December 21, 2021

Sixth Circuit Lifts Stay of OSHA COVID-19 Emergency Temporary Standard Requiring Vaccination or Testing

On December 17, the U.S. Court of Appeals for the Sixth Circuit lifted the stay of the Occupational Safety and Health Administration's (OSHA) emergency temporary standard (ETS) on COVID-19 vaccination and testing for private employers with 100 or more employees.

Extended Compliance Deadlines

Soon after the Sixth Circuit lifted the stay, OSHA announced that it will extend employers' time to comply with the requirements of the ETS by publishing the following on its website:

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.

Covered employers now have until January 10, 2022, to establish a vaccination/testing policy and until February 9, 2022, to begin weekly testing requirements.

The Sixth Circuit's Decision

The Sixth Circuit panel lifted the stay in a 2-1 decision. The panel determined that the ETS is within the bounds of OSHA's statutory authority. The opinion, authored by Judge Jane Stranch, noted that OSHA has clear authority to regulate viruses, which necessarily extends to "regulate infectious diseases not unique to the workplace." Further, the panel determined that in light of the continued spread of COVID-19 variants that have blocked the "safe return of American workers to their jobs," OSHA "can and must be able to respond to dangers as they evolve." Accordingly, the Sixth Circuit found that the challenges to the ETS did not have a likelihood of success—a necessary element to maintain the stay—and, therefore, lifted the stay.

Appeals

Multiple parties have already appealed to the U.S. Supreme Court. In particular, a group of 26 trade associations filed an emergency application to the Court seeking an immediate stay of the OSHA ETS pending resolution of the Court's review. The petitioners emphasize the irreparable harm they will suffer in having to implement the ETS. They cite "nonrecoverable compliance costs," which they allege will include the "costs of testing for the millions of employees who refuse to be vaccinated—and passing those costs on to consumers in the form of yet higher prices at a time of record inflation—or imposing the costs of testing upon their unvaccinated employees, who will quit en masse rather than suffer additional testing costs each week."

Next Steps

Although there are several emergency appeals to the U.S. Supreme Court seeking to again stay the ETS, given the current compliance timeline, employers do not have time to sit idly by until the Court takes further action. Covered employers, therefore, should continue to prepare for the requirements of the ETS, which are set to be enforced early in the new year.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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