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Appeals Court Extends Stay of Biden Vaccine Mandate for Most Employers

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On November 12, the Fifth Circuit declined to lift the emergency stay it had imposed on the implementation of the Biden Administration's vaccine mandate for employers with 100 or more employees that are not already covered by the Administration's federal contractor and health care mandates. (See our Client Alert here.) The court had issued the emergency stay on November 4, the same day that the Department of Labor's Occupational Safety and Health Administration (OSHA) released its COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). Under the emergency stay, OSHA is prohibited from taking any action to enforce the ETS. In the case before the Fifth Circuit, a diverse group of parties, including private employers and several states, have requested an order that permanently prohibits enforcement of the ETS.

The Fifth Circuit's ruling is likely not the final word on the matter. The case in that court is just one of multiple suits filed by at least 27 states in at least six federal appellate courts seeking the same relief. The suits will likely be consolidated before a randomly chosen court of appeals on November 16, and it is almost certain that, ultimately, the matter will be decided by the United States Supreme Court. While federal courts can move quickly when there is a need for an immediate decision, it is not clear how long it will take for the issue to make its way to the Supreme Court – or for that Court to decide whether employers must comply with the mandate.

The ETS includes two deadlines for compliance, which require employers to disseminate and implement their mandatory vaccination policies no later than December 5 and ensure that employees are either fully vaccinated or undergoing weekly testing no later than January 4. For now, those dates are stayed, meaning that OSHA is prohibited from enforcing them. It is not clear, however, how long that stay will last, or how long employers will have to comply with the mandate once the federal courts give the final word on whether the ETS can be enforced. Given the uncertainty, it would be prudent for affected employers to be prepared to meet the ETS requirements in the event the stay is reversed or overturned.

Additional Information

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