

Government Relations Update – December 10, 2021

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

OSHA Emergency Temporary Standard (ETS):

In the courts: As we've reported before, the legal challenge in which NAW is a petitioner has been consolidated in the 6th circuit court of appeals with other cases challenging the ETS filed in other circuits. At this point, the stay ordered by the 5th circuit in our case remains in place.

The government has filed a motion with the 6th circuit asking them to vacate the stay. On Tuesday, December 7th, our attorneys filed our opposition to that motion, and the government has until today, December 10th, to file their reply to our opposition.

We anticipate that the 6th circuit will act expeditiously on the motions related to the stay; it is possible we could have a decision this weekend but it's more likely the court will rule early next week. The court also has before it the motions filed by other petitioners asking for en banc consideration of the case. That circuit is known to be reluctant to order en banc consideration rather than having the usual 3-judge panels hear cases, and an en banc proceeding would slow the process down a bit. We anticipate a ruling on that motion in the near term, too.

If the 6th circuit leaves the 5th circuit stay in place, we expect the government to seek immediate review of the case by the Supreme Court, in which event our attorneys will be prepared to oppose that request for Supreme Court review; if the government should win in the 6th circuit and the court vacates the stay, we will seek Supreme Court review and ask for an immediate stay, and the government will almost certainly oppose our motion.

In Congress: Indiana Republican Senator Mike Braun (who is one of only two wholesaler-distributors in the Senate) led a successful effort in the Senate to pass a "Congressional Review Act" (CRA) resolution repealing the OSHA ETS. CRAs are "privileged" in the Senate so action on them cannot be blocked by the majority party, and they require only a simple majority vote. Democratic Senators Joe Manchin (WV) and Jon Tester (MT) both joined the 50 Republicans in voting for the CRA, which passed Wednesday evening by a vote of 52-48. Senator Braun referenced NAW in his closing remarks on the Senate floor prior to the vote, which you can watch [HERE](#).

NAW sent a "key vote" letter to the Senate supporting the CRA, which you can read [HERE](#).

And *Politico* ran an interesting story on the Senate CRA vote which you can read [HERE](#).

We don't yet know if/when the House will take up this CRA, nor if enough Democrats will support it to get it passed. And it would then go to the President's desk, where a veto is virtually certain.

Despite the unlikelihood of the CRA becoming law and repealing the ETS, it is a significant effort by Senator Braun, especially since it will have garnered Democrat votes against one of the President's signature policies – and hopefully will discourage the Administration from further regulatory overreach.

Federal Contractor Mandate:

In yet another setback for the Administration on its federal contractor mandate – and a significant setback – a federal district court judge in Georgia has issued a nationwide injunction blocking the mandate. The previous court injunctions were limited to Kentucky, Ohio, and Tennessee.

In this new case, the Associated Builders and Contractors (ABC) – a large national construction industry trade association – had intervened in the litigation and filed the motion for a preliminary injunction. Because ABC has tens of thousands of members, with a significant number of federal contractor members in all 50 states, the court enjoined the mandate nationwide.

The court's 28-page order is unambiguous, and addresses not only the government over-reaching its authority, but the burden the EO imposes on employers. A few excerpts follow, and you can read the order [HERE](#).

While the Procurement Act explicitly and unquestionably bestows some authority upon the President, the Court is unconvinced, at this stage of the litigation, that it authorized him to direct the type of actions by agencies that are contained in EO 14042.

. . . EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead, in application, works as a regulation of public health, which is not clearly authorized under the Procurement Act.

EO 14042 . . . has already required and will continue to require extensive and costly administrative work by employers and will force at least some individuals to choose between getting medical treatment that they do not want or losing their job (and facing limited job replacement options due to the mandate).

[T]he Court heard from three witnesses who described the incredibly time-consuming processes they have undertaken (typically requiring major input and assistance from numerous other departments across their institution) to identify the employees covered by the mandate and to implement software and technology to ensure that those employees have been fully vaccinated (or have requested and been granted an accommodation or exemption) by the deadline in January.

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

From **Reed Smith Law Firm**: Federal contractor vaccine mandate temporarily halted nationwide

On December 7, 2021, a federal court in Georgia issued a nationwide injunction prohibiting the federal government from enforcing Executive Order 14042 – the vaccine mandate for federal contractors and subcontractors. The federal contractor mandate applies to roughly one-quarter of the U.S. workforce and affects companies that do business with the federal government. The States... [Continue Reading](#)

From **Littler Law Firm**: Federal Contractor and Subcontractor Vaccine Mandate Enjoined Nationwide

On December 7, 2021, a federal court in Georgia issued an order enjoining the president, the Safer Federal Workforce Task Force, and 18 executive agencies and departments from enforcing the vaccine mandate that was established for federal contractors. To read more, click [HERE](#).

From **Reed Smith Law Firm**: NYC to mandate vaccinations for all private-sector workers

New York City Mayor Bill de Blasio announced that, effective December 27, 2021 and as part of an expansion of the city's "Key to NYC" program, all private-sector employers in the Big Apple will be required to adopt a mandatory COVID-19 vaccination policy for their employees. The expanded program will also include additional... [Continue Reading](#)

From **Nixon Peabody Law Firm**: Federal COVID-19 vaccination mandates on hold

Courts have now temporarily halted the three federal COVID-19 vaccination mandates impacting businesses. What's the Impact? To read more, click [HERE](#).

2. Latest on Senate Action on Build Back Better (BBB) Reconciliation Bill

President Biden's social spending proposal, the "Build Back Better" (BBB) bill, which the House has passed, continues to languish in the Senate. Senate Majority Leader Chuck Schumer (D-NY) has been vocal about his intention to pass the enormous spending bill before Christmas. However, that timeline is more than ambitious because the Senate must complete action on must-pass legislation – the National Defense Authorization Act and increasing the nation's debt limit – before the end of the year.

And there are two significant hurdles Senator Schumer must cross to get the BBB done: (1) he still does not have commitments from all 50 Senate Democrats to vote for the bill, which he must have to pass it; and (2) the bill has not yet gone through the process known as a "Byrd Bath" in which the Senate Parliamentarian reviews the bill to determine what provisions must be excluded because they are out of order under the reconciliation process. With the Senate Parliamentarian this week beginning the first stages of the complex review of the legislation, it is anticipated by many in Washington that the process could take well into next week – or longer.

While Senator Schumer has almost no control over the Byrd Bath process, he has at least a little more control over the hurdle of whipping all 50 Senators in his caucus to support the BBB. However, Senator Joe Manchin (D-WV) still has not given his public support for the BBB and, in fact, has poured cold water on various aspects of the legislation on a weekly (if not daily) basis. For example, Senator Manchin has vocally opposed including the current "paid leave" provisions in the bill because he strongly believes that paid leave legislation should be bipartisan and not part of the partisan fast-track reconciliation process.

Additionally, this week the Senator continued to raise his concern about the cost of the BBB. During a Wall Street Journal Summit this week, the Senator withheld support for the bill because of concerns over inflation and the bill's spending. He said, "the unknown [inflation] we're facing today is much greater than the need that people believe in this aspirational bill that we're looking at and we've got to make sure we get this right."

He also expressed significant frustration about the pay-for gimmicks that the House used to artificially bring the cost down. Some analysts have estimated that the real cost of the bill is closer to \$5 trillion than \$2 trillion. Senator Manchin echoed that concern about the real cost of the bill either increasing the debt or forcing further tax increases:

[O]ne [program] goes for three years, one goes for one year...one might go for the full ten years, do they not intend for those programs to last the full ten years? Well, if you don't intend for that to happen, what is the real cost? Because we're either going to debt finance it if we're not going to pay for it or come back and change the tax code again.

Further complicating the Majority Leader's mission, Arizona Democratic Senator Kyrsten Sinema is also not yet on board with the BBB, continuing to raise concern about the tax increases, and specifically voicing opposition to taxes on employers – both C Corporations and pass-throughs.

Once you take a step back and look at all the headwinds pushing against the BBB passage before Christmas, it is clear that it may be an unattainable goal. According to reports, many Democrats privately say that it will require a true Christmas miracle to pass the bill based on the current ambitious timeline. As for passage of the bill in general, that will entirely depend on the support of the Senate's moderate Democrats and what concessions their more liberal colleagues are willing to make.

3. Latest from the National Labor Relations Board (NLRB)

As expected, the Biden NLRB continues to take active measures to reverse pro-business decisions made by the Trump-majority Board. We anticipate working with our allies in the Coalition for a Democratic Workplace (CDW), which NAW helps manage, to challenge many of the NLRB's initiatives.

We will keep you apprised of these efforts as they occur. To that end, earlier this week the Board [invited](#) parties to file *amicus* briefs in *American Steel Construction*, 371 NLRB No. 41 (2021), on "whether the Board should reconsider its standard for determining if a petitioned-for bargaining unit is an appropriate unit."

As you may remember, the Obama Board issued a decision in the *Specialty Healthcare* case in 2011 that changed the way "appropriate bargaining units" are determined, creating a standard by which a union could organize a small minority of the workers in a workplace – known as micro-bargaining units. The *Specialty* standard resulted in the recognition of numerous micro units, among the most well known a unit consisting of just the fragrance counter workers in a Macys store.

The Trump NLRB reversed the *Specialty* decision, restoring the pre-Obama "community of interest" standard for determining appropriate units.

It is clear that the current Board plans to move back toward a "Specialty" standard to make it easier for unions to win certification elections by recognizing micro bargaining units. NAW will join CDW in filing an *amicus* brief in this case, and we will keep you apprised of this and other anticipated NLRB actions this year.

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

Many thanks—

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