

## Government Relations Update – January 4, 2022

### **1. Latest on OSHA Emergency Temporary Standard (ETS) – Litigation and comments**

As we reported just before Christmas, our litigation challenging the ETS is scheduled for oral argument before the Supreme Court at 10:00 AM on Friday, January 7th.

**Our attorneys have offered to brief petitioners' members on the case after the oral argument on Friday. If you would be interested in participating in a briefing on the case early next week, please email me at [jwest@naw.org](mailto:jwest@naw.org) and I'll try to get one scheduled.**

To recap:

- On Friday, December 17th, the 6th circuit court of appeals issued an order vacating the 5th circuit's stay of the OSHA ETS
- About an hour later, our attorneys filed our application for a stay in the Supreme Court (there were 8 applications for stay filed)  
OSHA announced that it would postpone enforcement of the mandate given the court schedule
- The Supreme Court docketed our application, and applications for stay of the health care worker mandate, for oral argument on January 7th
- Only two of the applications for stay in our case – ours and one filed by a number of states – were docketed for argument
- Our case will be heard first on Friday, at 10:00, for one hour; followed by arguments in the health care worker mandate case
- As our attorneys anticipated, the Supreme Court has not acted on the applications for a stay, presumably because OSHA postponed enforcement of the ETS awaiting the oral arguments in the case on January 7th
- After the Court docketed the case for oral argument, the Supreme Court asked the government to submit a response to our application by 4:00 on December 30th, and our attorneys filed a reply to the government's response at 10:00 AM on January 3rd.

For anyone interested in reading them, the government's (87-page) response brief is [HERE](#) and our reply brief is [HERE](#) (NOTE: the government's brief is lengthy because they had to respond to the arguments made by other applicants in addition to the business-focused arguments raised in our case.)

There were several amicus briefs filed in the case, including one signed by 47 Republican senators and 136 House Republicans – and it is very unusual for that large a group of Members of Congress to jointly file a brief in a court case. You can read the Member of Congress amicus brief [HERE](#).

*Of note: this amicus effort in the Senate was led by Indiana Senator Mike Braun. He also led the successful effort to pass a Congressional Review Act resolution to repeal the ETS (that resolution has not yet passed in the House). Senator Braun is one of just two wholesaler-distributors in the U.S. Senate and has been one of the most effective pro-business advocates. I'd encourage you to thank him for his effort on behalf of business, and particularly our industry. If you would like to thank him for the effort, please email Katie Baily at [Katie\\_Bailey@Braun.senate.gov](mailto:Katie_Bailey@Braun.senate.gov).*

Finally, last week NAW filed a comment letter with OSHA on the ETS, in case the stay is not granted and/or the rule is not overturned, and the agency proceeds with a rulemaking leading to a permanent rule. Many thanks to the NAW member companies that provided the feedback for our use in our [comment letter](#).

**Again, please let me know if you would be interested in participating in a briefing next week on the case by our attorneys.**

## **2. Latest on Senate State of Play**

The Senate returns this week with a full plate of agenda items they must take on. The first two items are the continued debate on President Biden's Build Back Better (BBB) tax and spend package and a controversial "voting rights" bill.

As you know, as 2021 came to a close, Senate Democrats failed to secure enough votes to pass the BBB. This is in large part a testament to NAW and the greater business community's efforts to highlight the glaring flaws of the BBB through a targeted media campaign over the past several months. And obviously to the public announcement by West Virginia Democrat Senator Joe Manchin that he would not vote for the bill.

However, now is not the time to let up on these efforts. Senator Manchin ultimately refused to support the legislation because he has serious objections to the high levels of spending in the bill, and particularly to the accounting "gimmicks" used to bring the final price of the bill down. But Senator Manchin has been equally vocal about his support for increased taxes to pay for the legislation to reduce the so-called accounting gimmicks. He has called for repeal of many of the tax cuts enacted in the 2017 Tax Cuts and Jobs Act, and for significant tax increases on "the rich."

Should the Democratic leadership gain the support of the Progressives on a smaller bill with fewer gimmicks and more tax increases to pay for it, the bill could win Senator Manchin's support. In that case, all eyes will turn to Arizona Democratic Senator Kyrsten Sinema, who has been a staunch opponent of tax increases on the employer community. However, although Senator Sinema has opposed any changes to the 199(A) pass-through deduction, she has been reluctant to support exempting pass-through income from the punitive income tax surcharge.

It is very hard to imagine Democratic majorities in both houses of Congress denying President Biden a victory on some version of the BBB, as it is now his top legislative priority for 2022. But if they do thread the needle and get something passed, it will certainly be a much smaller bill, with only a fraction of the massive spending and crippling tax increases they first proposed. And while most political pundits believe the odds are that SOMETHING will pass, NAW and our allies in the business community will continue our media campaign to educate voters and persuade moderate Democrats to oppose the bill.

In addition to trying to navigate a way to passing the BBB, the Majority Leader sent a "Dear Colleague" letter to members of the Senate in which he said he would bring up a bill to revamp the country's voting rights on or before January 17th. Schumer further says in the letter that should this vote fail to gain the 60 votes needed to shut down a filibuster, he will move forward with an effort to change the Senate rules and eliminate the filibuster, at least on this "voting rights" bill. However, for this effort to succeed Senator Schumer will, once again, need complete and total unity from his caucus, and Senators Manchin and Sinema have continued to publicly state that they do not support changing the filibuster rules.

Should the Senate complete all the above tasks in January; they will almost immediately be forced into the deadline to fund the government and prevent a shutdown by February 18th. So needless to say, if Congress' New Years' resolution was to stop lurching from crisis to crisis, they (like many of us) have already failed to keep that particular resolution.

Many thanks—

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