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OSHA and CMS Vaccine Mandates -- U.S. Supreme Court to Review

On December 17, 2021, the U.S. Court of Appeals for the Sixth Circuit upheld the OSHA Emergency Temporary Standard ("ETS") mandating businesses with 100 or more employees to require their employees be either (1) vaccinated against COVID-19, or (2) subject to weekly COVID-19 testing. This latest Court ruling removed the previous stay on the mandate as issued by the U.S. Court of Appeals for the Fifth Circuit on November 6, 2021. The next step in this ongoing appeals process is likely a final judgment by the U.S. Supreme Court.

In the days since the December 17 judgment, the U.S. Supreme Court has received numerous appeals from groups specifically asking Justice Brett Kavanaugh—who reviews decisions from the Sixth Circuit—to freeze the judgment while the appeals process plays out. In response, the U.S. Supreme Court is giving OSHA until December 30 at 4:00 p.m. to respond to motions to stay the enforcement.

Currently, amid the flurry of stays and appeals, the Department of Labor issued guidance on ETS compliance, stating:

"To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9 so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard."

On the CMS front (which has issued a vaccine mandate for hospitals, long term care facilities and certain other medical facilities), the U.S. Supreme Court agreed to hear on an emergency basis the stays that federal courts in Louisiana and Missouri have placed on the CMS order.

The same December 30, 4:00 p.m. deadline is also in place for challengers to the CMS vaccine mandate. Following the December 30 date, whether the CMS mandate and/or the OSHA ETS remain in place will likely be determined by the U.S. Supreme Court in early 2022 (and hopefully, prior to OSHA's January 10 implementation date).

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