Memo to ACSI Member Schools
Update on Biden Administration Nationwide Vaccine Mandate

Updated January 13, 2022

U.S. Supreme Court Issues Immediate Administrative Stay

In an exceptional action today, January 13, 2022, the U.S. Supreme Court has temporarily blocked the Biden Administration’s Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard regulation (ETS) vaccine mandate by issuing a stay with immediate effect that provisionally stops the implementation and enforcement of the ETS mandate pending further judicial proceedings. In its order, the High Court stated that those opposing the vaccine mandate are “likely to succeed on the merits of their claim that the Secretary lacked the authority to impose the mandate.”

This action by the Supreme Court follows in the wake of the hearing that occurred just last week on Friday, January 7, 2022, where the Court heard oral arguments as to whether OSHA should be allowed to begin enforcing its ETS requiring vaccinations or mandatory testing and mask-wearing of employees who work for organizations with 100 or more employees, or whether the ETS should be enjoined as an overreach of its Congressionally granted authority.

The ultimate outcome of this vaccine and testing mandate is yet to be seen, as proceedings will continue at the U.S. Court of Appeals for the Sixth Circuit with the likelihood that any final ruling at that level will be appealed to the Supreme Court for a full review on the merits.

For now, OSHA must refrain from implementing or enforcing the ETS. Even though the majority of the Supreme Court stated that the likely outcome is a determination that OSHA lacks the authority to issue such a vaccine mandate and will be permanently stopped, until such a final decision is made, member schools with 100 or more employees should still have a contingency plan for how their organization would respond should the mandate be allowed to go forward.

Recent Background

On Friday, December 17, 2021, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit (where all lawsuits against the Biden Administration’s vaccine mandate had been consolidated) lifted the nationwide stay that had previously been issued by the U.S. Court of Appeals for the Fifth Circuit on November 12, 2021, prohibiting the implementation or enforcement of the Biden Administration’s vaccination and testing mandate issued through the OSHA November 4, 2021 COVID-19 emergency temporary standard (ETS).
However, within 24 hours of the Sixth Circuit’s decision to lift the stay, the Attorneys General from 27 states filed an appeal and emergency application for an administrative stay with the U.S. Supreme Court on Saturday, December 18, 2021. The several states asserted serious statutory and constitutional defects of the ETS and requested that the high court immediately reinstate a stay against the ETS to forbid the implementation and enforcement of the mandate until the matter could be fully litigated. More than one hundred private corporations, labor unions, and non-profit organizations joined the 27 states in this appeal and request for emergency action, including Christian Employers Alliance, American Family Association, Home School Legal Defense Association, and Asbury Theological Seminary. The Attorney General for the State of Utah stated: “We remain confident that the court will agree that the mandate is [an] unconstitutional federal overreach . . .”

On Friday, January 7, 2022, the U.S. Supreme Court heard oral arguments as to whether OSHA should be allowed to begin enforcing its ETS regulation requiring vaccinations or mandatory testing and mask-wearing of employees who work for organizations with 100 or more employees, or whether the ETS should be enjoined.

On Thursday, January 13, 2022, the Court issued a stay order with immediate effect that provisionally stops the implementation and enforcement of the ETS mandate pending further judicial proceedings.

**What This Means**

This means that for now, OSHA is forbidden from implementing or enforcing any part of its ETS until judicial proceedings have been concluded.

**A Summary of the Proposed Emergency Regulation and To Whom It Would Apply**

- The ETS mandates that employers of 100 or more employees must require their unvaccinated employees to wear masks in the workplace when other workers or customers are near them with enforcement starting January 10, 2022. Employees must either be vaccinated or be tested weekly for COVID-19 to work in the workplace. However, OSHA will not issue any citations for noncompliance with the testing requirements before February 9, 2022, so long as an employer is exercising good-faith efforts to come into compliance with the standard.

- In determining if an organization has 100 or more employees, all part-time employees and full-time employees count towards the total number of employees, even if employees are spread among multiple locations. Independent contractors do not count towards the total number of employees.

- The requirements do not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present, employees while they are working from home or employees who work exclusively outdoors.
• Employer fines for violations of the ETS can be as much as $13,653 per violation.

• The short, three-page summary issued by OSHA on this ETS can be found here.

• OSHA website with fact sheets, policy templates, and other information regarding how to comply with this emergency temporary standard can be found here: COVID-19 Vaccination and Testing ETS

• A practical FAQ on the OSHA ETS and compliance advice by Fisher Philips can be found here.

• The full-text version of OSHA’s ETS as published in the U.S. Federal Register can be found here.

If a school believes that there are exemptions, privileges, or rights that should be asserted in their situation, or if, as an organization, they would desire to challenge compliance with this regulation, ACSI recommends that member schools first consult with their organization’s attorney or seek legal counsel from an attorney in their jurisdiction to advise them concerning their specific circumstances. Member schools should also check with their insurance carrier to determine if any course of action being evaluated by the school would affect insurance coverage.

If a school does not have legal counsel, ACSI will use its strategic relationships with Alliance Defending Freedom, First Liberty, Pacific Justice Institute, and a number of private law firms to assist member schools in finding appropriate legal counsel.