AS LEGAL CHALLENGES CONTINUE, OSHA SUSPENDS ITS VACCINE ETS

Update: This article was published on November 22, 2021, and it is specific to developments related to the OSHA COVID-19 vaccine mandate. Significant legal developments occurred this week with respect to the Centers for Medicare & Medicaid Services Interim Final Rule regarding a COVID-19 vaccine mandate for covered health care facilities. Please see Hall Render's latest article here reporting on those recent developments.

As Hall Render noted, last week the Sixth Circuit was selected to be the sole Court of Appeals to hear the 27 lawsuits brought to challenge the OSHA vaccine Emergency Temporary Standard ("ETS"). Nearly simultaneously, the Occupational Safety and Health Administration ("OSHA") suspended the enforcement of its vaccine ETS.

OSHA SUSPENDED ENFORCEMENT OF ITS VACCINE ETS

On November 12, 2021, the Fifth Circuit temporarily stayed OSHA's implementation of its vaccine ETS. This stay required that OSHA refrain from taking any steps to implement or enforce the ETS. One of the outstanding questions for employers nationwide remained how the Fifth Circuit's stay would impact OSHA's enforcement of the vaccine ETS. OSHA provided its answer on November 16 when it announced it would suspend its activities related to the "implementation and enforcement of the ETS pending future developments in the litigation," thus providing employers covered by the OSHA vaccine ETS some breathing room for now.

WHAT HAPPENS NEXT?

With the consolidation of dozens of challenges into a single Circuit, the coming days and weeks will result in procedural and merit-based rulings that will impact the expedited appeals. While challenges will typically be assigned to a three-judge panel, late last week parties in the challenges launched procedural requests that could push the determination about OSHA's vaccine ETS to the full Circuit. A majority of the judges must consent to this departure from standard procedure for appeals—but may do so in cases that involve "a question of exceptional importance." As of last Friday, three petitions requesting the case be heard en banc had already been filed, and OSHA was due to respond by November 30, 2021.

Whether or not the matter is first heard by the full Circuit, it remains certain that any party unsatisfied with a determination on the merits will quickly petition the Supreme Court of the United State to rule on the matter. There are two possible ways in which the Supreme Court may be asked to weigh in. First, any party may petition the Supreme Court for an emergency stay, in which the case would initially be assigned to Justice Brent Kavanaugh, who could issue an initial determination himself or request the full Court provide a preliminary ruling on the request for a stay. Second, any party receiving a negative decision from the Sixth Circuit may petition the Supreme Court to take up the matter and rule on the merits of the challenges. With OSHA's vaccine ETS originally scheduled to go into effect no later than January 4, 2022—it remains likely that all sides will continue to press for the most expedited process possible.

PRACTICAL TAKEAWAYS

The litigation surrounding the federal government's vaccination mandates will continue to remain complex and fast-moving. While the enforcement of the ETS is currently suspended, the Federal Contractor vaccination mandate and the CMS IFR remain in effect. Further, the OSHA Healthcare ETS issued in June 2021 remains in effect until December 21, 2021.

As employers and health care providers continue to navigate this uncertain period, they should to collaborate closely with counsel for guidance. For more information on any of these vaccination requirements, please contact:

- Drew Howk at ahowk@hallrender.com or (317) 429-3607;
- Liz Elias at eelias@hallrender.com or (317) 977-1468;
- Kevin Stella at kstella@hallrender.com or (317) 977-1426;
- Dana Stutzman at dstutzman@hallrender.com or (317) 977-1425;
- Jessica Biondo at jbiondo@hallrender.com or (248) 457-7851; or

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- Your primary Hall Render contact.

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