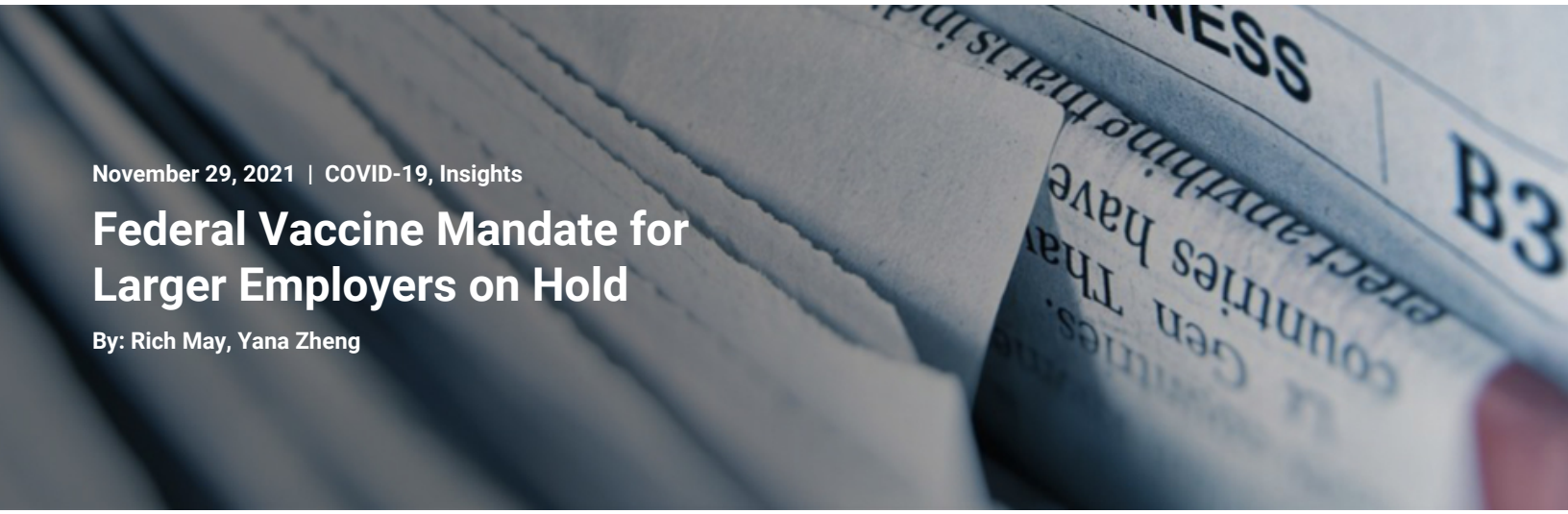


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Federal Vaccine Mandate for Larger Employers on Hold

By: Rich May, Yana Zheng

On September 9, 2021, President Biden released a new COVID-19 Action Plan, "Path Out of the Pandemic." In accordance with the Plan, on November 5, 2021, the Occupational Safety and Health Administration (OSHA) released an emergency temporary standard (ETS), requiring employers with 100 or more employees to ensure their workforce is fully vaccinated or require any unvaccinated employees to produce a weekly negative test results and wear a mask in order to work. Since then, more than 30 federal lawsuits have been filed nationwide to challenge the ETS.

One day after the ETS was issued, the 5th Circuit Court of Appeals issued a temporary stay of its enforcement, pending further judicial review. On November 12, the court extended its stay. For an emergency regulation to be upheld, OSHA must show that it is necessary to protect employees from "grave danger" due to exposure to "substances or agents determined to be toxic or physically harmful." The 5th Circuit identified multiple reasons why, in its view, the ETS should be enjoined, including that it does not pass constitutional muster and, even if it did, it exceeds OSHA's authority under the Occupational Safety and Health Act (OSH Act). Among other conclusions, the court stated COVID-19 does not pose a grave danger because the virus is "non-life threatening to a vast majority of employees," and does not arise to such a toxic or physically harmful "substance" or "agent" contemplated by the OSH Act.

Following the 5th Circuit's rulings, the federal Judicial Panel on Multidistrict Litigation, through a lottery, selected the 6th Circuit Court of Appeals to hear all of the legal challenges to the ETS. Ultimately, it is highly likely that the U.S. Supreme Court will be the final decision-maker on the enforceability of the ETS.

For the time being, the stay remains in place, meaning there is no legal obligation for any covered employer to comply with the ETS.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorneys Frank N. Gaeta and J. Allen Holland.



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