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Sixth Circuit Reinstates OSHA's Vax-or-Test Mandate: Impact on Employers and Healthcare Providers

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In the latest twist in the OSHA Vax-or-Test saga, the Sixth Circuit terminated the nationwide injunction of the Emergency Temporary Standard (ETS), clearing the way for OSHA to begin enforcing the Vax-or-Test ETS. OSHA quickly issued a statement that it is moving forward with implementation, but it will exercise enforcement discretion with respect to compliance dates. Specifically, OSHA will not issue citations relating to the Vax-or-Test ETS before January 10, 2022, and it will not issue citations relating to testing requirements before February 9, 2022, as long as the employer is exercising “reasonable, good faith efforts” to comply with the ETS.

Shortly after the Sixth Circuit's ruling, multiple parties filed an emergency application with the U.S. Supreme Court requesting a stay of the ETS. Pending the Supreme Court's review, we recommend employers covered by the Vax-or-Test ETS proceed with implementing its requirements. We will continue to keep you updated on the ongoing legal challenges to the ETS.

Impact on Healthcare Providers.

As discussed in our prior [alert](#), the Vax-or-Test ETS applies in workplace settings if the employer has more than 100 employees. Significantly, however, the Vax-or-Test ETS contains an exemption for workplace settings covered by the Healthcare ETS that issued in June 2021. 29 CFR 1910.501(b)(2)(ii). Thus, if a workplace setting is covered by the Healthcare ETS, it need not comply with the Vax-or-Test ETS.

Application Depends on Workplace Settings.

Providers should be aware that this exemption only applies to specific settings, not employers. Thus, it is possible for an employer to be covered by both the Healthcare ETS and Vax-or-Test ETS in separate work settings. For example, if an employer with 100+ employees has a work setting covered by the Healthcare ETS, but another work setting that is exempted from the Healthcare ETS (e.g., ambulatory care setting meeting the regulatory exception), that employer will need to comply with the Vax-or-Test ETS for the exempted work setting. A relevant excerpt from the Vax-or-Test ETS preamble is below.

OSHA's intent was to leave no coverage gaps between section 1910.502 and this ETS. In other words, the purpose of paragraph (b)(2)(ii) is to ensure that all workers in healthcare and healthcare support jobs who are at grave danger from exposure to SARS-CoV-2 are protected by either section 1910.502 or this ETS while performing their jobs. Therefore, it

will be necessary for employers with employees covered by section 1910.502 to determine if they also have employees covered by this ETS. For example, a healthcare employer with more than 100 employees that has non-hospital ambulatory care facilities that are exempt under section 1910.502(a)(2)(iii) (for non-hospital ambulatory care settings where all non-employees are screened prior to entry and those with suspected or confirmed COVID-19 are prohibited from entry) would be required to protect the employees in those ambulatory care facilities under this ETS.

86 FR 61515, available [here](#)

Healthcare Settings in Which the Vax-or-Test ETS May Apply.

The Healthcare ETS exempts the following settings:

- (i) The provision of first aid by an employee who is not a licensed healthcare provider;
- (ii) The dispensing of prescriptions by pharmacists in retail settings;
- (iii) Non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings;
- (iv) Well-defined hospital ambulatory care settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings;
- (v) Home healthcare settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not present;
- (vi) Healthcare support services not performed in a healthcare setting (e.g., off-site laundry, off-site medical billing); or
- (vii) Telehealth services performed outside of a setting where direct patient care occurs.

(29 CFR 1910.502(a)(2)). Because these settings are exempt from the Healthcare ETS, they are subject to the Vax-or-Mandate ETS. Accordingly, healthcare providers and facilities with 100+ employees that are subject to OSHA will need to comply with the Vax-or-Test ETS in the foregoing settings.

Note that the OSHA rules are separate from the CMS rules. The current injunctions that apply to the CMS rule do not affect the OSHA Vax-or-Test

ETS.

Outlook.

It appears that the Vax-or-Test Mandate may be heading to the Supreme Court. Stay tuned...