

## Judicial Holdings Throw Vaccine Mandate Implementation into Disarray

Alert

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As anticipated in our prior alerts, there have been continuing practical and legal challenges to implementing the Path Out of the Pandemic plan. This alert provides an update on the current status of challenges to OSHA's Emergency Temporary Standard (ETS), Executive Order 14042 for federal contractors, and the Centers for Medicare and Medicaid Services (CMS) Interim Final Rule. At this time, the implementation and enforcement of these actions have all been paused by judicial action either nationwide or in certain states, as follows:

- **OSHA – Nationwide Stay:** The OSHA ETS was halted by a nationwide stay issued on November 12, 2021 by the Fifth Circuit Court of Appeals. The stay was dissolved on December 17, 2021 by the Sixth Circuit. OSHA announced it will exercise enforcement discretion and not issue citations related to the ETS until January 10, 2022 (core ETS requirements) and February 9, 2022 (weekly testing requirement) if employers are taking reasonable, good faith efforts to comply.
- **Federal Contractor Guidelines – Nationwide Stay:** Executive Order 14042, mandating covered federal contractors to require employee vaccinations was also enjoined from enforcement on November 30, 2021 by a federal judge in Kentucky, impacting those employers involved in government contracting in three states: Kentucky, Ohio and Tennessee. On December 7, 2021, following an expedited briefing schedule and hearing, the Middle District of Georgia District Court issued a nationwide preliminary injunction, staying implementation of the government contractor vaccination mandate under EO 14042.

# Judicial Holdings Throw Vaccine Mandate Implementation into Disarray

- **Healthcare Rule – Stay in 25 States: Healthcare Rule - Nationwide Stay:** The CMS Interim Final Rule, requiring COVID-19 vaccinations for all staff at Medicare and Medicaid certified facilities, was enjoined on November 29, 2021, by a federal judge in Missouri, staying implementation and enforcement of the CMS vaccine rule in 10 states: Thereafter, the CMS vaccination rule was stayed for the remainder of the United States on November 30, 2021, by a federal judge in Louisiana. However, on appeal of this Louisiana ruling, the Fifth Circuit entered an order limiting the stay entered by the District Court to the fourteen states that brought the suit. Following this order by the Fifth Circuit, a federal court in Texas entered an order imposing a preliminary injunction against enforcement of the CMS interim final rule in Texas. Accordingly, the CMS interim final rule is currently enjoined from enforcement in the following states: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia and Wyoming

## Nationwide Stay of OSHA's ETS

In a previous [alert](#), we detailed the requirements of the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS), which is broadly applicable to employers with 100 or more employees. This ETS requires covered employers to develop, implement and enforce a mandatory COVID-19 vaccination policy, or a policy requiring employees to either get vaccinated or undergo regular COVID-19 testing and wear a face covering. Challenges to the ETS were filed in appellate courts across the country immediately after the ETS was published.

## Fifth Circuit Stays Implementation and Enforcement

Federal law governs these challenges and allows for judicial review in the U.S. Court of Appeals. While multiple Petitions for Review were pending, the U.S. Court of Appeals for the Fifth Circuit, which has jurisdiction in Louisiana, Mississippi and Texas, issued a stay of the ETS on November 6, 2021. This stay was not explicitly limited to the Fifth Circuit. The Court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." The Fifth Circuit later rejected the government's request to withdraw the stay pending consolidation of the various Petitions for Review.

On November 13, 2021, OSHA issued a statement indicating it would not enforce the ETS until further court orders, essentially conceding that the stay was of nationwide applicability. OSHA stated: "While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation. Note that the comment period is separate from the litigation."

# Judicial Holdings Throw Vaccine Mandate Implementation into Disarray

On November 16, 2021, the Petitions for Review pending in various courts of appeal were consolidated at the U.S. Court of Appeals for the Sixth Circuit. While all the Petitions for Review will be heard by the Sixth Circuit, the stay of the ETS previously issued by the Fifth Circuit currently remains in effect.

## Status of Proceedings Consolidated in Sixth Circuit

Since consolidation, a number of filings have been made regarding the Petitions for Review; however, the Sixth Circuit has not yet issued any substantive opinions. There are three key pending actions:

- **Petitions for the initial decision to be heard *en banc*:** Multiple petitioners filed petitions for *en banc* review, which request that all active status judges on the Sixth Circuit, not just a three judge panel, hear the consolidated Petitions for Review. At this time, the Sixth Circuit skews in favor of Republican appointees, with the current composition (including senior-status judges who are in the running to be selected for a panel) of the Circuit is 20 Republican appointees – eight Democratic appointees. If the Sixth Circuit permits *en banc* review, only active-status judges would sit, and the breakdown by appointment for the full Circuit is 11 Republican appointees – five Democratic appointees. However, Judge Helene White was nominated by the Clinton administration, never got a vote, and was re-nominated by George W. Bush, making the likely partisan breakdown 10-6.
- **OSHA's Motion to Dissolve the Stay:** On November 23, 2021, OSHA filed an emergency motion to lift the stay entered by the Fifth Circuit. The Court issued a briefing schedule, which requires briefing to be completed on the motion to lift the stay on December 10, 2021. This is notable, as that date is after the first major compliance deadline in the OSHA standard, December 5, 2021. OSHA requested an expedited briefing schedule, but the Court has not taken any action to date.
- **Merits:** Ultimately, the parties will also brief the case on the merits to determine whether OSHA met its burden of determining that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards and that a standard is necessary to protect employees from such danger. This briefing will not occur until after the stay motions are decided, and a separate briefing schedule will be issued.

We are continuing to follow the complex litigation and assist clients with determining how to proceed while the Stay is in effect, as [OSHA's Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#) guidance remains in place, as does OSHA's [National Emphasis Program](#).

In parallel, the ETS was published as an Interim Final Rule with a comment period. This would allow OSHA to satisfy the public participation requirements for development of a permanent standard, which could be issued notwithstanding the ETS litigation. On November 30, 2021, OSHA extended the comment period for the standard. Comments are now due January 19, 2022. OSHA specifically solicited comments regarding

# Judicial Holdings Throw Vaccine Mandate Implementation into Disarray

whether the ETS should be made a permanent standard; whether small employers (less than 100 employees) have administrative capacity to implement a vaccine mandate; what “significant risks” should be addressed in any permanent standard (face coverings, as example); and whether prior COVID infection should be considered as part of the standard. If you would like to provide comments on a potential permanent standard, contact our attorneys listed below.

## Federal Contractor Stay

Our previous alerts described [Executive Order 14042](#), which requires covered contractor employees to be vaccinated against COVID-19. On November 30, 2021, a U.S. District Judge in Kentucky granted a preliminary injunction enjoining the federal government from enforcing a vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee.

In the decision, the Court determined that the states of Kentucky, Ohio and Tennessee had standing to challenge the vaccine mandate, reasoning that “contractors who do not comply will likely be blacklisted from future contracting opportunities if they refuse to comply.” On the merits, the Court determined a preliminary injunction was warranted on the ground that the president’s authority is not absolute and must be grounded in the constitution or statute. The Court determined that the president exceeded his statutory authority in promulgating Executive Order 14042 and delegating authority to manage implementation of mandatory vaccination—a public health measure—using the Federal Property and Administrative Services Act’ (FPASA) statutory authority to create an economical and efficient system for federal government procurement and supply. The Court noted several concerns with this overreach based on FPASA: (1) infringement of the Competition in Contracting Act’s full and open competition requirements; (2) violation of the constitutional nondelegation doctrine to exercise statutory authority the president has not been granted by Congress; and (3) federalism and the Tenth Amendment’s principles that powers not delegated to the U.S. by the Constitution nor prohibited by it to the states are reserved to the states and do not confer on the president general police powers that are also reserved to the states.

Notably the court declined to issue a national preliminary injunction, but instead issued a preliminary injunction to address contracts and subcontracts in Kentucky, Ohio and Tennessee, as well as sheriff plaintiffs, noting that “the proper scope of injunctions is ongoing, [and] this court believes that redressability in the present case is properly limited to the parties before the court.”

On December 7, 2021, a federal judge in Georgia enjoined the federal government from enforcement of the vaccine mandate for federal contractors and subcontractors on all covered contracts nationwide. In its decision, the Court reasoned that the challenging plaintiffs had a likelihood of success on the merits of their claims, because the Federal Property and Administrative Services Act does not authorize the President to direct the type of actions that are contained in Executive Order 14042. The Court further

# Judicial Holdings Throw Vaccine Mandate Implementation into Disarray

reasoned that the harm imposed by Executive Order 14042 was felt by the challenging plaintiffs nationwide, and as such, awarded injunctive relief prohibiting enforcement of the Executive Order nationwide.

These cases are not the only challenges to the federal contractor vaccine mandate's viability. In addition to the suits discussed above, there are lawsuits challenging the vaccine mandate and subsequent guidance filed by several other states. These lawsuits are in various stages and challenge the implementation of the executive order as violating constitutional and statutory authorities and rights, as well as administrative rights and procedures. The suits also seek injunctive relief, and we anticipate rulings will be entered in one or more of those cases in the coming weeks based on the briefing schedules.

## CMS Injunction

In a prior [alert](#), we detailed the Interim Final Rule issued by the Centers for Medicare & Medicaid Services (CMS). On November 29, 2021, a U.S. District Judge in Missouri entered an order preliminarily enjoining the government from enforcing the Interim Final Rule against any and all Medicare and Medicaid certified providers and suppliers within the states of Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming. The Court reasoned that Congress did not grant CMS authority to mandate the vaccine, CMS bypassed notice and comment requirements, and the mandate is arbitrary and capricious. The government has filed a notice of appeal.

On November 30, 2021, a U.S. District Judge in Louisiana entered an order granting a preliminary injunction which enjoins the federal government from implementing the CMS mandate nationwide, excluding those 10 states already covered by the Missouri order. The Court relied on reasoning from the Fifth Circuit's stay of the OSHA ETS in conducting its analysis and further found that the CMS rule improperly bypassed notice and comment requirements, exceeded the government defendants' authority, was contrary to established law, was arbitrary and capricious, and implicated additional constitutional concerns. However, on appeal of this Louisiana ruling, the Fifth Circuit entered an order limiting the previously nationwide stay entered by the District Court to the fourteen States that brought the suit. In doing so, the Fifth Circuit reasoned that the District Court "gave little justification for issuing an injunction outside the 14 States that brought this suit." Following this, a federal court in Texas entered an order imposing a preliminary injunction against enforcement of the CMS interim final rule in Texas.

Notably, the Eleventh Circuit Court of Appeals, the appeals court with jurisdiction over appeals from Alabama, Georgia, and Florida, took a different position with respect the CMS interim rule. On December 6, 2021, the Eleventh Circuit issued an opinion upholding a Florida District Court's ruling which denied Florida's request to stay the CMS rule. While this ruling from the Eleventh Circuit does not alter the injunctions entered by the District Courts in Missouri, Louisiana and Texas, it does signal that additional appeals regarding this issue are likely.

# Judicial Holdings Throw Vaccine Mandate Implementation into Disarray

## Takeaways

The ultimate viability of these federal vaccine requirements will continue to undergo judicial scrutiny and additional appeals are all but certain, meaning clarity on the issues may not occur anytime soon. In the meantime, if you have questions regarding these ongoing developments, please contact [Brittany Barrientos](#), [Amy Conway](#), [Susan Warshaw Ebner](#), [Alisa Ehrlich](#), [Molly Keppler](#), [Pat Konopka](#), [Erin Naeger](#), [Sharon Ng](#), [Kristin Parker](#), [Greta Reyes](#), [Bernadette Sargeant](#), [Stephanie Scheck](#), [Ben Woodard](#), [Eric Whytsell](#) or the Stinson LLP contact with whom you regularly work.

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