



ACCNJ LEGAL & INSURANCE UPDATE

Federal Appeals Court Temporarily Blocks OSHA Vaccine Mandate for Large Employers

Over the weekend, a federal appeals court temporarily blocked OSHA's Emergency Temporary Standard ("ETS") that was set to impose vaccination, testing, and face covering requirements for employers with 100 or more employees. The Court of Appeals for the Fifth Circuit [issued an order](#) staying the ETS until it can be reviewed by the Court. The stay temporarily blocks the government from enforcing the rule until a decision is rendered on the substantive issues raised by the petitioners, who argue the ETS exceeded the scope of OSHA's authority and was unconstitutional.

The petitioners consist of a mix of companies and individuals who immediately filed suit in the Fifth Circuit Court of Appeals after the ETS was released on Thursday (November 4th). Unlike most lawsuits, challenges to an OSHA ETS can bypass lower courts and are initially heard by federal appellate courts. Similar lawsuits were filed in the Sixth, Seventh, Eighth, and Eleventh Circuits. With challenges to the ETS filed in multiple circuit courts, federal rules would typically consolidate the cases to be heard by one court chosen by a lottery. However, circuit courts can rule on a temporary injunction before the lottery takes place, which is exactly what the Fifth Circuit did in the case at hand.

The Fifth Circuit did not provide much detail on why it was issuing the stay – merely stating that the petitioners “give cause to believe there are grave statutory and constitutional issues with the Mandate.” The government has until 5:00pm on Monday to respond. The petitioners will then have to respond to the government's positions by 5:00pm on Tuesday. Therefore, it is likely we will see rapid developments throughout the week, including a potential consolidation of the different legal challenges filed in other federal circuit courts.

Employers that would have been subject to the ETS should continue prepping for its application. The stay can be lifted just as easily as it was created and being familiar with the rules is a company's best course of action at the moment. Of course, actual implementation of any employer policy designed to comply with the ETS should not take place until the legal challenges surrounding the ETS have been resolved.

ACCNJ will continue to bring members the latest developments surrounding the ETS throughout the week, including a bulletin that will discuss how the OSHA ETS impacts the Memorandum of Understanding between ACCNJ and the construction trades with whom ACCNJ negotiates with. Feel free to contact ACCNJ staff with any questions.

Program Requirements

On October 29, 2021, a Federal Court in New Jersey denied a challenge to a New Jersey statute that requires contractors bidding on public works projects to participate in a registered apprenticeship program (the “Apprenticeship Requirement”). The United States District Court for the District of New Jersey (the “Court”) granted the State’s motion to dismiss, but will provide plaintiffs with an opportunity to amend their complaint to address the legal deficiencies noted in the Court’s opinion.

The complaint was brought by the New Jersey Electronic Life Safety Security Association (“NJELSA”) and one of NJELSA’s members. NJELSA is a non-profit trade association representing approximately 200 member companies in New Jersey that are licensed and certified as “life safety system installers” (i.e., fire and security alarm systems). The plaintiffs filed their original complaint after NJELSA members were denied contractor registration renewals for not satisfying the State’s Apprenticeship Requirements. The Apprenticeship Requirements, which stem from a 2019 amendment to New Jersey’s Contractor Registration Act, requires public contractors to participate in an apprenticeship program approved by the U.S. Department of Labor (“USDOL”).

NJELSA argued that it was impossible for its members to satisfy the new requirement because USDOL does not have a registered apprenticeship program applicable to the life safety system industry, nor does USDOL include life safety system installers in its list of recognized apprenticeship trades and programs. Accordingly, NJELSA felt the law was unconstitutional as applied to NJELSA members. In addition, NJELSA argued the Apprenticeship Requirements should be preempted by ERISA.

The Court rejected the Plaintiffs’ arguments. As to the constitutional arguments, NJELSA felt the Apprenticeship Requirements effectively favor union contractors and place an onerous burden on small non-union companies. This argument was unpersuasive for the Court because the regulations that implement the Apprenticeship Requirements provide five mechanisms for satisfying the law and only one involves participating in a union-sponsored apprentice program. The other four methods would allow a contractor to satisfy the Apprenticeship Requirements without being a union signatory contractor.

To support its decision, the Court cited guidance from USDOL that appears to recognize numerous occupations within the life safety industry as apprenticeable trades. The Court also pointed out that Plaintiffs always have the option to develop/sponsor an apprentice program for the life safety industry and apply for USDOL approval. The Court acknowledged that the Plaintiffs may have a sustainable claim if they can demonstrate that USDOL has not – and would never – register an apprenticeship program for the life safety industry. Accordingly, the Plaintiffs were afforded 30-days to amend their complaint to address whether this was a plausible option.

As to ERISA preemption, the Court analyzed prior legal precedent and noted that apprenticeship requirements are typically only preempted by ERISA when they mandate an employee benefit structure and specify how that structure must be administered. Here, the Court felt the Apprenticeship Requirements did not mandate employee benefit structure or their administration and, therefore, was not preempted by ERISA.

ACCNJ will closely monitor any additional developments surrounding this litigation and update members accordingly. For additional reading, the case is: *New Jersey Electronic Life Safety Security Association, and Cencom Corp. t/a Central Jersey Security v. New Jersey Department of Labor and Workforce Development*, Civ. Action No. 21-00622 (FLW) (U.S. Dist. Ct. for the Dist. of New Jersey, October 29, 2021).

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