OSHA's Emergency Employee Vaccine Mandate, Frozen By Fifth Circuit, Seeks To Thaw Out In Sixth Circuit

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Myriad legal challenges abounded since the Emergency Temporary Standard—requiring workers to be fully vaccinated or face weekly testing and masking—was published earlier this month, and so plenty of questions remain unanswered ahead of the intended deadline for mandatory employee vaccination.

In an effort to combat the ongoing COVID-19 pandemic, earlier this year President Joe Biden issued a directive that medium and large private employers require their employees be fully vaccinated against COVID-19 or face weekly testing. In response, the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") issued what is known as an "Emergency Temporary Standard"—a regulation taking immediate effect when workers face grave danger—implementing that directive by way of a vaccine mandate. Since then, a host of private businesses and states have petitioned federal courts around the nation to strike down the new OSHA vaccine mandate, resulting in yet-unresolved litigation pending before the Sixth Circuit while the initial deadlines for employee vaccination draw nearer.

The Mandate

Published on Friday November 4, 2021, OSHA's ETS directs businesses with over 100 employees to mandate worker vaccinations (or require, at minimum, weekly testing for unvaccinated workers). Part-time workers do count toward this 100-employee threshold. Independent contractors do not.

Employers are further tasked with making sure that unvaccinated workers wear masks while on site. If an employee cannot produce a negative test, or does produce a positive test, that employee must be removed from the workplace. Employers do not have to cover the costs for unvaccinated employees' tests or masks (although, as a practical matter, collectively bargained agreements between employers and unions may require otherwise). Workers seeking to avoid testing and masking requirements must be fully vaccinated by January 4, 2022. Employers must be in compliance with the ETS's masking and paid time off requirements by December 5, 2021.

According to the federal government, the ETS will apply to roughly 84 million workers. This figure does not count workplaces already covered by a prior White House directive requiring a vaccination requirement for federal contractors. Employers to which the ETS applies should take note that these requirements preempt any contradictory state or local laws restricting the imposition of vaccination, testing, and masking requirements, which the federal government made clear by way of a fact sheet outlining the new regulations.

Legal Challenges and the Fifth Circuit Freeze

Rather unsurprisingly, the ETS caused immediate backlash in the form of a tidal wave of legal challenges which swept through the nation's federal courts. In less than a week from the ETS's publication, petitions seeking to strike down the ETS already had rushed in from the Fifth Circuit (*BST Holdings v. OSHA*), the Sixth Circuit (*The Southern Baptist Theological Seminary v. OSHA, Answers in Genesis Inc. v. OSHA, Kentucky v. OSHA, Phillips Manufacturing & Tower Company v. DOL, Bentkey Services LLC v. OSHA*), the Seventh Circuit (*Tankcraft Corp. v. OSHA, Indiana v. OSHA*), the Eighth Circuit (*Missouri v. Joseph R. Biden, The Job Creators Network v. DOL*), and the Eleventh Circuit (*Florida v. OSHA*). Challengers included religious schools and institutions, trade groups, wholesale bakeries, manufacturing companies, free market advocates, media outlets, and other businesses all across the nation. Numerous states also sought to strike down the ETS, including Texas, Louisiana, Mississippi, South Carolina, Utah, Kentucky, Indiana, Missouri, Florida, Alabama, Georgia, Alaska, Arizona, Nebraska, Arkansas, Oklahoma, Kansas, Montana, Ohio, South Carolina, Tennessee, Idaho, and West Virginia.

Most notably, just a day after the ETS was published, a three-judge panel of the Fifth Circuit issued an Order temporarily freezing the imposition of the vaccination-or-testing provision set to go into effect. In *BST Holdings v. OSHA*, the Fifth Circuit essentially consolidated a number of challenges to the ETS brought by a variety of businesses and a group of states, including the Christian television network Daystar, the Gulf Coast Restaurant Group, a set of 15 Louisiana supermarkets, and Texas, Mississippi, and Utah. The Fifth Circuit stayed the vaccine mandate pending further action by the court due to asserted statutory and constitutional issues with the ETS's mandates. Ultimately, the Fifth Circuit affirmed its freeze despite the federal government's contention that the freeze could cost dozens to hundreds of lives per day by allowing COVID-19 to continue to spread in workplaces across the country.

Sixth Circuit Review

Challenges to the ETS continued to pour in following the Fifth Circuit's freeze. As a result, the U.S. Judicial Panel on Multidistrict Litigation decided to appoint one federal appeals court to oversee the dozens of petitions for review that found themselves pending in the D.C., First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals. After random selection, the Sixth Circuit was tapped to oversee the challenge to the ETS. Typical procedure would select a random panel of Sixth Circuit judges who would make an initial determination regarding the challenges to the ETS. That decision could then be reviewed "en banc" by all the Sixth Circuit judges. But, the ETS's challengers requested that the full slate of Sixth Circuit judges hear the issue all at once. In the meantime, the federal government requested in a recent filing that the Sixth Circuit at least modify the Fifth Circuit's freeze order to permit testing and masking requirements to remain in effect while the litigation proceeds.

Takeaways

At present, the litigation revolving around the ETS remains ongoing, and OSHA has suspended activities related to the ETS's implementation and enforcement pending its future developments. It is unclear what the Sixth Circuit will do, how it will do it, and whether it will modify the Fifth Circuit's freeze in the meantime. Therefore, in the meantime, employers should keep in mind that the Fifth Circuit freeze only applies to those who would be newly covered by the ETS. If other authorities -- such as state or local laws -- already require mandatory employee vaccination, those requirements are unaffected. Similarly, prior federal directives, such as those requiring vaccination for federal contractors, also remain in place. But, prohibitions on vaccine mandates for businesses in states which have precluded employer mandates also remain, since OSHA has suspended implementation and enforcement of the ETS pending the outcome of litigation. If the freeze eventually is lifted, the ETS's vaccine mandate will preempt any such states' mandate prohibition, though. Clearly this saga is far from over, and employers should keep a close eye on this very fluid situation as it continues to evolve.