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COVID-19 UPDATE

On November 4, 2021, the White House announced that the Department of Labor's Occupational Safety and Health Administration ("OSHA") would require employers with 100 or more employees to mandate employees be vaccinated against Covid-19 or submit to weekly testing. The OSHA rule would also require that employers provide paid time off for employees to get vaccinated and require all unvaccinated workers to wear a face mask while in the workplace.

The following day, OSHA published an Emergency Temporary Standard ("ETS") on the rule in the Federal Register. The ETS, found at 29 C.F.R. §§ 1910.501-509, imposes two deadlines on employers with more than 100 employees:

- No later than December 6, 2021: Determine the vaccination status of each employee, including whether the employee is fully vaccinated and maintain a record of the same; Require employees to promptly notify the employer if they receive a positive Covid-19 test or are diagnosed with Covid-19 by a licensed healthcare provider; Require unvaccinated employees to wear a face mask anytime they are indoors or when occupying a vehicle with another person unless (1) in a room alone with floor-to-ceiling walls and a closed door; (2) eating or drinking at the workplace; (3) for identification purposes in compliance with safety and security requirements; (4) wearing a respirator or other facemask; or (5) the employer can show that the use of face coverings is infeasible or creates a greater hazard; Establish, implement, and enforce a written policy either requiring vaccination from Covid-19 or regularly providing proof of negative Covid testing and wearing a face covering while in the workplace; Provide employees a reasonable amount of time to receive their primary vaccination doses, including up to four hours PTO for vaccination (including travel time); and provide reasonable time and paid sick leave to recover from side effects experienced as a result of vaccination.
- No later than January 4, 2022: Require that any employee who has not completed their primary vaccination dose (2 shots of Pfizer/Moderna; 1 shot of Johnson & Johnson) be tested for Covid-19 and provide documentation of the test results to the employer at least once every seven days. Employees that do not provide a negative result must be removed from the workplace until a documentation of a negative test is provided.

The ETS has been challenged in the courts, and 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 (at least as to employers with 100 or more employees) “until further court order.” At the moment, therefore, the December 6, 2021, and January 4, 2022, deadlines are not enforceable. On November 16, 2021, the various cases challenging the ETS around the country were consolidated and assigned to the United States Court of Appeals for the Sixth Circuit (based in Cincinnati). The Sixth Circuit may choose to continue, alter, or lift the Fifth Circuit’s order prohibiting OSHA from enforcing the ETS. The matter will likely be resolved by the United States Supreme Court. For now, OSHA has postponed enforcement of the ETS, but OSHA maintains that it is a valid exercise of its authority and plans to aggressively defend the ETS in the courts.

As with so much over the last two years, the legal framework of the ETS and whether or not it is enforceable are unresolved issues that are rapidly developing. The attorneys at Madigan, Dahl & Harlan are monitoring the situation, and are available to answer any questions you may have about the ETS, the vaccine requirement or any other employment law matters, 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, please contact one of the attorneys at Madigan, Dahl & Harlan, P.A.*

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