Part I Update: Where Has All The Litigation Gone?

11.24.2021

Yesterday, the Government asked the Sixth Circuit Court of Appeals to lift the pre-lottery stay of the enforcement of the OSHA Interim Final Rule for employers with 100 or more employees (OSHA IFR) entered by the Fifth Circuit Court of Appeals.

This Alert briefly updates (with a nod to Pete Seeger and all who popularized or covered his song) where all the litigation has gone after a multi-circuit lottery held 4 days after we issued our November 12, 2021 Client Alert analyzing the CMS IFR affecting health care workers (Part I Client Alert), with a promised Part II analyzing the OSHA IFR. The lottery and litigation under both IFRs warranted this Update.

The OSHA IFR - The Sixth Circuit "Wins" the Lottery: 34 lawsuits were filed to halt the OSHA IFR in all 12 federal circuit courts of appeal. By last week, in each circuit, either state attorneys general or labor unions had sought immediate action to stay that IFR. On November 6 and in a fuller opinion on November 12, the Fifth Circuit quickly stayed the IFR's enforcement, finding it unauthorized by statute and perhaps unconstitutional.

Late on November 16, given the plethora of lawsuits, the Judicial Panel on Multidistrict Litigation held a lottery under its procedures to determine which federal court of appeals would hear the 34 lawsuits. The Sixth Circuit Court of Appeals in Cincinnati, Ohio "won" that lottery.

By November 21 (late Sunday), the Clerk of the Sixth Circuit Court of Appeals had assigned the transferred cases a common case number. The cases included the highly publicized petition for review by Governor Abbott of Texas (and more than a dozen similar petitions) seeking to invalidate the OSHA IFR as unenforceable against contrary state law under the Federal Constitution's Supremacy Clause.

Related People

Robert H. Schwartz
Shareholder

Related Services

Health Care

Health Care Industry Team

Labor and Employment

And multiple filings followed in the Sixth Circuit consolidated action.

On Monday, November 22, just as they had in their respective lawsuits before each federal circuit court, the state attorneys general joined to file an "omnibus" petition (for want of a better legalese description) to have the Sixth Circuit judges sit "en banc" from the start (skipping the step of having a three-judge panel first) to review of their petitions and their emergency motions to stay the OSHA IFR. Under the Sixth Circuit's procedures, only active judges (and no judges on senior status) may sit on an en banc panel. It is unknown at this writing whether the Sixth Circuit will suspend that limitation.

Yesterday (November 23), the Government filed its motion requesting that the Sixth Circuit dissolve the Fifth Circuit's stay, in part because "Congress charged OSHA with eliminating grave dangers in the workplace, without any carve-out for viruses or dangers that also happen to exist outside the workplace." Previously, OSHA had announced that it would suspend enforcement of the OSHA IFR in light of the Fifth Circuit's stay.

Even before the MDL Order, state attorneys general who had originally filed in the Sixth Circuit had sought initial review en banc, and a briefing schedule had been set, requiring the last brief on those petitions to be filed on November 30.

The scheduling order on the Government's motion to stay provides that any party who wishes to join that motion or to file a motion to modify, revoke or extend the stay may do so by November 30, with responses filed no later than December 7, and reply briefs filed no later than December 10.

The CMS IFR – Florida District Court Denies Stay of Enforcement: On a slower track beginning in federal district courts, various state attorneys general have filed at least four cases seeking to stay the CMS IFR (the vaccine mandate for health care workers). Those cases remain at the trial court level in three of those federal courts of appeals: one in Missouri (in the Eighth Circuit); one in Texas and at least one other in Louisiana (in the Fifth Circuit); and one in Florida (in the Eleventh Circuit).

On Saturday (November 20), the federal district court in Florida denied the state's request for a stay of the CMS IFR, finding that the state had not demonstrated any imminent irreparable harm to the state.

What Conclusion Can Be Drawn So Far, If Any? The Government is moving forward to enforce each IFR. ***For the OSHA IFR***, even with the legal challenges on a fast track, prudent covered employers should begin to comply with the **December 6 compliance requirements** in the OSHA IFR in light of the OSHA penalty provisions.

For the CMS IFR, health care providers and suppliers should begin to comply with **Phase I requirements by December 5** in order to have sufficient time to review requested exemptions and accommodations in the light of staffing needs, with guidance from the EEOC and the CDC where appropriate. In short, for a provider to await a definitive court ruling before implementing the CMS IFR's requirements could place the provider in serious jeopardy and could result in the provider losing its ability to be viable. Although there is an opportunity for the courts to rule otherwise, the risks associated with a "wait and see" attitude are extremely high.

Butzel Long draws upon an interdisciplinary team of attorneys in our health care law, labor and employment law, and federal contractor law practices in order to analyze the federal vaccine mandates applicable to health care providers and suppliers.

For assistance with these critical matters, you can contact the authors of this Alert, your regular Butzel attorney, or any member of Butzel's healthcare industry group.

Diane Soubly
737.213.3625
soubly@butzel.com

Robert Schwartz
248.258.2611
schwartzrh@butzel.com

Mark Lezotte
313.225.7058
lezotte@butzel.com

Debra Geroux
248.258.2603
geroux@butzel.com