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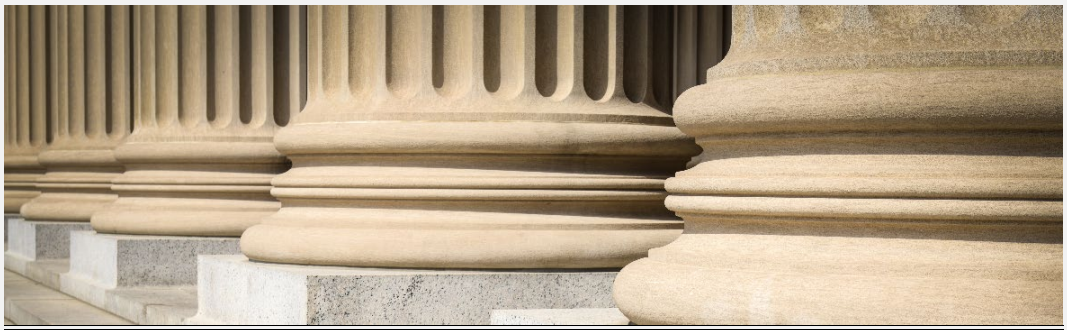
United States | Human Capital | 19 November 2021



Rewards Policy Insider
2021-22

In this Issue:

OSHA Suspends Implementation of COVID-19 Vaccination Mandate Pursuant to Court Order

The Occupational Health and Safety Administration on November 17 announced that it was suspending efforts to implement and enforce its COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) pursuant to an order by the Fifth Circuit Court of Appeals. More than 20 lawsuits challenging the ETS have been filed in 12 different federal circuits. The Supreme Court likely will be called upon to resolve questions about whether OSHA has the authority to enforce the ETS.

Background

The ETS generally requires most employers with at least 100 employees to implement a policy requiring employees to either be vaccinated for COVID-19 or submit to weekly testing. The policies must be implemented by December 5, 2021 and testing of unvaccinated employees is supposed to begin by January 4, 2022. See Rewards Policy Insider 2021-21 for a more complete summary of the ETS.

Almost immediately after OSHA issued the ETS, the 5th Circuit Court of Appeals issued a temporary stay at the request of a number of businesses and states that filed suit seeking to permanently enjoin OSHA from enforcing it. The 5th Circuit subsequently issued an order affirming the temporary stay based on its conclusions that the ETS likely exceeds OSHA's statutory authority and may not pass constitutional muster. As a result, the court ordered that OSHA "take no steps to implement or enforce the ETS "until further court order."

As noted above, the 5th Circuit case is one of many challenging the ETS's validity. When many different cases raising the same issues are pending in the federal courts, the Judicial Panel on Multidistrict Litigation intervenes to consolidate the cases in a single circuit. They decide on the circuit by staging a lottery, which in this case resulted in the Sixth Circuit Court of Appeals gaining jurisdiction over the consolidated cases.

What Should Employers Do Now?

Employers otherwise subject to the ETS should note that a temporary stay can be lifted at any time. Whether to keep the temporary stay in place is likely to be one of the first issues the Sixth Circuit addresses, and whatever decision it reaches could be appealed to the Supreme Court.

If the temporary stay is lifted, the legal challenges to the ETS almost certainly will continue. But while the substantive issues make their way through the courts, OSHA almost certainly would resume ETS implementation and enforcement efforts. That could set up a situation where the ETS becomes fully effective on January 4, 2022 – and remains in effect for quite some time – before the Sixth Circuit and/or the Supreme Court issue a final verdict on the merits of the consolidated cases.

Unless and until the Sixth Circuit and/or Supreme Court issue final rulings confirming that the temporary stay will remain in place until they decide on the request for a permanent injunction, employers probably will want to continue efforts to be ready to comply with the ETS by the December 5 and January 4 deadlines.

Future editions of Rewards Policy Insider will continue to provide updates on this evolving situation.

House Version of Build Back Better Act Includes Universal Paid Leave

Whether to include universal paid leave in the Build Back Better Act (BBBA) has been the subject of vigorous debate in Washington and beyond, with even the Duchess of Sussex weighing in. Nonetheless, some thought it would be left out after the White House released a framework for a final bill that did not include paid leave. But House leadership has put it back in, and the full House approved the measure on November 19.

The House-passed version provides for only 4 weeks of paid leave, as opposed to the 12 weeks that was originally proposed. Additionally, the updated wage replacement formula would be applied against up to $1,192 of weekly earnings ($62,000 per year), as opposed to up to $4,807 weekly ($250,000 per year) in the previous version approved by the House Ways and Means Committee. But beyond these and some other changes, the overall structure of the new version is basically the same as the Ways and Means Committee version.

Specifically, this universal paid leave benefit would be available through three different channels:

1. A federal program, to be set up and operated by the Social Security Administration, that would provide benefits directly to anyone who meets the eligibility criteria and is not otherwise covered by a legacy state or eligible employer program.
2. A legacy state program that was enacted before the BBBA, and that provides at least 4 weeks of paid family and medical leave for at least all the same reasons and at wage replacement rates at least as generous as the federal program.
3. An "eligible employer" program that provides effectively the same minimum benefit as the federal program and meets certain other requirements, including job protection and group health plan benefit continuation for employees taking leave.

Legacy states and eligible employers would be eligible for grants from the federal government to offset a significant portion of the costs of providing up to 4 weeks of paid family and medical leave benefits.

More about Eligible Employer Programs

Employers that want to qualify as "eligible employers" would have to make the paid family and medical leave benefit available to all employees and for all the same reasons as the federal program. They could provide these benefits pursuant to an insured or self-insured program.

Employers that choose to self-insure would be required to obtain a surety bond to guarantee benefits. Also, the federal grants they qualify for would be paid by March 31 of the succeeding year.

In either case, the grant would replace up to 90% of the employer's cost of providing the 4-week benefit

What's Next?

The House-passed bill will now go to the Senate, where it faces procedural hurdles and other challenges. In particular, Senator Joe Manchin (D-WV) has consistently objected to the paid family and medical leave proposal and so far has not shown signs of changing his position. Because all 50 Senate Democrats will be needed to pass a bill, Senator Manchin's opposition could force paid leave to be dropped from the BBBA.

Additional updates on this developing story will be featured in upcoming editions of Rewards Policy Insider.

EEOC Issues Guidance on Religious Objections to COVID-19 Mandates

Many employers are now required to mandate their employees be vaccinated for COVID-19, and in some cases are required to impose such mandates, but still may have to provide accommodations for people who do not want to be vaccinated due to a sincerely held religious belief. The EEOC has recently issued guidance on handling these religious-based accommodation requests.

Background

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination based on religion. This includes a right for job applicants and employees to request an exception, called a religious or reasonable accommodation, from an employer requirement that conflicts with their sincerely held religious beliefs, practices, or observances ("religious beliefs").

If an employer shows that it cannot reasonably accommodate an employee's religious beliefs without undue hardship on its operations, the employer is not required to grant the accommodation.

According to the Supreme Court, requiring an employer to bear more than a "de minimis," or a minimal, cost to accommodate an employee's religious belief is an undue hardship. For this purpose, costs include not only direct monetary costs but also the burden on the employer's business. In this case, the EEOC advises that would include the risk of spreading COVID-19 to other employees or to the public.

Examples of undue hardship include the religious accommodation impairing workplace safety, diminishing efficiency in other jobs, or causing coworkers to

carry the accommodated employee's share of potentially hazardous or burdensome work.

EEOC Guidance

According to the most recent guidance issued by the EEOC, which has enforcement jurisdiction with respect to Title VII, employees can ask for an accommodation by letting their employer know there is a conflict between their sincerely held religious beliefs and the employer's COVID-19 vaccination requirement. Once put on notice, employers should be prepared to tell the employee who to contact and/or what procedures they will need to follow in order to request a religious accommodation.

Generally, employers should assume that an employee's request for a religious accommodation is based on their sincerely held religious beliefs. But employers do have some leeway to seek additional information if the employer has an objective reason for questioning the religious nature or the sincerity of a particular belief.

An employee's request is not invalid simply because it is based on religious beliefs that are not familiar to the employer. However, religious accommodations are not available purely for social, political, or economic views, or for personal preferences.

The fact that an employer grants a religious accommodation does not mean that it cannot later change or discontinue it. This might happen, for example, if the employer stops using the accommodation for a sincerely held religious belief or the accommodation poses an undue hardship due to changed circumstances.

The full text of the EEOC's guidance is available here.