CLIENT ALERTS & INSIGHTS

November Ends With Flurry of Litigation Regarding Various COVID Vaccine Mandates

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As November came to an end, federal courts across the country continue to examine and issue preliminary rulings on challenges to various COVID vaccine mandates put in place by the Biden Administration. At the beginning of November, the Biden Administration had implemented a web of vaccine mandates through Occupational Safety and Health Administration ("OSHA"), the Centers for Medicare & Medicaid Services ("CMS"), and President Biden's Executive Order requiring vaccinations for employees of federal contractors and subcontractors. However, in just four weeks, all three have experienced preliminary setbacks through legal challenges. As of December 1, 2021, the OSHA and CMS mandates are preliminarily stayed by court orders nationwide, while the federal contractor mandate is stayed in three states: Ohio, Kentucky, and Tennessee.

The most notable is the OSHA Emergency Temporary Standard ("ETS") that was published to the federal register on November 5, 2021 (see summary of the OSHA ETS here). The OSHA ETS outlined a federal requirement for employers with 100 or more employees to either require employees to receive COVID vaccines or comply with weekly COVID testing and mask requirements in order to work. The following day, the Fifth Circuit Court of Appeals granted an emergency nationwide stay halting implementation and enforcement of the OSHA ETS (5th Circuit stay described here). On November 8, OSHA acknowledged this stay and its effect to block the rule, but encouraged employers to continue to prepare to comply. In the days that followed, the Judicial Panel on Multidistrict Litigation conducted a lottery to determine which of the 12 federal courts of appeal (all with pending challenges to the OSHA ETS on their dockets) would hear consolidated challenges to the OSHA ETS. The Sixth Circuit was selected on November 16. The next week, OSHA filed a motion to dissolve the stay with a subsequent request to condense and expedite the briefing schedule. Even with this proposed truncated schedule to dissolve the stay, briefing would not be completed until December 6, the day that the first wave of requirements contained in the OSHA ETS are effective. In sum, at this time, there is no indication when, or if, the rule will take effect.

On Monday, November 29, the Eastern District of Missouri issued a preliminary injunction blocking the CMS from enforcing its vaccine mandate for healthcare workers at Medicare- and Medicaid-certified medical facilities in ten states: Alaska, Arkansas, Iowa, Kansas, Missouri, New Hampshire, Nebraska, Wyoming, and North and South Dakota (see prior summary of CMS mandate here). Those states sued the administration, claiming the mandate was unconstitutional. The court held that a federal agency has no power to act, let alone preempt, legislation of a state unless Congress confer such power upon it. While acknowledging the Secretary of Health and Human Services' general authority to enact regulations to administer Medicare and Medicaid and ensure safety of recipients, the court continued that the breadth of the CMS mandate required clear authorization from Congress that was never provided. The court also found the CMS did not follow

the Administrative Procedure Act's required notice and comment period for administrative rulemaking, while further declining to find that good cause existed to justify skipping the requisite notice and comment period, concluding that the CMS failed to show the notice and comment period was impracticable, unnecessary, or contrary to the public interest in the current circumstances. On November 30, the Western District of Louisiana issued an injunction of the CMS mandate covering the remaining states, creating a nationwide injunction stopping the CMS rule from taking effect.

Also on November 30, the third vaccine order, which applied to federal contractors and subcontractors, was blocked in three states: Ohio, Kentucky, and Tennessee. The requirement commenced with an Executive Order from President Biden on September 9 and continued with supplemental guidance issued by the Safer Federal Workforce Task Force on September 24 (see prior summary here). The Eastern District of Kentucky granted a preliminary injunction blocking this contractor vaccine order in Kentucky, Ohio, and Tennessee. While finding that Congress can delegate procurement authority to the president to promote the economy and efficient federal contracting, that power has limits. Although the court conceded that the government may have authority "at some level and in some circumstances" to require vaccinations, the president's authority over federal procurement is not one of them, as such authority is not absolute. The president's actions pursuant to that procurement authority must have a "close nexus" to the "economy and efficiency" in federal contracting. Here, the court stated that if the president's procurement authority was interpreted so broadly to find a close nexus between vaccinations and such economy and efficiency, it "could be used to enact virtually any measure at the president's whim under the guise of economy and efficiency." The judge also stated that the mandate would limit full and open competition by precluding certain companies that would present the best value to the government from competing for procurement contracts in violation of the Competition in Contracting Act. The court declined to apply its ruling nationwide, finding the scope of the injunction was limited to the states that brought the suit.

While none of the orders described above are final determinations on the constitutionality or enforceability of the various mandates, they all present obstacles to implementation and enforcement, particularly on the timelines and deadlines originally identified. Furthermore, none of the stays or injunctions prevents an employer from independently deciding to implement - or continue to enforce - its own vaccine mandate or testing policy, provided appropriate accommodations for medical or religious reasons are considered.

Employers preparing to comply with any of the above mandates should remain vigilant and monitor each situation to determine when or if such mandates become effective and enforceable and require compliance. Benesch will continue to provide updates regarding all of the mandates as soon as new information becomes available.

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