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Federal Judge Blocks CMS' COVID-19 Vaccine Mandate for Healthcare Workers Nationwide; Federal Contractor Mandate Stayed in Three States

In November [we reported](#) that OSHA's Emergency Temporary Standard ("ETS") requiring employee vaccinations for employers with 100 or more employees had been stayed by the Fifth Circuit Court of Appeals. One day after that stay, which was issued on a nationwide basis, [OSHA announced](#) its decision to temporarily suspend implementation and enforcement of the vaccine ETS pending the outcome of the litigation.

The Fifth Circuit case is one of several federal lawsuits that have been filed across the country challenging the enforceability and constitutionality of the OSHA vaccine mandate, all of which have since been consolidated before the Sixth Circuit Court of Appeals. Just before the Thanksgiving holiday, OSHA filed a motion asking the Sixth Circuit to lift the Fifth Circuit's nationwide stay of the ETS. In addition to seeking a full revocation of the stay, OSHA is asking that if the vaccination requirement remains stayed during the pendency of the consolidated lawsuits, the stay as to the mandate's testing and face covering requirements should be lifted. The Sixth Circuit has set a briefing schedule that will delay any ruling on OSHA's motion until at least December 10, which will be after OSHA's original December 6 compliance deadline. Challengers to the ETS Rule are seeking an *en banc* review of OSHA's motion, which, if granted, would require all eligible, active and participating judges of the Sixth Circuit to consider OSHA's motion, instead of the normal three-judge panel.

The stay of the OSHA vaccine mandate was only the beginning of several setbacks the Biden administration has suffered with respect to its vaccine mandates. On November 30, a federal district judge in Louisiana stayed the Centers for Medicare and Medicaid Services ("CMS") vaccine mandate, which is applicable to many healthcare workers. The order, which expressly states that the stay is effective on a nationwide basis, was issued just one day after a Missouri federal district judge in a separate lawsuit stayed the CMS mandate in 10 states (Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming), and just hours after a federal

district court judge in Kentucky stayed President Biden's federal contractor vaccine mandate in three states: Kentucky, Ohio and Tennessee.

The Department of Justice already has filed an appeal seeking to overturn the Missouri federal court's stay of the CMS mandate in 10 states. The Eighth Circuit, where the appeal was filed, consists of mostly Republican-appointed judges. This is also true in the Sixth Circuit, which would consider an appeal of the federal contractor decision issued in Kentucky, if one is filed. An appeal of Tuesday's order staying the CMS mandate nationwide would be filed in the Fifth Circuit, where the nationwide stay of the OSHA vaccine mandate was previously issued.

The court orders described above are at this time only temporary and could ultimately be lifted, in whole or in part, if the Biden administration prevails. Moreover, the stays only limit the federal government's ability to mandate vaccinations for the reasons explained in the orders. Employers may still voluntarily choose to implement mandatory vaccination, testing or other COVID-19 safety policies, except as limited or prohibited by local or state laws. While the list could grow as time goes on, states that have already enacted such limitations include Florida, Montana, Tennessee and Texas.

Kutak Rock will keep you updated as new developments occur, but if you have any questions you may contact any member of Kutak Rock's [National Employment Law Group](#) or [OSHA Compliance & Workplace Safety Group](#). You may also visit us at www.KutakRock.com.

