

Publications

Federal Vaccine Mandates End-of-Year Roundup

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CLIENT ALERT | 12.23.2021

Keeping up with the status of the various federal vaccine mandates over the past few months has felt like riding a bumpy and exhausting rollercoaster. In the hope that what follows lessens your confusion as you prepare for the holidays, the Vorys COVID Task Force has prepared a roundup of the latest on each of the federal mandates, with guidance on what to monitor as we head into 2022. We recognize that this information is likely to change in the coming days, but for now here are where things stand:

OSHA's Emergency Temporary Standard

The legal battle over the Occupational Safety and Health Administration's emergency temporary standard on COVID-19 (the ETS) took another dramatic twist last week.

In a 2-1 decision issued on the evening of December 17, 2021, the panel majority dissolved the stay previously issued by the Fifth Circuit, freeing OSHA – for now – to move forward with enforcement of its ETS requiring large employers to mandate either vaccination or weekly testing. See our [December 18 Client Alert](#) for further analysis of the Sixth Circuit's ruling. Almost immediately following the Sixth Circuit's decision to lift the stay, OSHA announced that it will expect covered employers to come into compliance with all but the testing requirements of the ETS by January 10, 2022, and be ready to comply with the standard's testing requirements by February 9, 2022.

Challengers to the OSHA ETS have already filed multiple emergency applications to the U.S. Supreme Court, and the Supreme Court has scheduled a January 7, 2022 special session to hear oral arguments on whether to permit the rule to take effect. Employers should be prepared to comply with the ETS requirements in accordance with OSHA's new timeline, but should remain aware that the Supreme Court will have the last word.

CMS Healthcare Workers Mandate

Unlike the OSHA ETS, the litigation regarding the Centers for Medicare and Medicaid Services (CMS) healthcare workers mandate has been fragmented. On November 30, 2021, the U.S. District Court for the Western District of Louisiana issued a ruling blocking the mandate nationwide. However, on December 15, 2021, the Fifth Circuit ruled that the nationwide application was too broad, limiting the stay to the 14 states that were parties to the lawsuit.

In a separate case, the U.S. District Court for the Eastern District of Missouri halted the mandate in 10 other states. The Eighth Circuit denied the request to lift that stay.

Thus, the CMS mandate is currently stayed in 24 states, and unencumbered by judicial holds in the remaining 26 states. The states where the CMS mandate is currently on hold are: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming.

On December 2, 2021 CMS suspended all enforcement of the mandate following the lower court stays. Despite the Fifth Circuit's decision lifting the nationwide stay, CMS has not to this point indicated an intention to enforce the rule in those 26 states where the stays do not apply.

The Supreme Court will also consider the CMS mandate during its January 7, 2022 special session. Employers should continue to monitor CMS enforcement guidance, and stay tuned for further Vorys Client Alerts following next month's oral arguments.

Mandate for Federal Contractors

President Biden issued an Executive Order mandating that all government contractors must require their employees working on government contracts to be vaccinated. The mandate was to take effect on January 4, 2022. However, on December 7, 2021, the U.S. District Court for the Southern District of Georgia granted a nationwide preliminary injunction to temporarily halt enforcement. The injunction prevents enforcement of the vaccine mandate for prime contractors and subcontractors on all covered contracts "in any state or territory of the United States of America." This decision followed a decision in the Eastern District of Kentucky on November 30, 2021, which blocked enforcement of the mandate in Kentucky, Ohio, and Tennessee. On December 16, 2021, the U.S. District Court for the Western District of Louisiana blocked the contractor mandate in Louisiana, Mississippi, and Indiana.

The government filed a Notice of Appeal asking the Eleventh Circuit to issue an emergency stay of the lower court's order blocking the mandate. The Eleventh Circuit denied that motion on December 17, 2021 and set an expedited briefing schedule on the merits. Based on that schedule, it does not appear that the Eleventh Circuit will hear oral argument on the matter until late January or early February 2022 at the earliest. In the meantime, the nationwide injunction remains in place.

Healthcare Provider Emergency Temporary Standard

As the "temporary" in ETS makes clear, these standards aren't permanent. Rather, an ETS is only permitted to remain in effect for a six-month period, after which time it expires. The OSHA ETS pertaining to healthcare providers went into effect on June 21, 2021, and, accordingly, expired December 21, 2021. To date,

OSHA has been silent on this development.

With the expiration of the Healthcare ETS, healthcare providers previously exempted from the OSHA ETS are now likely subject to its requirements. Healthcare providers should begin efforts to ensure compliance with the OSHA ETS, but should remain aware that the Supreme Court could once again stay the mandate prior to it taking effect.