

## *HR Heads-up*

# ***OSHA's Vaccination, Testing, and Masking Rule Upheld by the Sixth Circuit Court of Appeals***

BRIAN P. GOODMAN, STORM B. LARSON | 12.20.21

In November, the Occupational Safety and Health Administration (OSHA) released an Emergency Temporary Standard (Rule) requiring employers with 100 or more employees to adopt either a mandatory vaccination policy, or a mandatory weekly testing and masking policy for unvaccinated employees. This Rule does not apply to public sector employers in Wisconsin. Before the Rule could take effect, the Fifth Circuit Court of Appeals issued an initial stay of the Rule which prohibited OSHA from enforcing the Rule pending further court action.

On Friday, December 17, 2021, the Sixth Circuit Court of Appeals, ruling on a consolidated appeal of all challenges to the Rule from courts across the country, dissolved that initial stay, meaning OSHA can enforce the Rule, at least for now. OSHA has issued a statement that it will not issue citations for noncompliance with the Rule prior to January 10, 2022. With respect to the weekly testing requirements, OSHA will not issue citations for noncompliance prior to February 9, 2022, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. According to news reports, several petitions to the U.S. Supreme Court have already been filed seeking to overturn this action by the Sixth Circuit Court of Appeals. If the U.S. Supreme Court chooses to take up such an appeal, it is uncertain how and by when the U.S. Supreme Court might rule.

Employers should not assume that the U.S. Supreme Court will act to stay the Rule. Therefore, employers with 100 or more employees should take steps to have a policy in place that complies with the Rule by January 10, 2022, to avoid risk of citation. OSHA has provided model policies that can be customized for specific employers. By that same date, employers should require employees who are not fully vaccinated to wear a mask. To comply with this deadline, employers should begin collecting acceptable proof of vaccination (such as a copy of a CDC

vaccination card) from all employees as soon as possible. Employers that are not going to have 100 percent employee vaccination rates by February 9, 2022, should also begin planning for implementing a weekly testing program. Please see our firm's prior article, [OSHA Releases Emergency Temporary Standard for COVID-19 Vaccination, Testing, and Face Coverings](#), for details on compliance with this Rule. Failing to comply with OSHA's enforcement deadlines could lead to audits and citations from OSHA.

If you have questions about compliance with this Rule, including customizing a policy for your business, please consult with a member of Boardman Clark's Labor and Employment Practice Group.

Disclaimer: This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.

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