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Litigation Update on OSHA Vaccine-or-Test ETS

Shortly before Thanksgiving, we sent a newsletter discussing the status of the Emergency Temporary Standard ("ETS") released by the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") regarding vaccination against Covid-19. As a reminder, under the ETS employers with 100 or more employees needed to require that employees either be vaccinated against the virus or submit to weekly testing and consistent face masking subject to certain exceptions (such as eating, drinking, working alone in a room with floor-to-ceiling walls and a closed door, or when the employer can show that face coverings are infeasible). The ETS set two deadlines: employers had to have determined vaccination status and require face masking no later than December 6; and the so-called "Vax-or-Test" requirement was set to go into place on January 4.

As we said in our last email, the United States Court of Appeals for the Fifth Circuit (based in New Orleans) granted a motion to stay enforcement of the ETS, directing that OSHA "take no steps to implement or enforce" the ETS "until further court order." The cases challenging the ETS were then consolidated and assigned to the United States Court of Appeals for the Sixth Circuit (based in Cincinnati) for hearing.

Last week, the Sixth Circuit issued two orders relevant to the case. First, on Wednesday, December 15, the Sixth Circuit *denied* a request from the challengers for what is called an "initial hearing *en banc*." The circuit courts generally hear cases in panels of three judges, who are randomly assigned to the case. After the circuit court panel issues a decision, the parties have the

option to either petition "for *certiorari*" asking the United States Supreme Court to hear the case or petition for "*en banc* review" where all active judges on the circuit (other than in the Ninth Circuit, which has a slightly different process for *en banc* review) rehear the case. An initial hearing *en banc* bypasses the panel step, and would have had the entire Sixth Circuit hear the case in the first instance. These motions are rarely granted, as the typical process is having the panel hear the case first. What made the Sixth Circuit's order interesting, therefore, was the dissent from the decision, wherein the circuit's Chief Judge talked primarily not about whether the case should be heard by the entire court without a panel review, but rather discussed the merits of the stay that had been issued by the Fifth Circuit. Attorneys and pundits around the country began speculating what that meant for the future of the Fifth Circuit's stay.

We got our answer on Friday evening, when the Sixth Circuit's panel dissolved the stay that had been issued by the Fifth Circuit (giving OSHA the "further court order" that it needed before enforcing the ETS) in a 2-1 vote. This order reinstated OSHA's ETS, including all requirements for data collection, mask use, and vaccination or regular testing. Cognizant of the fact that employers may have halted their efforts to comply with the deadline given the now-dissolved stay, OSHA issued a statement confirming that it plans to enforce the ETS, but has adopted a grace period for compliance in which it will not issue sanctions so long as:

- Effective immediately: Employers must begin taking good-faith steps to come into compliance with the standard;
- No later than January 10, 2022: Employers must have adopted written policies, require consistent and correct face-mask use for unvaccinated employees, and provide PTO for employees to get vaccinated;
- No later than February 9, 2022: Employers must require unvaccinated employees to begin testing at least weekly for Covid-19.

Of course, the Sixth Circuit is unlikely to be the final stop for this litigation, and as of this writing there are currently eight different petitions for emergency relief pending before the United States Supreme Court asking for the ETS to again be stayed.

Until the Court acts on those requests, however, employers should be aware of the above deadlines, and begin taking steps to ensure that they are in compliance with the ETS. The attorneys at Madigan, Dahl & Harlan are monitoring the situation and are available to answer any questions you may have about the ETS or other employment-law matters. If you have any questions, please email us at email@mdh-law.com, visit our website at www.mdh-law.com, or call us at 612-604-2000.

This communication is not intended to and does not constitute legal advice. For specific questions, contact one of the attorneys at Madigan, Dahl & Harlan, P.A.

Madigan, Dahl & Harlan, P.A.
Two22/Campbell Mithun Tower
Suite 3150
222 South 9th Street
Minneapolis, MN 55402
Main: (612) 604-2000
email@mdh-law.com
www.mdh-law.com

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