

LABOR AND EMPLOYMENT

ALERT

JANUARY 7,
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UPDATE: Will the Supreme Court Uphold OSHA's Vaccination or Testing Requirement for Large Employers and Vaccine Mandate for Certain Health Care Providers?

By *Lisa M. Brauner*

Legal requirements to implement and enforce Covid-19 vaccine or testing mandates for workers have become a complicated and confusing issue for many employers. In addition to local vaccine mandates in some jurisdictions, the federal government has issued a variety of Covid-19 vaccine or testing mandates. Litigation resulting from the federal government's actions in response to the Covid-19 pandemic has created significant uncertainty.

- See Schnader's earlier client alert for background and details – [Will OSHA's Mandatory Vaccination/Weekly Testing Rule for Large Employers Survive Court Challenges?](#)

CURRENT SUPREME COURT ACTION

On January 7, 2022, the U.S. Supreme Court heard oral argument on challenges to two federal Covid-19 vaccine mandates – 1) the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) mandatory vaccination and Covid-19 testing/masking requirement/Emergency Temporary Standard (ETS) for large employers to implement a mandatory vaccination policy, originally by January 4, 2022, or require full vaccination of all employees or proof of weekly Covid-19 testing and face coverings for unvaccinated workers;¹ and 2) a mandatory vaccination requirement issued by the U.S. Department of Health and Human Services' Centers for Medicare & Medicaid Services (CMS) for

certain healthcare workers at healthcare facilities that receive Medicare and Medicaid funding to be fully vaccinated by January 4, 2022. With respect to the challenge to OSHA's ETS, 27 states, private entities and religious groups filed suit in federal courts throughout the United States seeking a preliminary injunction to prevent enforcement of the mandates, challenging OSHA's authority to enact such rules, and also challenging the rules and orders on First Amendment and freedom of religion grounds. The Supreme Court is expected to issue a decision quickly.

OSHA RULES REMAIN IN EFFECT WITH NEW DEADLINES

OSHA's ETS requiring private sector employers with 100 or more employees to develop, implement and enforce a mandatory vaccination policy or adopt a policy requiring vaccination or weekly testing of those unvaccinated, remains in effect. The U.S. Court of Appeals for the Sixth Circuit dissolved the Fifth Circuit's stay of OSHA's ETS on December 17, 2021.

OSHA has stated that it intends to implement the ETS but said it is exercising "enforcement discretion" with respect to the ETS compliance dates. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any ETS requirements before January 10, 2022, and will

¹ According to OSHA, a mandatory vaccination policy requires vaccination of all employees, other than those employees who fall into one of three categories: those for whom a vaccine is medically contraindicated; those for whom medical necessity requires a delay in vaccination; or

those legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

not issue citations for noncompliance with the ETS testing requirements before February 9, 2022 (previously January 4, 2022). OSHA will not issue citations before these dates, “so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.” Written public comments on any aspect of the ETS are due by January 19, 2022.

Employers should expect OSHA’s ETS vaccine mandate to take effect as scheduled, unless the U.S. Supreme Court rules otherwise.

IMPLEMENTATION OF CMS RULES

CMS announced that it will implement and enforce its vaccine mandate for certain healthcare workers on a modified timeline, with respect to 25 states,² the District of Columbia, and U.S. territories, where a preliminary injunction has not been granted by the courts. The deadline for Phase 1 implementation is January 27, 2022 and the deadline for Phase 2 implementation is February 28, 2022. The public comment period for the Interim Final Rule closed on January 4, 2022.

FEDERAL CONTRACTOR MANDATE

President Biden’s Executive Order requiring all federal contractors to be fully vaccinated by January 4, 2022, with no weekly testing option, currently faces a nationwide injunction, following a December 7, 2021 Georgia federal district court decision. That case is on appeal to the Eleventh Circuit Court of Appeals which has refused to stay the injunction while it is considering the appeal. A number of other federal courts have separately issued preliminary injunctions to prevent implementation and enforcement of the federal contractor vaccine mandate, and those matters and any appeals of those decisions are pending.

Stay tuned for further updates on these fast-moving developments. ◆

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader’s Covid-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center.

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.

For more information about Schnader’s Labor and Employment Practices Group or to speak with a member of the firm, please contact:

*Jo Bennett
Co-Chair, Labor and Employment Practices Group
215-751-2134
jbennett@schnader.com*

*Michael J. Wietrzychowski
Co-Chair, Labor and Employment Practices Group
856-482-5723
mwietrzychowski@schnader.com*

*Lisa M. Brauner
Partner
212-973-8170
lbrauner@schnader.com*

www.schnader.com

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² CMS’s rule does not currently apply, due to court-issued injunctions, to 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, Texas, Utah, West Virginia, and Wyoming.