



News & Types: Employment, Labor & Benefits Update

Masuda Funai Employment Newsflash - 5th Circuit Orders OSHA Not to Implement or Enforce Its Vaccination Mandate

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Practices: Employment, Labor & Benefits

On November 13, 2021, the United States Court of Appeals for the Fifth Circuit (the “5th Circuit”) granted the petitioners’ motion for a stay pending judicial review of OSHA’s COVID-19 Vaccination and Testing Emergency Temporary Standard (“ETS”) for employers with 100 or more employees and ordered OSHA to take no steps to implement or enforce the ETS until further court order. In reaffirming its initial stay, the 5th Circuit cited a multitude of reasons why the petitioners’ challenges to the ETS are likely to succeed on the merits, including finding that the ETS:

1. grossly exceeds OSHA’s statutory authority,
2. is overbroad because it applies to two out of three private sector employers without any recognition that workplaces are diverse, and some employees are less vulnerable than others,
3. is underinclusive because it doesn’t cover employers with 99 or fewer workers, which raises doubt as to whether an emergency really exists that requires an ETS,
4. likely exceeds the federal government’s authority under the Constitution’s Commerce Clause because it regulates noneconomic activity that fits within the States’ police powers, and
5. improperly provides OSHA virtually unlimited control over individual conduct under the guise of a workplace regulation.

The 5th Circuit also found that denying the petitioners’ stay would cause great harm. For individuals, they would have to choose between their job(s) or vaccination(s). For companies, they would be irreparably harmed absent a continued stay, due to the financial effects of lost or suspended employees, compliance and monitoring costs, the diversion of resources to ensure compliance, and/or OSHA’s plan to impose stiff penalties on companies that refuse to punish or test unwilling employees. In contrast, the 5th Circuit found that the stay would cause no harm to OSHA because the ETS is likely unconstitutional, and any harm caused to OSHA pales in comparison to the harm caused to individuals and companies.

Finally, the 5th Circuit found the continued stay in the public interest because it maintains our constitutional structure and maintains an individual's liberty to make personal decisions regarding their own convictions, even if those decisions frustrate government officials.

Webinar: Although the ETS continues to be stayed pending further court order, because other courts are considering similar issues and because the U.S. Supreme Court will likely be asked to decide the issue, we will still conduct the planned webinar on Monday, November 15, 2021, at 12:00 p.m. CST.