



# SCWA Legislative Update

January 5, 2022

## SPECIAL ALERT



### Update on OSHA's Vaccine Rule

In early November, OSHA issued an Emergency Temporary Standard (ETS) requiring employers with 100 or more employees to take steps to combat the spread COVID-19 including, most importantly, mandating that all employees either be vaccinated or submit to weekly testing. The release of the ETS was met almost immediately by a flood of lawsuits challenging OSHA's actions.

**There is some concern that if this is approved for large employers, it may then be issued for small employers.**

The course of these cases over the last two months has left many businesses understandably confused about where things stand and what they should be doing. This is particularly concerning given that OSHA is prepared to begin enforcing the first phase of the ETS on January 10 – the Monday after the Friday on which the Supreme Court will be hearing arguments on the challenges. In this Alert, we break down where things stand now, how we got there and what businesses should be preparing for going forward.

#### Where Things Stand Now

- The Supreme Court will be hearing oral arguments on the challenges to the ETS this Friday, January 7. It is not yet clear when we can expect the Supreme Court to issue a ruling. At this time, the Supreme Court has not stayed implementation of the ETS pending its decision.
- OSHA bumped back its original enforcement dates but it is prepared to begin enforcing most provisions of ETS on January 10 and the vaccine and testing requirements of the ETS on February 9. Penalties for violating any OSHA standard, including the ETS, can be sizeable.
- The provisions of the ETS that OSHA is on track to start enforcing on January 10 include the following:
  - Covered (employers with 100 or more employees) must have identified, and keep record of, employee vaccination statuses.
  - Covered employers must provide employees with up to 4 hours of paid leave to receive each dose of the COVID vaccine and reasonable paid time off to recover from any side effects that the employee may experience from each dose of the vaccine.
  - Covered employers must implement and communicate written COVID safety

protocols that include provisions: (i) requiring employers to provide notice if they are diagnosed with or test positive for COVID-19, (ii) removing employees who are diagnosed with or test positive for COVID-19 from the workplace until certain criteria are met, and (iii) requiring unvaccinated employees to wear face coverings when they are indoors or sharing a vehicle for work (with certain exceptions permitted).

- Covered employers must report work-related COVID fatalities or hospitalizations to OSHA.

## How We Got Here

- OSHA issued the ETS on November 5. Originally, the bulk of the ETS was set to go into effect on December 5 with the vaccine or test requirement going into effect on January 4.
- Challenges to the ETS were filed in every federal circuit. When this happens the federal courts use a lottery system to select which court will handle all of the cases (this prevents different courts from issuing decisions that are inconsistent with one another).
- Before the lottery could occur, the Fifth Circuit Court of Appeals issued a nationwide order temporarily staying the ETS.
- On November 17, the Sixth Circuit Court of Appeals was selected in the lottery to handle all of the cases. It was then up to the Sixth Circuit to decide whether to keep the Fifth Circuit's stay in place or vacate it.
- On December 17, the Sixth Circuit issued a decision lifting the stay and allowing OSHA to move forward in implementing and enforcing the ETS. The Sixth Circuit panel held that OSHA had not overstepped its authority in issuing the ETS and rejected arguments that the ETS was unnecessary.
- Once the stay was lifted, OSHA announced that it would give lenience to the ETS' original enforcement dates and that it would begin enforcing the vaccine or test requirement on February 9 and the rest of the ETS' provisions on January 10.
- The Sixth Circuit's decision was appealed to the Supreme Court and briefs were submitted on December 30. The Supreme Court will be hearing the oral arguments on the ETS the same day as it will be hearing challenges to the Centers for Medicare & Medicaid Services (CMS) vaccine rule for Medicare and Medicaid certified providers and suppliers.

## What Covered Businesses Should Be Prepared For

With the timing of the Supreme Court oral arguments and the OSHA enforcement date, there are three potential outcomes here:

1. The Supreme Court issues a decision on or before January 10 upholding the ETS and the OSHA proceeds with enforcement of the ETS.
2. The Supreme Court issues a decision on or before January 10 striking down the

ETS or staying the ETS pending a decision.

3. The Supreme Court doesn't decide the case or stay the ETS by January 10 and OSHA proceeds with enforcement of the ETS.

Businesses with 100 or more employees need to be prepared that, unless the Supreme Court rules otherwise, the provisions of the ETS will go into effect on January 10 and February 9 and OSHA will begin issuing penalties for non-compliance on those dates. While the vaccine and testing provisions have gotten the most attention, as outlined above, the ETS also has a wide range of other requirements that are set to go into effect on January 10. Items such as developing and issuing compliant policies and determining all employees' vaccination statuses will take time and planning. Covered businesses that elect to wait to see what happens with the Supreme Court before taking steps towards compliance may find themselves in a scramble or unable to get themselves into full compliance if enforcement begins on January 10 as OSHA has planned.

The legal issues that the Supreme Court will be considering in this case are nuanced and deal with questions of administrative law and rulemaking authority. Businesses that are assuming that the ETS will be struck down, or that the Court will have ruled on the case by January 10, are perhaps taking an unnecessary risk. Rather than waiting for the Supreme Court's decision, businesses may want to begin to take steps now to prepare so that they can be in full compliance by January 10 if the ETS goes forward on that date.



The Senate has already begun their work in earnest this new year. Leader Schumer announced plans to push through voting rights legislation and vowed to bring BBB to the floor and force the hands of both Senators Manchin and Sinema. However, no one anticipates any real movement to take place this week, given Senator Menendez is out recovering from surgery.

What makes Leader Schumer's voting rights push particularly bold is his threat to change the rules (i.e. filibuster reform) by January 17<sup>th</sup>, MLK Jr. Day, if the Republicans continue to block the bill. He is also connecting the need for elections reform to the January 6<sup>th</sup> attack, and elaborates on this need to protect our democracy in a [January 3<sup>rd</sup> letter here](#). Seemingly, in an election year, this may appear to be nothing more than political theater, but we hear conversations continue to happen at the members and staff level.

For now, the Senate will continue its aggressive push on judicial nominees, after a [record year of securing 40 federal judges in 2021](#). And the Build Back Better Act will continue inching forward through the parliamentary process. To date, only a few Committees have had their Byrd meetings with the Parliamentarian.

