



Labor & Employment Issues In Focus

Pitta LLP
For Clients and Friends
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SIXTH CIRCUIT UPHOLDS OSHA LARGE EMPLOYER VACCINATION MANDATE, DISSOLVES FIFTH CIRCUIT STAY NATIONWIDE

Late Friday, December 17, 2021, a divided panel of the United States Court of Appeals for the Sixth Circuit upheld the Biden Administration's Occupational Safety and Health Administration ("OSHA") vaccination mandate for employers employing 100 or more workers and lifted a stay of that mandate previously imposed by the Fifth Circuit Court of Appeals. *In re: OSHA Covid Rule*, No. 21-07000, (6th Cir., December 17, 2021). The mandate now becomes effective January 10, 2021, barring intervention by the United States Supreme Court.

OSHA issued its Emergency Temporary Standard on November 5, 2021 requiring all employers with 100 or more employees to ensure vaccination or mask and weekly testing policy. A phalanx of Republican led states and business groups won a preliminary stay of the mandate from a conservative panel of judges in the Fifth Circuit Court of Appeals which deemed the mandate beyond OSHA's authority since it extended outside the workplace. The Court also found that the mandate imposed irreparable harm on businesses that could fail and employees losing employment, all without a present "grave danger" in their view.

Appellate Court procedure consolidated all actions challenging or otherwise regarding the mandate from virtually every Circuit Court to the Sixth Circuit for decision. There, Judge Jane B. Stranch (Obama appointee), joined by Judge Julia Smith Gibbons (Bush appointee) rejected the arguments accepted by the Fifth Circuit and lifted the stay, allowing the mandate to go effective nationwide. Judge Stranch minced no words in accepting OSHA's argument of a "grave danger" satisfying the statutory need for an emergency order. "The record establishes that COVID-19 has continued to spread, mutate, kill, and block the safe return of American workers to their jobs. To protect workers, OSHA can and must be able to respond to dangers as they evolve", inside the workplace, even if the risk also exists outside the workplace, she explained. Judge Stranch dismissed arguments that the mandate failed as both constitutionally "overinclusive" and "underinclusive", responding that the Constitution does not require "pinpoint precision", only a valid relationship of the mandate to its goal, a standard easily met by OSHA. Significantly, Judge Stranch identified many of Plaintiffs' arguments as attacks on the federal government's power to regulate commerce, a right she pointedly traced back to the National Labor Relations Act. Judge Gibbons underscored the point in a one-page concurrence "... we do not substitute our judgment for that of OSHA, which has been tasked by Congress with policymaking responsibilities." This "limitation is constitutionally mandated" she stressed. Judge Joan Larsen (Trump appointee) disputed OSHA's authority in a dissent mirroring the Fifth Circuit's stay decision.

Reaction has been swift. OSHA welcomed the decision and announced that the effective date for non-compliance would be moved back from the original January 4 to January 10, 2022, with the testing requirement moved back further to February 9, 2022, “so long as an employer is exercising reasonable good faith efforts to come into compliance....” The plaintiff states and businesses immediately filed with the Supreme Court for an emergency stay which will likely not be decided until early January by Justice Kavanaugh. In the past, a Supreme Court 6 to 3 majority has denied appeals from Indiana, Maine, and New York vaccination mandates, but swing conservative Justices Kavanaugh and Barrett may be less inclined to favor sweeping federal government authority. As this case illustrates, decisions in this unprecedented crisis may turn more on judicial and political philosophies than settled law or authority.

NEW YORK CITY PUBLISHES GUIDANCE FOR SWEEPING COVID-19 VACCINE MANDATE EFFECTIVE DECEMBER 27, 2021

On December 15, 2021, the City of New York published “Frequently Asked Questions for Covered Entities” (“FAQ”) clarifying and expanding the order of the Commissioner of the Department of Health and Mental Hygiene (“DOHMH”) to require COVID-19 vaccinations for private sector workers by December 27, 2021, to-date the most sweeping municipal mandate in the nation.

According to the FAQs, on December 27, 2021, workers must provide or have provided proof to their employers of having received at least one dose of a COVID-19 vaccine. Workers will be excluded from the workplace unless they have an exception to the vaccine mandate based upon religious or medical accommodation. The FAQs provide employers with guidance on how to keep a record of each worker’s proof of vaccination or a worker’s reasonable accommodation to the vaccine. The FAQs also provide guidance on the limited circumstances under which an unvaccinated worker may enter the workplace briefly for visits.

The DOHMH created a one-page attestation sign that employers must complete affirming compliance with the order. The FAQs contain guidance on the how employers can verify proof of vaccinations including acceptable documents. The FAQs state that employers do not need to fire or discipline employees who refuse to comply with the order. As long as the worker is out of the workplace, it is the employer’s decision whether to discipline or fire such worker, or if the worker can contribute to their business while working remotely. The FAQs warn that “inspectors from various agencies will begin enforcing the order on December 27, 2021. All inspectors, no matter which agency they are from, will be inspecting for compliance with the same standards.”

This is a link to the FAQs:

<https://www1.nyc.gov/assets/counseltothemayor/downloads/Workplace-FAQ.pdf>.

Please do not hesitate to contact the Pitta LLP attorney with whom you work, if you have any questions.

EEOC ISSUES NEW TECHNICAL GUIDANCE FOR COVID-19 AS A DISABILITY

On December 14, 2021, the United States Equal Employment Opportunity Commission (“EEOC”) updated its COVID-19 technical guidance adding a new section on COVID-19 as a disability. The Updated EEOC technical guidance provides broader information than a July guidance from the Department of Justice and the Department of Health and Human Services and may fuel a surge in litigation claims alleging discrimination based on COVID-19 experience as a disability.

According to the Center for Disease Control, “some people experience a range of new or ongoing symptoms that can last weeks or months after first being infected with the virus that causes COVID-19. Unlike some of the other types of post-COVID conditions that tend only to occur in people who have had severe illness, these symptoms can happen to anyone who has had COVID-19, even if the illness was mild, or if they had no initial symptoms.

The EEOC technical guidance says that an applicant or employee’s COVID-19 “may cause impairments that are themselves disabilities under the American with Disabilities (“ADA”), regardless of whether the initial case of COVID-19 itself constituted an actual disability.” However, the technical guidance also says that an applicant or employees with mild COVID-19 symptoms that resolve in a few weeks with no consequences – “will not have an ADA disability that could make someone eligible to receive a reasonable accommodation.”

Further, an applicant or employees with “disabilities are not automatically entitled to reasonable accommodations under the ADA.” The applicant or employee is entitled to a “reasonable accommodation when their disability requires it, and the accommodation is not an undue hardship for the employer. But employers can choose to do more than the ADA requires.” Finally, an employer risks violating “the ADA if it relies on myths, fears, or stereotypes about a condition and prevents an employee’s return to work once the employee is no longer infectious and, therefore, medically able to return without posing a direct threat to others.” This is a link to the EEOC technical guidance: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

NEW YORK STATE SUPREME COURT ORDERS NEW YORK CITY TO DELAY IMPLEMENTATION OF MEDICARE HEALTH CARE PLAN SWITCH UNTIL APRIL 1

On December 14, 2021, New York State Supreme Court Judge Lyle Frank issued a temporary injunction against a planned change in New York City retirees’ health insurance plan until at least April 1, 2022. New York City retirees will have until June 30, 2022 to opt out of the plan.

The injunction blocks an agreement between Mayor Bill de Blasio's administration and major municipal unions, which promised billions in health care savings for retirees. Under the agreement, retirees would shift from Medicare plans to allegedly more cost-effective, privately managed Medicare Advantage plans, effective on January 1, 2022. The agreement automatically enrolled retirees into the new plans unless they opted out by October 31, 2021. In September, a group of retirees organized and challenged the agreement between Mayor de Blasio and the municipal labor unions citing confusion with the plan's implantation and lack of information relating to the change. *NYC Organization of Public Service Retirees, Inc. et al., v. Renee Campion et al.*, Index No. 158815 (2021). On October 22, 2021, Judge Frank issued a temporary injunction against the agreement, which prohibited New York City from moving ahead with the planned switch. Judge Frank ordered that the City take steps to inform retirees of their rights and the new parameters of the plan.

The ruling on December 14, 2021, issued a series of conditions with which the City must comply before the implementation of the new Medicare Advantage plan. Judge Frank decreed that retirees must be allowed to opt out of the plan until at least June 30, 2022 and that the City must take additional steps to fully inform retirees on what treatments and procedures will be included in the new plan, and which doctors will not be participating in the plan.



MERRY CHRISTMAS!

As we approach the end of the year, Pitta LLP wishes our clients, colleagues, and friends Happy Holidays, peace on Earth, good will toward all and a Happy and Joyous New Year!

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