Client Alert News Flash

<u>Latham & Watkins Executive Compensation, Employment & Benefits Practice</u>

January 14, 2022 | Number 2921

US Supreme Court Stays OSHA's COVID-19 Vaccine-or-Test Mandate

The stay means employers are currently not required to mandate vaccines or testing under OSHA rules.

Key Points:

- On January 13, 2022, the US Supreme Court stayed the vaccine-or-test emergency temporary standard (ETS) that the US Occupational Safety and Health Administration (OSHA) issued in November 2021.
- The stay will be in effect until the claims contesting the ETS' legality that are pending in the US Court of Appeals for the Sixth Circuit are fully resolved.
- At this time, employers do not need to comply with the ETS and OSHA cannot enforce it.

As Latham & Watkins reported in a previous <u>Client Alert</u>, on November 5, 2021, OSHA published an <u>ETS</u> that requires covered employers to take affirmative steps to address COVID-19 safety in the workplace, including adopting a policy that requires employees to be fully vaccinated against COVID-19 or that gives employees a choice between being vaccinated against COVID-19 or being subject to COVID-19 testing and face-covering requirements.

Legal challenges quickly cast doubt over the ETS' future. On November 12, 2021, the Fifth Circuit issued a nationwide injunction staying the ETS in a case that was subsequently transferred to the Sixth Circuit and consolidated with other cases challenging the ETS. Following Latham's *Client Alert*, on December 17, 2021, the Sixth Circuit lifted the Fifth Circuit's stay. With the stay removed and little time to comply with the ETS, OSHA revised the ETS' enforcement deadlines, allowing covered employers until January 10, 2022, to develop and adopt a compliant vaccination policy and maintain a roster of each employee's vaccination status, and until February 9, 2022, to require regular testing of employees who are not fully vaccinated.

On January 7, 2022, the US Supreme Court heard oral arguments on whether to impose a stay on the ETS. On January 13, 2022, the Court issued a decision staying the ETS pending the outcome of the cases in the Sixth Circuit and any petitions for writs of certiorari to the Court, if sought. Thus, until the Sixth Circuit issues a final decision on the legality of the ETS, and the time for petitions for writs of certiorari have expired or any writ petitions have been disposed of, employers need not comply with the ETS, and OSHA may not enforce it.

Latham & Watkins operates worldwide as a limited liability partnership organized under the laws of the State of Delaware (USA) with affiliated limited liability partnerships conducting the practice in France, Hong Kong, Italy, Singapore, and the United Kingdom and as an affiliated partnership conducting the practice in Japan. Latham & Watkins operates in Israel through a limited liability company. Latham & Watkins operates in South Korea as a Foreign Legal Consultant Office. Latham & Watkins works in cooperation with the Law Office of Salman M. Al-Suddari in the Kingdom of Saudi Arabia. Under New York's Code of Professional Responsibility, portions of this communication contain attorney advertising. Prior results do not guarantee a similar outcome. Results depend upon a variety of factors unique to each representation. Pleased direct all inquiries regarding our conduct under New York's Disciplinary Rules to Latham & Watkins LLP, 1271 Avenue of the Americas, New York, NY 10020-1401, Phone: +1.212.906.1200. © Copyright 2022 Latham & Watkins. All Rights Reserved.

Although the OSHA ETS is not in effect at this time, employers may be required under other laws to mandate vaccines (subject to accommodation obligations), such as under the federal vaccine mandate for healthcare workers and the New York City Order requiring vaccines. The vaccine mandate for federal contractors and subcontractors is currently not in effect as it was stayed by a court in December 2021.

Employers that are not required to mandate vaccines may still choose to do so, subject to applicable state or local laws restricting or banning vaccine mandates by employers, such as in Florida, Montana, Texas, and Utah. Employers mandating vaccines should be aware of their obligations to accommodate employees who are unable to get vaccinated due to disability, religion, or pregnancy.

Employers should reach out to the Latham & Watkins employment team with any questions about vaccine mandates and bans.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Nineveh Alkhas

nineveh.alkhas@lw.com +1.312.876.7724 Chicago

Linda M. Inscoe

linda.inscoe@lw.com +1.415.395.8028 San Francisco

Joseph B. Farrell

joe.farrell@lw.com +1.213.891.7944 Los Angeles

Laura D. Waller

laura.waller@lw.com +1.312.876.7629 Chicago

You Might Also Be Interested In

New Restrictions on Non-Competes and Non-Solicits: What Employers Should Know

10 Employer Obligations Required by OSHA's COVID-19 Vaccine-or-Test Mandate

10 Q&As on D.C.'s Non-Compete Ban

Reminder: Employers Must Report 2021 ISO and ESPP Transactions

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's Client Alerts can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham, visit our subscriber page.