

CLIENT ALERTS

“And The Beat Goes On” Part 2: Where Are We Now with the CMS IFR and OSHA IFR?

Client Alert

1.5.2022

In this “sequel” reminiscent of the *Fast and Furious* franchise, we supplement our last five Health Care Client Alerts to update health care providers attempting to chart a course on “shot-or-test” and vaccine mandates:

CMS AND OSHA IFRS: ORAL ARGUMENT BEFORE THE U.S. SUPREME COURT

On **January 7, 2022**, U.S. Supreme Court (SCOTUS) will hear oral arguments on the refusal of the Sixth Circuit to continue the stay of the “shot-or-test” OSHA IFR for employers with 100 or more employees and on the continued stays in place against the CMS IFR.

NOTE: ON-GOING ENFORCEMENT DATES OF THE CMS IFR

The Justice Department (the Government) applied to SCOTUS to overturn, before judgment, the stays of the CMS IFR affecting 24 states (14 states in the appeal to the Fifth Circuit and 10 states in the appeal to the Eighth Circuit)[1] plus 1 additional state (Texas) in which a federal district court stayed the CMS IFR for the entire state.

On December 28, CMS indicated that, “as an exercise of enforcement discretion,” **it will begin enforcing the CMS IFR in the other 25 states (including Michigan), the District of Columbia, and the territories on the following schedule: “the deadline for Phase 1 implementation is January 27, 2022, and the deadline for Phase 2 implementation is February 28, 2022.”**

In accordance with the CMS IFR, **by January 27th, health care workers at Medicare- and Medicaid-certified health care providers and suppliers must either have applied for “legally recognized” religious or medical exemptions or have provided**

Related People

Robert H. Schwartz
Shareholder

Related Services

Health Care
Health Care Industry Team

CLIENT ALERTS

proof of the first of an approved two-shot vaccine or of an approved one-shot vaccine. Please see our prior Alerts regarding the other requirements (tracking vaccinations, signage, screening, remote work arrangements, etc.) that the states unaffected by the stays must also meet by January 27.

For now, until SCOTUS acts after oral argument on January 7, health care providers in the 25 states in which stays are in effect may still choose, but are not required, to adopt the mitigating measures in the CMS IFR, unless state law prohibits them from doing so.

NEW MEXICO HEALTH CARE WORKERS' EMERGENCY APPLICATION TO STAY VACCINE MANDATE DENIED

On December 21, 2021, Justice Gorsuch (who considers emergency applications from federal court decisions within the Tenth Circuit Court of Appeals) rejected without comment the application of two nurses in *Valdez v. Lujan Grisham*. The nurses sought to stay the New Mexico vaccine requirement for health care workers as a violation of their constitutional right of individual liberty and bodily integrity, based on one of the nurse's independent research of the vaccines. As in other cases (e.g., in Maine and New York) where health care workers have unsuccessfully challenged vaccine mandates before SCOTUS, Justice Gorsuch's denial reinforces one state's power to issue vaccine requirements.

Perhaps because of that pattern of upholding state vaccine mandates, the Government has requested, in the alternative to wholesale overturning of the stays against enforcement of the CMS IFR, that SCOTUS only leave in place partial stays just for state-operated Medicare/Medicaid-certified health care providers.

MORE TO COME

The source of authority for each IFR differs, and the upcoming January 7 oral arguments will be available live through the procedure SCOTUS adopted for oral argument during the pandemic.

Butzel will continue to track the litigation involving the CMS and OSHA IFRs. If you have any questions about the status and requirements of the CMS IFR, its impact on your health care facilities, and how to proceed in light of the injunctions and suspension of enforcement of the IFR, please contact the authors of this Alert or any member of Butzel's health law, labor and employment law, and federal contractor law practices.

Diane Soubly

734.213.3625
soubly@butzel.com

Robert Schwartz

248.258.2611
schwartzrh@butzel.com

CLIENT ALERTS

Mark Lezotte

313.225.7058

lezotte@butzel.com

[1] For a list of those states, see our prior Alert at [resources-alerts-And-The-Beat-Go-On-Status-of-Litigation-on-CMS-IFR-and-OSHA-IFR.html](#).