

Sixth Circuit Lifts Stay on OSHA's Vaccine-or-Test Rule

By **Morris L. Hawk**

On Friday, the Sixth Circuit Court of Appeals lifted the stay on OSHA's vaccine-or-test rule for employers with 100 or more employees. In response, OSHA posted a brief statement on its website stating that large employers should have compliant policies in place by January 10th and be prepared to meet the rule's testing requirements by February 9th.

The divided three-judge panel of the Sixth Circuit granted the emergency motion filed by the Department of Justice to dissolve the stay, which had originally been issued by the Fifth Circuit. Judge Stranch, an Obama appointee, and Judge Gibbons, a George W. Bush appointee, formed the majority. Judge Nelsen, a Trump appointee, dissented from the ruling.

Writing for the majority, Judge Stranch concluded that OSHA had the authority to immediately implement the rule under the OSHA statute's requirements for an emergency rule because the COVID-19 virus is a "physically harmful" agent that poses a "grave danger" to employees. Judge Gibbons issued a concurring opinion, noting that OSHA was entitled to deference in exercising the policy-making responsibilities granted to it by Congress and had likely acted within the bounds of its statutory authority and the Constitution. In dissent, Judge Nelsen adopted the reasoning set forth by the Fifth Circuit that OSHA lacked the authority to issue the rule.

Those challenging the rule have already filed an appeal to the U.S. Supreme Court, which could enter its own order staying the rule. Roetzel will keep you updated on further developments in the case. As of now, however, employers with 100 or more employees should be prepared to meet the revised January 10th and February 9th deadlines announced by OSHA. Our November 5, 2021 [client alert](#) sets forth the requirements of the rule.

Please reach out to your Roetzel attorney if you need assistance with implementing a vaccination policy in compliance with OSHA's vaccine-or-test rule; determining whether you meet the 100-employee threshold; or any other question related to the day-to-day administration of the rule's requirements.

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