

CLIENT ALERT: Legal Challenges to the OSHA Mandatory Vaccination Rule to be Considered in Consolidated Case; Future Regarding Implementation of the Rule Remains Uncertain

On November 8, 2021, the U.S. Department of Justice (DOJ) moved to merge the multiple legal challenges initiated in response to the Biden administration's **vaccine mandate**, and as a result, the lawsuits will be considered by a single, randomly selected appeals court. The outcome of the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS) remains uncertain pending the resolution of the consolidated cases.

Following OSHA's unveiling of the **ETS on November 4, 2021**, 26 states and several private employers and organizations filed lawsuits arguing that the rule is unconstitutional. On Monday, November 8, OSHA notified a judicial panel of the multidistrict legal challenges, in accordance with a federal law requiring agencies to notify the panel when one of their orders is challenged in more than two federal appeals courts. The DOJ subsequently moved to consolidate the lawsuits, filed in the Fifth, Sixth, Seventh, Eighth, Eleventh and D.C. circuits. As a result, the judicial panel is expected to hold a multi-circuit lottery to assign the consolidated cases to one of those six federal appeals courts on November 16, 2021.

This development follows the **Fifth Circuit's ruling on November 6, 2021**, temporarily suspending the OSHA rule and citing "grave statutory and constitutional issues." The Fifth Circuit ruling was in response to a lawsuit filed by a group of private companies who seek to have the new vaccine mandate voided. Circuit courts are entitled to rule on requests to halt the OSHA rule before the multi-circuit lottery is held; however, such stays can be lifted by the court that is ultimately selected to hear the consolidated case.

Given these legal challenges, the future of the OSHA ETS remains uncertain and a final resolution may not be reached for weeks. In the meantime, employers should prepare to implement the policies and procedures mandated in the ETS, given the potential risk associated with non-compliance if the rule goes into effect, as scheduled.

MBJ will continue to monitor these issues. In the meantime, please contact your MBJ attorney with any questions you may have regarding these or any of the other legal changes addressed above.

***Shane R. Goodrich** is an attorney with Morgan, Brown & Joy, LLP, and may be reached at (617) 523-6666, or sgoodrich@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.*

This alert was prepared on November 9, 2021.

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, should not be construed as legal advice or a legal opinion on any specific facts or circumstances by Morgan, Brown & Joy, LLP