COVID-19: ALL (SOME) OR NOTHING: WHERE THE FEDERAL VACCINATION MANDATES STAND AS EMPLOYERS PLAN FOR 2022

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Labor, Employment, and Workplace Safety Alert

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UPDATE: Shortly after the publication of this alert on 20 December 2021, the United States Supreme Court announced that it will hear arguments on 7 January 2022 on both the Occupational Safety and Health Administration's Emergency Temporary Standard and the Centers for Medicare and Medicaid Services Interim Final Rule with Comment.

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In the span of a few weeks, the various vaccination mandates issued following President Biden's September 9th announcement (discussed further here) have emerged from legal challenges in federal courts throughout the country in varying conditions.

- OSHA ETS: Vaccination or testing requirements under the Occupational Health and Safety Administration's (OSHA) emergency temporary standard (ETS) have been reinstated, with delayed enforcement
- CMS IFR: The Centers for Medicare and Medicaid Services Interim Final Rule with Comment Period (CMS IFR) is now in effect in 25 states
- Federal Contractors: The vaccine mandate for federal contractors pursuant to Executive Order 14042 (EO 14042) is enjoined nationwide

As employers subject to one or more of the mandates grapple with issues related to coverage of their workforce, or in some cases, individual workplaces or locations, their compliance obligations may differ dramatically. Further, the landscape likely will continue to evolve in the form of higher court review or additional guidance from the issuing agencies. This alert discusses the current status of the different federal mandates, the complex issues related to compliance, specifically for employers that may be covered by more than one mandate, and best practices for covered employers prior to saying goodbye to 2021.

OVERVIEW OF CURRENT LEGAL LANDSCAPE

On 17 December 2021, the Sixth Circuit Court of Appeals granted the Biden administration's request to lift the stay issued by the Fifth Circuit Court of Appeals in November on the OSHA ETS requiring private employers with at least 100 employees to implement vaccination or testing requirements for employees (discussed further here).

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A few days earlier, on 15 December 2021, the Fifth Circuit Court of Appeals issued an opinion that partially upheld and partially reversed the Western District of Louisiana's nationwide injunction against application of the CMS IFR requiring specified types of Medicare- and Medicaid-certified providers and suppliers (discussed further here) to implement a vaccination mandate. The order lifted the injunction for jurisdictions outside of the 14 states included in the lawsuit before the court (Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, and West Virginia). In addition to those 14 states, a separate stay remains in place for the 10 states[1] that had also previously filed a lawsuit targeting the CMS vaccine mandate in the Eastern District of Missouri, as well as in one additional state (Texas) stemming from a lawsuit that had been on hold in the Northern District of Texas, but where an injunction was recently issued.

Finally, on 7 December 2021, the U.S. District Court for the Southern District of Georgiaissued an order enjoining the president, the Safer Federal Workforce Task Force, and 18 executive agencies and departments from enforcing the vaccine mandate that for federal contractors pursuant to EO 14042 on a nationwide basis. Then, on Friday, the Eleventh Circuit Court of Appeals denied a request to dissolve the nationwide injunction. Currently, all of the mandates are primed for further review by district and circuit courts, with the potential for Supreme Court review.

PRIVATE LARGE EMPLOYERS

Immediately following the Sixth Circuit's decision, the Supreme Court was asked to reinstate the stay on an emergency basis with multiple parties filing appeals, including 27 states. Although Justice Brett Kavanaugh is the assigned justice to hear emergency requests from the Sixth Circuit, there is a potential in this instance that such an emergency request would be heard by the whole Court, where five justices would likely be necessary to reinstate a stay. Indeed, the Supreme Court has just given DOJ until 30 December to respond to the stay request, which indicates some decision on the stay is likely from the whole Court early in January 2022. As employers wait for potential Supreme Court review, in the interim OSHA released a statement on 18 December 2021 that it would be “exercising enforcement discretion … to provide employers with sufficient time to come into compliance.” OSHA further noted that it will not issue citations for noncompliance with any requirements of the ETS before 10 January 2022 and will not issue citations for noncompliance with the testing requirements of the ETS before 9 February 2022 “so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.”

While the Sixth Circuit has lifted the stay, allowing the OSHA ETS to go into effect immediately, albeit with the delayed enforcement deadlines, there has not yet been a decision on the merits. Despite the OSHA ETS' express preemption clause, which would typically preempt conflicting state and local laws, many petitioners have raised arguments relating to whether an employer must comply with conflicting state or local laws and orders that restrict private employers' ability to mandate vaccination against COVID-19 (see, e.g., prior legal alert here and here). Although there is the potential for additional legal review, in the interim, the OSHA ETS is in effect. Therefore, covered employers should, at a minimum, develop their COVID-19 workplace policy, begin to get proof of vaccination status of employees, inform employees who are not vaccinated that they will be required to mask and test, and begin determining how they will implement the testing requirement.

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MEDICARE- AND MEDICAID-CERTIFIED HEALTH CARE PROVIDERS AND SUPPLIERS

In light of the decision from the Fifth Circuit, the Biden administration has asked the U.S. Supreme Court to review the lower courts' conflicting decisions on the CMS IFR. The administration has specifically asked the Supreme Court to put a hold on federal lower court decisions that would prevent the CMS requirement of vaccinations for healthcare workers at Medicare and Medicaid certified providers and suppliers covered by the IFR from taking effect. The appeal argues that “delaying the rule would cause serious, tangible harm to the public health” and references the potential threat of an anticipated COVID-19 surge on patients at hospitals, nursing homes and other facilities, who could be at risk from unvaccinated staff. The lower court rulings that have delayed implementation of this mandate have turned on the authority of the agency, in this case CMS, to promulgate and enforce such requirements. However, in its December 6th opinion denying the State of Florida's motion for a stay of the CMS IFR pending an appeal, the Eleventh Circuit Court of Appeals opined that the Secretary of Health and Human Services likely was authorized to promulgate the interim regulation. Absent the U.S. Supreme Court addressing this matter, the current status of the mandate is set forth in the Fifth Circuit's opinion that partially lifted the November 30th injunction, thus allowing implementation of the CMS IFR to proceed in the states not party to that matter and preventing application of the District Court's application of its injunction nationwide.

In the event the CMS IFR remains in limbo in the 25 states covered by the various injunctions, or is invalidated, health care employers with 100 or more employees will be subject to the OSHA ETS. Although the OSHA ETS exempted workplaces covered by the prior emergency temporary standard issued for health care employers (Healthcare ETS) (discussed further here), since it is set to expire on 21 December 2021,[2] healthcare employers would likely no longer be exempt from the OSHA ETS and therefore could be required to implement either a mandatory vaccination program or mandate COVID-19 testing for any unvaccinated employees. Additional guidance from OSHA or CMS is needed here.

To the extent the CMS IFR goes into effect nationwide, or goes into effect only in the 25 states where the injunction has been lifted, covered employers will still have to comply with elements of the OSHA ETS. Although the OSHA ETS exempted workplaces covered under the Healthcare ETS (discussed above) and EO 14042, it did not explicitly exempt those covered by the CMS IFR. For example, employees who are granted a reasonable accommodation for religious or medical reasons will still be required to submit to COVID-19 testing on a weekly or other basis.

FEDERAL CONTRACTORS

Unlike the OSHA ETS and the CMS IFR, EO 14042 remains enjoined on a nationwide basis. The Eleventh Circuit has denied the federal government's request to set aside the nationwide injunction pending review, but did set an expedited briefing schedule.

Additionally, following the December 9th decision, the Office of Management and Budget (OMB) issued guidance on implementing the requirements of EO 14042 in light of the ongoing litigation and nationwide injunction. Specifically, OMB provided that for existing contracts or contract-like instruments that contain a clause implementing requirements of EO 14042, the “Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency, where the place of

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performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements."

Finally, OMB specifically stated that "Federal agency COVID-19 workplace safety protocols for Federal buildings and Federally controlled facilities still apply in all locations" and any contractor employees working onsite in those buildings and facilities are required to adhere to Federal agency workplace safety protocols when working onsite.

It is interesting to note that OMB is applying the injunctions to the entire scope of EO 14042 and is not limiting this guidance to the vaccination mandate. Additionally, OMB has drafted the guidance to permit it to immediately enforce EO 14042 to the extent the injunctions are lifted (even if only in certain geographic areas), which indicates that OMB may hold employers to current deadlines. Therefore, employers that currently have a clause implementing EO 14042 in their contracts may want to continue preparation for compliance despite the current injunction. Also, as discussed further below, to the extent the contractor mandate remains enjoined, contractors with at least 100 employees would look to the OSHA ETS as long as that remains enforceable.

LEGAL CONSIDERATIONS FOR HIGHER COURT REVIEW

Of the three mandates (EO 14042, CMS IFR, and OSHA ETS), the OSHA ETS is procedurally in the strongest position. The Sixth Circuit is hearing all of the consolidated challenges and has already allowed it to be enforced pending review (and has denied en banc review), so no other circuit or district court will be in a position to enjoin it. The only court that could practically enjoin the OSHA ETS at this time would be the U.S. Supreme Court. In contrast, EO 14042 and the CMS IFR remain subject to various ongoing challenges in district and circuit courts. Notably, however, the Supreme Court has been asked to allow the CMS mandate to be enforced pending review, and there is a likelihood that a similar request will be brought at some point soon for EO 14042 as well.

OSHA's decision to extend the time period for compliance with the ETS to January 10th, and more significantly to not cite companies who are making reasonable efforts to comply through 9 February, will likely be considered by the Supreme Court in determining whether to grant an administrative stay of the mandate at this time. Ultimately, the decision whether the OSHA ETS will be stayed pending review is in the Supreme Court's hands, and a decision is still anticipated soon in light of the upcoming deadlines.

LOOKING FORWARD TO 2022

Employers covered by the OSHA ETS will have the benefit of extended enforcement deadlines, with the initial December deadline extended to January 10, 2022, and the testing/masking deadline extended to 9 February 2022. Despite the additional time to come into compliance, employers should continue to develop policies on vaccination and testing; ascertain the vaccination status of all employees; and prepare to implement a workplace testing protocol for all employees who are not fully vaccinated, including those who are or will be granted a reasonable accommodation under applicable law. Finally, covered employers should monitor developments related to the coverage of over the counter COVID-19 tests by private insurance,[3] which may impact the testing protocols that are eventually adopted.

Likewise, the practical impact is that the CMS IFR is presently enjoined in 25 states, and enforceable elsewhere in the United States. Further, two Circuit Courts have already disagreed on the CMS IFR's enforceability in preliminary rulings on stay/injunction motions, with the Eleventh Circuit opining favorably and the Fifth Circuit

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finding that it exceeds CMS's authority. As with EO 14042, entities with 100 or more employees that would be subject to the CMS IFR but are in one of the 25 states where it is enjoined, would look to the OSHA ETS to provide the basic compliance standard while the CMS mandate is enjoined.

To the extent EO 14042 remains enjoined going forward, contractors with 100 employees or more would look to the OSHA ETS to determine their basic compliance obligations. The OSHA ETS has a broad state preemption provision, which contractors could likely raise as a defense in states and localities that are seeking to limit mandates (see, e.g., prior legal alert here and here). Contractors covered by the ETS could proceed to implement a vaccine mandate under the OSHA ETS, and allow a testing alternative as long as EO 14042 remains enjoined. Of course, if EO 14042 is ultimately enforceable, contractors will be required to follow its stricter provisions, exempting employees only on the basis of a disability or sincerely held religious belief. Though the OSHA ETS would no longer apply to those workplaces covered by EO 14042, a federal contractor may have other portions of its workforce that would have to comply with the vaccination or testing requirements.

Our lawyers regularly advise clients on COVID-19 matters and we are well prepared to assist businesses as they navigate operations or seek clarifying guidance regarding reopening. Visit the K&L Gates HUB for information about our available COVID-19 resources.

Our Labor, Employment, and Workplace Safety lawyers assist with all aspects of a mandatory vaccination program, including determining coverage under the various directives and proposed regulatory actions, addressing compliance with federal and state laws, developing COVID-19 safety policies and procedures, and crafting communications to employees and contractors.

Our Government Contracts and Procurement Policy lawyers and professionals can help federal contractors understand the new obligations and risks that will emerge as a result of this latest action by the White House related to COVID-19.

Our Health Care and FDA lawyers and professionals can help clients navigate the various mandate requirements and applicable issues, both state and federal, and work closely with our Labor, Employment, and Workplace Safety practice to address the multi-pronged needs that arise assessing regulatory requirements and implementation.

FOOTNOTES

[1] Those states include Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.

[2] OSHA emergency temporary standards remain in effect for a six month period, until superseded by a permanent standard. The Healthcare ETS went into effect upon publication in the Federal Register on June 21, 2021.

[3] On December 2, 2021, the President announced that 100% of the cost of U.S. Food and Drug Administration authorized over-the-counter COVID-19 tests will be covered for those with private insurance during the public health emergency. Therefore, employees with health insurance would not have to pay out-of-pocket for these tests, which would address concerns related to the cost of testing under the pending ETS. Additionally, for those not covered by private insurance, at-home tests will be distributed through key community sites, such as health centers and rural clinics. To note, the President clarified that the current workplace testing protocols under the

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pending ETS remain in place. See https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-president-biden-announces-new-actions-to-protect-americans-against-the-delta-and-omicron-variants-as-we-battle-covid-19-this-winter/ (December 19, 2021).

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