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Beyond the OSHA Vaccine Mandate: Employer Update

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OSHA ETS

- Occupational Safety and Health Administration (OSHA)
 - Federal agency that oversees workplace safety under the Occupational Safety and Health Act (the OSH Act)
- Emergency Temporary Standard (ETS)
 - OSHA has the authority to issue temporary regulations where there is a “grave danger” to workers and the measure is “necessary” to address the “grave danger.”
 - OSHA determined that the danger from unvaccinated workers is “grave” and that mandatory requirements—not just encouragement—are “necessary” to protect all workers from COVID-19



The Scope of the ETS

- The ETS was intended to pre-empt or override state or local laws that conflict with the ETS or provide for less effective measures.
- The ETS was “temporary.” 6-month shelf life.
- The ETS also functions as a proposed regulation that could become permanent.



Coverage of the ETS - Employers

- Employers with 100 or more employees
- The ETS did not apply to an employer that is covered by other federal mandates:
 - Government contractors and subcontractors
 - Healthcare providers
 - SCOTUS - 5 to 4
 - Stay denied challenging CMS Rule



The Short Mercurial Life of the ETS

- The ETS was published on November 5, 2021.
- It initially set two deadlines:
 - December 5, 2021
 - Employers must begin to comply with the requirements of the ETS and begin enforcing a vaccination policy, except the requirement for weekly testing
 - January 4, 2022
 - Weekly testing requirement becomes effective



Legal Challenges

- The ETS initially was stayed by the Fifth Circuit Court of Appeals on 11/12/2021.
- The stay was considered to be effective nationwide because it directs OSHA to take no action to enforce the ETS.
- Challenges in all of the circuit courts were transferred to the Sixth Circuit.



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Legal Challenges (cont.)

- The 6th Circuit lifted the stay on 12/17/2021.
- Race to the United States Supreme Court.
- Argued January 7, 2022.
- 6-3 decision on January 13, 2022 reimposing the stay.
- Case technically now back before the 6th Circuit.



Supreme Court Decision

- OSHA without authority to broadly regulate public health.
- OSHA should focus on specific occupational dangers.
- OSHA lacked the authority to impose the ETS.
- “Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.”



Practical Implications

- For all intents and purposes, the ETS as currently formulated is dead.
- The ETS on employers with 100 or more employees to adopt a mandatory COVID-19 vaccination policy or to mandate weekly testing in lieu of vaccination will not be enforced or implemented by the federal government -- at this time.



WWOD?

- WHAT WILL OSHA DO?
- OSHA specifically has the ability to regulate Covid-19 where it may be an occupational hazard or pose a special danger, like researchers in a lab working with the Covid-19 virus or in particularly cramped or crowded environments.



Statement by Secretary Walsh (1/13/2022)

- “Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the Covid-19 National Emphasis Program and General Duty Clause.”



General Duty Clause

- The General Duty Clause from the OSHA Act of 1970 requires that, in addition to compliance with hazard-specific standards, all employers provide a work environment "free from recognized hazards that are causing or are likely to cause death or serious physical harm."



Covid-19 National Emphasis Program (7/7/2021)

- Employees in high-hazard industries
- Target establishments that have workers with increased potential exposure
 - Hospitals, assisted living, nursing homes and other healthcare and emergency response providers treating patients with COVID19, as well as workplaces with high numbers of COVID-19-related complaints or known COVID-19 cases
 - Workplaces in where workers are in close proximity (<6 feet) to the public or coworkers
 - Such as meatpacking plants, correctional facilities, poultry processing facilities, warehouses, restaurants and grocery stores
- Prioritize COVID-19 fatality events for inspection



OSHA Goes Back to the Drawing Board?

- ETS Morph Into Regulation?
- New ETS?
- Targeted Regulations
- Infectious Diseases Rule Already on Regulatory Agenda
 - Employees in health care and other high-risk environments? Or broader?
 - Infectious disease hazards such as tuberculosis (TB), varicella disease (chickenpox, shingles), and measles.
 - As well as new and emerging infectious disease threats, such as Severe Acute Respiratory Syndrome (SARS), COVID-19, and pandemic influenza.



Best Practices After SCOTUS Stay of ETS

- The ETS had set minimum requirements for:
 - Vaccination and support for vaccination?
 - Face coverings?
 - Testing unvaccinated employees?
 - Verification of vaccination status?
 - Providing information to employees about vaccines, employer policies, and legal rights?
 - Stay away if infected?



Reporting Serious Cases to OSHA

- Covered employers must report to OSHA:
 - Each *work-related* COVID-19 fatality within 8 hours of the employer learning about the fatality, and
 - Each *work-related* COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization.
- Reports can be made online or by phone with OSHA.



OSHA Enforcement

- OSHA has the authority to issue fines for violations.
 - Maximum penalty for a “serious” violation is \$13,653 *per* violation.
 - Maximum penalty for a “willful” violation is \$136,532.

FINED!



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State Plans

- There are 22 states that have OSHA-approved state plans that cover employees in both the private and public sector.
 - In these states, the state – not OSHA – enforces workplace safety regulations.
 - States may set standards that exceed any standards established by OSHA
 - States may set ETS-like standards in the absence of action by OSHA



State and Local Laws

- Some **RED** States
 - Prohibit Employers From Mandating Vaccinations
 - Unemployment compensation where employment separation based upon refusal to comply with employer vaccine mandate
 - Require broader accommodations based upon prior COVID-19 infection or personal objections to vaccines
- Some **BLUE** States and localities
 - Mandate vaccinations in certain workplaces
 - Mandate masking in certain circumstances



State and Local Laws

- States that have restrictions on an employer's ability to mandate vaccination of employees include:
 - Alabama, Arkansas, Florida, Iowa, Kansas, Montana, North Dakota, Tennessee, Texas, Utah, and West Virginia
- The restrictions vary from state-to-state:
 - Some have exceptions for health care facilities
 - Some allow mandates if there is a broad exemption process, including political or personal conscience reasons



State and Local Laws

- States or localities that require employee vaccination include:
 - California, Illinois, Massachusetts, New Jersey, New York State, New York City, Philadelphia, Oregon, and Washington.
 - This list is NOT complete – applicable rules are constantly changing
- State or local rules that require employee vaccination vary from place-to-place:
 - Some require employee vaccination for health care employees, state contractors, public employees, daycare employees, university employees.



Employer Mandates

- In general (subject to state and local restrictions), employers can require employees to be vaccinated.
- Exemptions and accommodations must be provided for disabilities and religious concerns.
- Employers may be required by a client / property owner to implement a vaccine mandate.



Employer Paid Leave

- To encourage vaccination, employers can provide time off for employees:
 - To get vaccinated
 - To recover from adverse reaction to vaccination
 - Time off to quarantine or isolate
- Federal law does not provide for any required paid time off.
- State or local law may require paid time off specifically for vaccination / quarantining or pursuant to regular paid sick time laws.



Other Compliance Issues

- Collective Bargaining
- Wage and Hour
 - Time to get vaccinated as working time
 - COVID-19 Testing as working time
- Who Pays for COVID-19 Testing?
- Who pays for masks?
- Long COVID-19 – disability? FMLA?





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