

Government Relations Update – December 3, 2021

1. Latest on the OSHA Emergency Temporary Standard and the Federal Contractor Mandate

The Biden Administration has suffered numerous setbacks in most of its vaccine mandate efforts. Courts have enjoined the OSHA ETS, the federal contractor Executive Order (EO), and the health care worker mandate. And the Federal government has had to modify its own mandate that federal employees be vaccinated.

OSHA ETS:

As you know, the litigation that we joined challenging the ETS resulted in a 5th circuit court of appeals stay, blocking the mandate. Because litigation was filed in multiple circuits, the court held a lottery to determine which circuit would handle the cases. The 6th circuit court of appeals won the lottery, and all of the cases have been consolidated in that circuit.

The government filed a motion with the 6th circuit to vacate the 5th circuit stay, and a motion asking the court to set a very expedited schedule for filing briefs with the court. We have filed – on the Friday after Thanksgiving – an opposition to the expedited briefing schedule, and will shortly file an opposition to the government's motion to vacate the stay. Our opposition brief to that motion will have to be filed by December 7th, but that date could move up.

At this point it appears that the stay will remain in effect until mid-December, although the 6th circuit could take the unexpected action lifting the stay at any time. We will let you know as soon as any decisions are made in this case.

Federal Contractor Executive Order (EO) Mandate:

As we reported previously, on November 10th the Safer Federal Workforce Task Force revised its [Guidance](#) on the EO, extending the deadline for worker vaccinations to January 18th. (Some press reports are still erroneously citing the January 4th date.)

More significant, yesterday the U.S. district court for the eastern district of Kentucky granted a preliminary injunction against the federal contractor mandate. The injunction strikes down the EO only in the three plaintiff states: Kentucky, Ohio, and Tennessee.

In his 29-page [Order](#), the judge wrote:

Can the president use congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors? In all likelihood, the answer to that question is no. So, for the reasons that follow, the pending request for a preliminary injunction will be GRANTED.

As of this update, we do not know if the government will appeal this injunction. Nor are we aware of litigation challenging the contractor mandate nationwide. We are following this closely to determine if there are other legal challenges that may be of interest to NAW members and in which NAW might participate. We will obviously keep you informed as we learn more.

Health Care Worker Mandate

The Center for Medicaid and Medicare Services (CMS) has implemented an interim final rule requiring that health care workers be vaccinated. While this does not directly impact most NAW members, we thought we'd share information on court action on this mandate since it is obviously related to the business mandates. On Monday, November 29th, a federal judge in Missouri [issued an injunction](#) against the rule in 10 states, and on Tuesday, November 30th, a federal judge in Louisiana [enjoined the rule nationwide](#). In both cases the issue of government overreaching its statutory authority was raised. In the rule enjoining the mandate nationwide, the court said:

Implicit in determining whether a preliminary injunction should be granted is determining whether the Government Defendants have the statutory and/or constitutional authority to implement the CMS Mandate. Finding that the Government Defendants do not have the authority to implement the CMS Mandate, this Court GRANTS Plaintiff States' Motion for Preliminary Injunction [Doc. No. 2] and IMMEDIATELY ENJOINS and RESTRAINS the Government Defendants from implementing the CMS Mandate

Federal Worker Mandate

In the one area where the government's authority would appear clear – a mandate that federal employees get vaccinated – the government is facing implementation challenges.

As the Washington Post [reported](#):

“Although the vaccination mandates issued by President Biden in September defined ‘fully vaccinated’ as at least two weeks beyond the sole or second shot, depending on the vaccine, the data released Wednesday characterize employees as vaccinated if they have received at least one dose

And CNN [reported](#) this week that, despite the November 22nd vaccination deadline, “the Administration is allowing agencies to delay the firing of unvaccinated federal employees until after the holidays.”

We will keep you posted on developments on all these matters. In the interim, you may find this analysis of value:

- **From Littler Law Firm:** Federal Contractor and Subcontractor Vaccine Mandate Temporarily Enjoined in Kentucky, Ohio, and Tennessee

A federal court has issued an order granting a preliminary injunction to block the enforcement of the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee. To read more, click [HERE](#).

2. Latest Action on Senate Build Back Better (BBB), Debt Limit & Continuing Resolution (CR)

With only 29 days left until the end of the year, time is quickly running out for Democrats to wrap up work on the Build Back Better act. Additionally, there are only two days left until federal agencies run out of money and only 13 days left until the debt ceiling needs to be raised. In short, December is going to be an absolute mess on Capitol Hill.

Build Back Better (BBB): In the Senate, all eyes remain focused on Sen. Joe Manchin (D-WV) as the Build Back Better (BBB) act, President Biden's top legislative priority, continues to be negotiated

between Senate Majority Leader Schumer and Minority Leader McConnell. Sen. Manchin has met separately with both Senate Leaders but hasn't committed to any timeline for bill consideration. Sen. Manchin said he's still reviewing the version of the legislation passed two weeks ago by the House and has made no decisions about whether he can support a bill after the Senate completes its own draft. Leader Schumer has stated repeatedly that he wants this bill voted on before Christmas.

Continuing Budget Resolution (CR): Government funding expires this Friday, December 3rd. As of this GR Update, negotiations continue between Democrats and Republicans as both sides pledge to avoid a government shutdown by the end of the week. Early this morning, House Democrats released a short-term spending bill to keep the government agencies funded through Feb. 18th, appeasing House Republicans. A vote in the House is expected sometime this evening.

However, this bill would require cooperation by Senate Republicans. On Wednesday, Republican Senator Mike Lee (UT) said that he would be unwilling to support a CR unless the bill halts funding for President Biden's vaccine mandate. "I'm sure we would all like to simplify the process for resolving the CR, but I can't facilitate that without addressing the vaccine mandates," Lee told Politico. "Given that federal courts across the country have raised serious issues with these mandates, it's not unreasonable for my Democratic colleagues to delay enforcement of the mandates for at least the length of the continuing resolution." Republican Senator Ted Cruz (TX) also announced yesterday he will oppose the CR if it doesn't halt Covid-19 vaccine mandate.

Despite the threat in his party to holdup a stopgap measure over vaccine mandates, Senate Leader McConnell pushed back against his colleagues during a Fox News interview this morning. "I don't think shutting down the government over this issue is going to get an outcome. It will only create chaos and uncertainty," McConnell says on Fox News. Leader McConnell continued by saying the Senate will hold a vote next week on vaccine mandates.

If a government shutdown does happen, it would occur over the weekend and have very limited -- if any -- real-world impact.

Debt Limit Negotiations: Ongoing discussions surrounding lifting the debt ceiling continue between Senate Majority Leader Schumer and Minority Leader Mitch McConnell. Treasury Secretary Janet Yellen has warned that the federal government could run out of the ability to borrow more money by Dec. 15th.

Testifying before the Senate Banking Committee on Tuesday, Secretary Yellen reiterated her previous projections regarding the Dec. 15th deadline. The Treasury Department has been using what it calls extraordinary measures, such as suspending certain investments, to conserve cash as it bumps against the \$28.88 trillion borrowing limit set by Congress. "There's uncertainty about where we will be on Dec. 15 and there are scenarios in which we can see it would not be possible to finance the government," Sec. Yellen said. "That doesn't mean that there are not also scenarios in which we can, but we think it's important for Congress to recognize that we might not be able to and therefore to raise the debt ceiling expeditiously."

Both Democrats and Republicans want to lift the debt limit beyond the 2022 elections. However, Minority Leader McConnell is under a lot of pressure to force Democrats to commit to raising the debt limit by a dollar amount instead of allowing a suspension of the borrowing limit to a date certain.

3. Latest on Mandatory Paid Leave Program in House Reconciliation Bill

As you may already know, the House-passed Build Back Better (BBB) bill included the creation of a program that would provide four weeks of paid leave for all workers (both private and public). Based on the House-passed language, the new entitlement program would go into effect at the beginning of 2024 and would apply to every employer of any size. It further would require employers to provide this leave to all employees regardless of job type or length of employment. Although the program was scaled back to four weeks from the originally proposed twelve weeks, the Congressional Budget Office estimates that the paid leave provisions would cost \$205.5 billion over ten years.

Based on the analysis from *Bloomberg Government* (which you can view [here](#)), the paid leave provisions in the House Passed BBB:

- Would allow eligible workers to be entitled to as many as four weeks for the birth or adoption of a child, to care for a family member with a serious health condition, or an employee's own health condition;
- The benefits are tied to the individual's average weekly earnings and hours;
- If a state has a preexisting leave program, the state will receive grants to cover the costs of the benefit (currently, only nine states and Washington DC have statewide paid leave programs);
- If an employer provides paid leave, they will receive grants to cover 90% of their paid leave benefit for up to four weeks.

The paid leave provisions in the House-passed bill are not certain to remain in the bill as the Senate modifies it. Senator Joe Manchin (D-WV) has voiced his opposition to including the paid leave provisions in the Democrat's reconciliation BBB legislation. The Senator says that he supports a paid leave program but feels that it should be done in a bipartisan manner rather than through the partisan reconciliation process. The Senator's opposition is significant enough that President Biden initially dropped the provision from his framework before House Democratic leadership slipped it back into the bill just before passage. Additionally, Manchin's preferred "payfor" for the program is a payroll tax, which directly conflicts with President Biden's promise not to raise taxes on middle-class families.

NAW continues to monitor the Senate negotiations regarding the BBB and will update as new developments arise.

In the interim, we would appreciate your feedback on whether and how a federal mandated leave program would impact your business.

4. Employer Resources

As the Coronavirus Pandemic continues to impact the United States economy and businesses across the nation, it can be hard to decipher how new regulations and laws may impact your business. To help you manage these issues NAW is providing information about reports, webinars, and seminars that you may find useful:

From ***Littler Law Firm***: Dear Littler: Can we ban the unvaccinated from our office parties?

The holiday season is upon us, and we'd like to celebrate this year by holding an actual office party like we did in the "before" times. Can we make sure only vaccinated people attend? To read more, click [HERE](#).

You can find previous updates by [clicking here](#).

Many thanks—

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