CLIENT ALERT: Sixth Circuit Lifts Stay of OSHA Emergency Temporary Standard, Enforcement of Vaccine Mandate to Begin in January

On December 17, 2021, the Sixth Circuit Court of Appeals lifted the stay of the Occupational Safety and Health Administration's (OSHA) requirement that employers with 100 or more employees require their workers are vaccinated or alternatively produce a negative COVID-19 test on a weekly basis. As a result, the U.S. Department of Labor (DOL) announced that affected employers have until January 10, 2022 to comply with the vaccine-or-test rule.

On November 4, 2021, OSHA published an Emergency Temporary Standard (ETS) detailing the requirements of the Biden administration's vaccine-or-test mandate. On November 6, 2021, the Fifth Circuit Court of Appeals issued a decision that temporarily suspended the ETS on the grounds that the rule raised constitutional issues and exceeded OSHA's authority. Following the entry of the stay, a judicial panel consolidated the numerous legal challenges to the ETS and held a multi-circuit lottery, resulting in assignment of the consolidated cases to the Sixth Circuit Court of Appeals.

On December 17, 2021, a three-judge panel for the Sixth Circuit dissolved the stay ordered by the Fifth Circuit and reinstated the ETS. In its decision, the Court concluded that implementation of the vaccine-or-test mandate "is an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs." The Court found little likelihood that the states and private companies challenging the ETS would succeed on their legal arguments and that the likely irreparable harm to the government and the public interest outweighed any potential injury to the petitioners who may be subject to the mandatory vaccination policy.

As noted above, as a result of the Sixth Circuit's holding, the DOL announced that employers with 100 or more employees must come into compliance with the majority of the ETS requirements by January 10, 2022. However, affected employers have until February 9, 2022 to comply with the ETS weekly testing requirement for unvaccinated employees before OSHA begins enforcing the rule, so long as employers can demonstrate they are exercising reasonable, good faith efforts to come into compliance with the standard.

The Sixth Circuit's order does not fully resolve the pending legal challenges to the ETS. Numerous emergency stay petitions were filed with the U.S. Supreme Court immediately after the Court's decision was published, requesting that the stay be reinstituted while the case remains pending for consideration of the merits of the ETS. However, given these developments, it is recommended that

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employers with 100 or more employees confer with their MBJ attorney to ensure they are taking the necessary steps to come into compliance with the requirements of the ETS by the January 10 and February 9 deadlines.

MBJ will continue to monitor these issues for any forthcoming guidance. 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.

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