

Status Update: OSHA's COVID-19 ETS, Federal Contractor Mandate, and Related Congressional Activity

U.S. Occupational Safety and Health Administration's (OSHA) COVID-19 Vaccine and Testing Emergency Temporary Standard (ETS)

On November 12, the U.S. Court of Appeals for the Fifth Circuit [granted a motion to stay](#) OSHA's ETS mandating that large employers of 100 or more employees implement and enforce a COVID-19 vaccination and testing standard. The order was filed in response to petitions brought forth by states, employers, individuals, and organizations that sought to halt the ETS pending judicial review. Per the order, OSHA may not take any further steps to implement or enforce the mandate until another court order is issued.

Petitions for review of the ETS were submitted to courts across the country. The Judicial Panel on Multidistrict Litigation oversees the consolidation of multidistrict litigation and via lottery has [selected the Sixth Circuit Court](#) to review the merits of the challenges against the ETS. The Sixth Circuit may very well extend the stay given how the ETS could exacerbate current labor shortages and supply chain challenges. Additionally, the court mainly comprises Republican president-appointed judges, which may be favorable for the petitioners. Though even if the Sixth Circuit rules in line with the previous order, it is likely that the case will go to the U.S. Supreme Court for a final decision.

Employers do not have to comply with the ETS while the stay is in effect but may choose to prepare draft policies and procedures in the event the stay is lifted, leaving little time to come into compliance.

Written comments on the rule are [due to OSHA December 6, 2021](#). NACD submitted a comment deadline extension request November 8. It is unclear whether OSHA will grant the extension and, in the meantime, NACD will prepare written comments for the original deadline. If you or your organization have any feedback to provide or would like to be included on the comment review process, contact Analisa Toma, Manager of Regulatory Affairs at atoma@nacd.com.

Federal Contractors

As a reminder, federal contractors, including subcontractors and independent contractors, are subject to separate and more strict [workplace safety and vaccine protocols](#). If your organization works with civilian agencies, be sure to review the agency's policies as [Executive Order 14042](#) encourages agencies not directly subject to the EO to incorporate similar clauses into their contracts. Additionally, companies that are working under [The Defense Production Act](#) are likely to be subject to EO 14042. Currently, there is no exception for those operating under DPA orders. These organizations should contact their contracting officer to understand their obligations.

The [compliance date](#) for federal contractors has been moved to **January 18, 2022**.

Congressional Activity

The Congressional Review Act (CRA) provides a tool through which Congress can invalidate an agency rule in its entirety. On November 17, 2021, Sen. Braun (R-IN) and Rep. Keller (R-PA) introduced a CRA challenge to the OSHA ETS. All 50 Republican senators and 192 Republican representatives co-sponsored the bill (no Democrats have co-sponsored either bill). However, invalidating a rule through the CRA procedure requires not only that both the U.S. House of Representatives and Senate pass a resolution of disapproval, but also that the president sign the resolution (or for Congress to override a presidential veto). With the current makeup of Congress and the White House, it's exceedingly unlikely that the Democratic majority would allow a CRA disapproval resolution to pass and that the disapproval resolution would be signed by President Biden. Nonetheless, the widespread support for the CRA challenge among congressional Republicans shows fairly unified Republican opposition to the OSHA ETS mandate.

For questions related to the CRA challenge to the ETS, please contact Brian Callahan, NACD Senior Director of Legislative Affairs, at bcallahan@nacd.com.

NACD will keep members informed as new developments occur regarding the ETS and related issues.