SpencerFane®

Supreme Court to Hear Challenges on Federal Vaccine Mandates from OSHA and CMS

Late on Wednesday, December 22, the United States Supreme Court announced that it will hear oral arguments on January 7, 2022, on several consolidated cases challenging the Emergency Temporary Standard ("ETS") issued by the Occupational Health and Safety Administration (OSHA) requiring that employers with 100 or more employees adopt vaccine mandate and testing policies, as well as the vaccine mandate imposed on certain health care facilities under the Interim Rule issued by the Centers for Medicare & Medicaid Services (CMS).

As we explained earlier this week, the OSHA ETS for large employers abruptly became effective last Friday night when the Sixth Circuit Court of Appeals dissolved an injunction blocking its implementation and enforcement. OSHA then quickly announced that it would begin imposing penalties for non-compliance beginning on January 10, 2022, affording employers very little time to adopt the required policies, obtain the required vaccination records from employees, and otherwise come into compliance.

Meanwhile, the CMS interim rule for healthcare facilities has been stayed in half of the United States since late November, when two separate federal judges blocked its enforcement while legal challenges remain pending. One of those judges originally ruled that the injunction should apply nationwide, but that decision was overruled by the Fifth Circuit on December 15, which limited the injunction to only those states that are parties to the lawsuit challenging the healthcare mandate.

Now, the Supreme Court intends to weigh in since receiving over a dozen applications seeking emergency review. However, it remains unclear whether the Supreme Court will issue any ruling before OSHA starts enforcing the large employer

ETS on January 10.

If you are finding it difficult to keep score on the enforcement status of the various federal vaccine mandate initiatives, you are not alone. Here is a quick summary of where we stand, although events of the past few months have repeatedly shown that the status of any of these mandates can change on a moment's notice:

Vaccine Mandate	Coverage	Status as of 12/23/21
OSHA "Large Employer" Emergency Temporary Standard	Generally applies to private employers with 100 or more employees and some public employers. Requires, among other things, adoption of mandatory vaccination and/or testing policies applicable to most employees, as well as employer record of employees' vaccination status and proof of vaccination. See our summary of requirements here.	Currently in effect. OSHA has stated it will not issue citations for noncompliance with any requirements before **January 10** and will not issue citations for noncompliance with testing requirements before **February 9**. Supreme Court to hear oral arguments on challenges on **January 7**.

CMS Interim Rule for Covered Health Care Facilities	Generally requires vaccination of healthcare workers. No option for testing unless employee qualifies for medical or religious accommodation.	Enforcement currently blocked in at least 25 states. CMS announced on **December 2** that it has suspended enforcement efforts while court injunctions remain in place. However, that was before the Fifth Circuit partially lifted the injunction on **December 15**, which was originally applicable nationwide, as to those states that are not parties to one of the lawsuits challenging the mandate. It remains unclear whether CMS intends to pursue enforcement in states that are currently not subject to an injunction. Supreme Court to hear oral arguments on challenges on **January 7**.
Federal Contractor Vaccine Mandate	Requires mandatory vaccination and other requirements for employees of covered federal contractors and subcontractors that work on or in connection with federal contracts. See our summary of the requirements here.	Enjoined nationwide as of **December 7**.

OSHA Healthcare ETS	Applies to all settings where any employee provides healthcare services or healthcare support services, and requires employers to develop and implement effective COVID-19 plans. A summary of the requirements can be found here.	The ETS became effective immediately on June 21, 2021 when issued. But OSHA's emergency temporary standard statutory authority requires the agency to promulgate a final rule no later than six months following the publication of the ETS, and OSHA did not issue such final rulemaking before December 21. The OSH Act, however, also specifies that ETS "shall be effective under superseded" by the final rule. OSHA has not officially weighed in as of the date of this alert regarding the agency's position whether the Healthcare ETS still applies.

Key Takeaways

The Supreme Court will hopefully provide official answers in January 2022 as to whether the OSHA ETS and/or the CMS interim rule are enforceable in their current forms, but those answers may not arrive before OSHA and CMS begin enforcement efforts. All employers that could potentially be subject to any of the federal vaccine mandates should continue to carefully monitor these legal challenges and should be prepared to act quickly in the event any or all of them are ultimately upheld by our country's highest court.

This blog post was drafted by Spencer Fane Partners Andrew Brought (Kansas City) and Randi Winter (Minneapolis). For more information, please visit www.spencerfane.com.