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EMPLOYMENT LAW BULLETIN

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APPEALS COURT LIFTS STAY TO OSHA VACCINATION ETS (UPDATED)

On Friday night, December 17, 2021, the Sixth Circuit Court of Appeals in Cincinnati lifted the stay of OSHA's Emergency Temporary Standard (ETS) on mandatory vaccination or weekly testing. In a 2-1 opinion written by an Obama appointee, and joined in by a Bush appointee, the Sixth Circuit dissolved the nationwide stay previously issued by the Fifth Circuit on November 6, 2021. A Trump appointee dissented. In addressing the issue of whether a stay pending judicial review is merited, a majority of the three-judge panel found that "the harm to the government and public interest outweighs any irreparable injury to the individual petitioners who may be subject to a vaccination policy." Among other things, the court noted that employers have the option to require unvaccinated workers to wear a mask on the job and test for COVID-19 weekly. The dissenting judge stated that the petitioners had shown a likelihood of success on the merits of their challenge to the OSHA ETA. The dissenting judge stated it was clear that "the Secretary of Labor lacks statutory authority to issue the mandate . . . and the Secretary made no finding that the emergency rule is necessary in any sense even approaching indispensable."

OSHA in response to the ruling immediately updated its website and the Department of Labor issued a news release. OSHA indicates that it will move forward immediately to implement and enforce the ETS, but revise the time deadline so that the first date to have everything but testing in place is January 9, 2022, followed by implementation of the testing by February 8, 2022. It should be noted, however, that technically compliance is required by the terms of the ETS and OSHA is stating it will use its enforcement discretion to not cite companies for noncompliance between now and the new deadlines if they can demonstrate that they have been making good faith efforts to come into compliance.

A number of parties in the Sixth Circuit proceedings have already filed a joint emergency motion with the Supreme Court requesting the Court to stay the ETS. It should be noted that the issue before the Supreme Court at the current time is limited to whether an emergency stay should be granted prohibiting OSHA from implementing or enforcing the stay while the court systems determines whether OSHA had authority to issue the mandate. Failure to reinstate the stay by the high court may only mean that it is too early for the court system to resolve such issues.

The legal papers to the Supreme Court are directed to Justice Kavanaugh because he has jurisdiction over the appeals court that made the ruling. He is likely to refer the matter to the full court. The Court asked for responses by December 30, 2021 to the mandate challengers' request. The justices are already considering an appeal to the vaccine mandate aimed at healthcare workers and also ask for a response in that dispute by December 30, 2021.

The Eleventh Circuit on the same day denied the Government a stay of a nationwide injunction of the federal contractor vaccine mandate. It is anticipated that the Government will take up that denial with the Supreme Court.

At the same time, a growing number of states restrict COVID-19 vaccine mandates by private sector employers. As of the end of November, these states included Alabama, Arkansas, Arizona, Florida, Iowa, Montana, Tennessee, Texas, Utah, and West Virginia, and the list is growing. The Administration has indicated its intentions to pre-empt state laws to the extent contrary to its vaccine, testing or mask requirements.

It is prudent at the present time for employers to move ahead in preparing the extensive documents required by the OSHA ETS, determine whether they will allow weekly testing rather than mandatory vaccination, prepare their reasonable accommodation exemption forms, determine the manner in which they deal with employees refusing the requirements, so that they will be able to show current good faith efforts to comply as well as prepare for the need for compliance as the mandatory deadlines approach. Wimberly, Lawson, Steckel, Schneider & Stine, P.C. have prepared various policies to cover these points that can be adapted to individual company needs.

The President's executive order that applies to certain federal contractors and subcontractors that provide services to the federal government, and which requires vaccination without the testing option, was to have taken effect by January 4, 2022. A team of attorneys from Wimberly, Lawson, Steckel, Schneider & Stine, P.C., led by Larry Stine, was successful in securing a nationwide injunction against the federal contractor mandate which currently remains in effect.

FEDERAL CONTRACTOR MINIMUM WAGE FINAL RULE REQUIRES $15.00 MINIMUM WAGE

On November 22, 2021, the Department of Labor's (DOL) Wage and Hour Division issued a final rule implementing President Biden's Executive Order 14026, increasing the Minimum Wage for Federal Contractors, which applies to all workers performing work on or in connection with covered federal contracts. This minimum wage will increase to $15.00 per hour beginning January 30, 2022. According to a DOL news release, in addition to increasing the minimum wage for federal contractors, the final rule:

- Continues to index the federal contract minimum wage in future years to inflation;
- Eliminates the tips minimum wage for federal contractor employees by 2024; and
- Insures a $15.00 minimum wage for workers with disabilities performing work on or in connection with covered contracts.

Because of the impact of this higher federal minimum wage for federal contractors and certain subcontractors, it is important for employers to understand who is covered by the requirements. In general, the requirements apply to federal contractors, and those subcontractors who are either covered by the Davis-Bacon Act, by the Service Contract Act, contracts for concessions; or contracts entered with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents or the general public supply services, but not who supply products. It specifically does not apply to contracts related to the manufacturing or furnishings of materials, supplies, articles or equipment to the Federal Government.

The $15 an hour rate does not apply to existing contracts until that contract is renewed, extended or an option on the contract is exercised on or after January 30, 2022. All new contracts entered into on January 30, 2022 and after obligate the contractor to pay the $15.00 an hour minimum wage. If a solicitation is accepted before January

30, 2022 but the contract is to be signed on January 30, 2022, some special rules apply. Please give us a call if you are in that situation.

FEDERAL CONTRACTORS SOON TO BE REQUIRED TO VERIFY THEY HAVE AFFIRMATIVE ACTION PLANS

In general, companies that do business with the federal government are required to have affirmative action plans. Such plans address how contractors recruit and employ women, minorities, certain veterans, workers with disabilities, and set goals for recruitment. Under the prior policy, the Office of Federal Contract Compliance Programs (OFCCP) would not review such affirmative action plans unless an employer was being audited. In a policy announced in early December, the OFCCP announced an online portal known as the Affirmative Action Plan Verification Interface (AHP), for contractors to attest that they have developed and maintained their plans. Registration for this portal is scheduled to begin February 1, 2022, with a certification period planned to run from March 31 to June 30,2022. The OFCCP plans to use this annual certification response as an additional criterion for the agency to schedule compliance reviews. In other words, contractors that do not develop or maintain an AHP will be cited by the OFCCP for a violation and may be referred for an audit and enforcement. The OFCCP may also recommend that procurement officers check this new data base before awarding a contract.

WORKPLACE WALK-OUTS AND STRIKES THIS YEAR HAVE MORE THAN DOUBLED

Unions have engaged in over 240 major strikes this year, doubling the number from last year. Some have labeled the situation "strike-tober." The causes show an increased self-confidence and militancy on the part of employees.

First, workers are scarce and they know it. They can quit or strike with the confidence that they are unlikely to be permanently replaced, and that they can simply find a job elsewhere, as a temporary or permanent job. Further, they can strike knowing that the current administration supports their strike activity. President Biden recently stated in connection with the strike at John Deere: "My message is they have a right to strike and they have a right to demand higher wages." The Deere workers rejected an initial settlement of about a 5.5% wage increase for the first year, and then rejected a second settlement of around a 10% wage increase for the first year, before finally ratifying a contract. One of the issues in the Deere negotiations and so many other negotiations pertain to two-tier programs, in which newly-hired employees do not receive the same rates of pay as more senior employees. With respect to the strike at Kellogg, President Biden publicly criticized the company when it stated it was going to exercise its legal right to hire permanent replacements for the striking workers. The National Labor Relations Board (NLRB) has become the most pro-union since the 1930s. President Biden has even set up a task force to find ways that more pro-union policies can be implemented without new laws.

While only 10.8% of the U.S. workforce belongs to unions, and even less in the private sector, opinion polls suggest that 68% of Americans support unions, up significantly from a decade ago. Workers may now believe they have the upper hand and they know they have an ally in the White House. Historically, workers are more likely to strike when their jobs seem more secure due to the labor shortages.

Labor militancy has also spread to organizing campaigns, the prime examples being union efforts to organize Amazon and most recently Starbucks. At Amazon in Alabama, the NLRB Regional Director ordered another election, primarily because Amazon asked the postal service to set up a mailbox for mail ballots near the facility,

which the NLRB called intimidating. Unions have won two elections recently in the New York area at a single Starbucks store, under the current NLRB concept of allowing smaller voting units, called "micro-units," which gives unions a better chance to win than larger voting units. Starbucks, with its extremely progressive public image on most issues, uses the approach of arguing that a labor organization would interfere with the direct relationship it has with its workers.

Employees read reports about executives making a lot of money, and companies having high profit levels. Unions are trying to reclaim concessions they have made in recent years. When its workers read about strikes elsewhere, many of which are "successful," they see what they can win by going on strike.

For those employers interested in developing long-term plans to prevent unionization, Wimberly & Lawson conducts audits of company vulnerability to such campaigns, along with generic policies, posters, handouts and other materials useful to run a union-free campaign, along with providing management and supervisory training.

Be sure to visit our website at http://www.wimlaw.com often for the latest legal updates, Alerts, and Firm biographical information!

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