written by Kathleen B. Dodd Barton, Christopher M. Caiaccio and Kayla M. Lazarus

Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Resource Center page](#) and/or your email for updates.

On November 4, 2021, the U.S. Department of Labor issued emergency temporary standards (“ETS”) requiring large employers of 100 or more employees to implement a mandatory written COVID-19 vaccination policy and gather vaccination status information from all employees, among other requirements. The announcement was followed almost immediately by a flurry of petitions filed in federal appellate courts challenging the ETS. On November 6, 2021, the Fifth Circuit Court of Appeals, which covers Louisiana, Mississippi, and Texas, issued a temporary stay of the ETS vaccination mandate. On November 12, 2021, following additional briefing and expedited judicial review, the Fifth Circuit reaffirmed the initial stay. However, because challenges to the ETS have been brought in multiple federal circuits, the multi-circuit “lottery” provisions of 28 U.S.C. §2112(a) have been triggered. Under this provision, the Judicial Panel on Multidistrict Litigation, a panel of seven judges selected by the Chief Justice of the Supreme Court of the United States, will consolidate the petitions and assign them to a randomly selected federal appellate court. It is expected the lottery will be held on November 16. The court to which the consolidated case is assigned will then have the ability to lift the Fifth Circuit Court of Appeals’ stay or allow it to remain in effect. Thus, at this time, employers cannot predict whether or when the stay will ultimately be lifted nationwide.

The stay issued by the Fifth Circuit will not be the last word and the Fifth Circuit may not be the court issuing the last word. Because challenges to the ETS have been brought in multiple federal circuit courts of appeals, the multi-circuit “lottery” provisions of 28 U.S.C. §2112(a) have been triggered. Under this provision, the Judicial Panel on Multidistrict Litigation,¹ will consolidate the petitions into one case and assign them to a randomly selected federal appellate court. It is expected this will occur on November 16. The court assigned the consolidated case will have jurisdiction over the matter and the authority to revisit the Fifth Circuit’s stay. Thus, at this time, employers cannot predict whether or when the stay will ultimately be lifted nationwide.

The most burdensome requirement of the ETS with a December 6 deadline is determining employees' vaccination status, collecting and retaining proof of such status, and creating a roster of employees' vaccination status. Depending on the size of the workforce, gathering this information can take a significant amount of time. Each employee must provide acceptable proof of vaccination status, as listed in the ETS. Employees who do not provide this proof are not fully vaccinated for ETS purposes. Importantly, if an employer collected vaccination status before the ETS was effective and retained a record of such status, the employer will be in compliance as to such employees (but only those employees).

Employee vaccine records and rosters are confidential medical information. Thus, employers should bear in mind that the information should be accessible only by those with a need to know, which means that only a limited number of employees will be able to assist with gathering and maintaining the requisite information. Further, employers must be careful not to directly communicate an employee's vaccination status to an employee's supervisor or any other employees who are not responsible for maintaining the vaccination records. (However, as a practical matter, because unvaccinated employees are required to wear a mask in the workplace, anyone responsible for enforcing the mask requirement will need to know which employees are required to wear masks. With that said, employers should be careful to communicate only that the employee "is required to wear a face mask" and refrain from indicating or confirming vaccination status.)

The other ETS requirements with a December 6 deadline are: (1) issuing to employees – in language spoken by their employees – the employer's written policy on mandatory vaccines and/or testing in lieu of vaccination and other information about OSHA anti-discrimination and retaliation, prohibitions on providing false statement and documents, and the efficacy, safety, and benefits of the COVID-19 vaccine; (2) requiring unvaccinated employees to wear a face covering or face mask in the workplace most of the time; (3) providing employees with up to four hours of paid time off to receive each dose of a COVID-19 vaccine; and (4) providing employees with a reasonable amount of paid sick time to recover from any side effects from receiving each dose of a COVID-19 vaccine.

We will continue to monitor the status of the stay of the ETS and provide updates on the stay and any adjusted compliance deadlines or requirements.

Footnotes

¹ The Judicial Panel on Multidistrict Litigation is a panel of seven judges selected by the Chief Justice of the Supreme Court of the United States that has responsibility to consolidate petitions and lawsuits raising the same claims into one lawsuit.

Related People



Kathleen B. Dodd Barton

t 404.815.6158

kbarton@ktslaw.com



Christopher M. Caiaccio

t 404.815.6203

ccaiaccio@ktslaw.com



Kayla M. Lazarus

t 415.273.4389

klazarus@ktslaw.com