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Occupational Safety and Health Administration

Sixth Circuit Reinstates OSHA ETS Requiring Vaccines or Testing for Large Employers

By Josh Schultz, Esq.

On December 17, 2021, the U.S. Court of Appeals for the Sixth Circuit issued a decision lifting the stay of OSHA's Emergency Temporary Standard ("ETS") requiring covered employers with 100 or more employees to mandate their employees to either be fully vaccinated against COVID-19 or wear approved protective face coverings in the workplace and take weekly COVID-19.

The U.S. Court of Appeals for the Fifth Circuit previously suspended enforcement of the ETS on November 6th. The Supreme Court will hold a special hearing, with arguments scheduled on January 7, 2022, to decide the future of the mandate.

The ETS will now revert to the initial compliance dates - the mandatory vaccination policy was to be created and enacted by December 5, 2021 and the COVID-19 testing for employees who are not fully vaccinated is required by January 4, 2022. However, OSHA has issued a press release stating that the agency is exercising enforcement discretion with respect to these compliance dates. OSHA stated that they will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, as long as an employer is exercising "reasonable, good faith efforts to come into compliance with the standard."

In reaching their 2-1 decision, the Sixth Circuit reasoned that OSHA's issuance of the ETS was not a transformative expansion of its regulatory power,

INSIDE THIS ISSUE

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noting that OSHA has regulated workplace health and safety, including diseases, for decades. OSHA has authority to issue an ETS if the agency can show: (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) that a standard "is necessary to protect employees from such danger."

The Court found that OSHA has demonstrated the "pervasive danger" presented by COVID-19 to workers in their workplaces, particularly unvaccinated workers. Further, the Court stated that OSHA's current regulations were insufficient to address the problem. The Sixth Circuit also cited evidence presented by OSHA that vaccinations reduce the presence and severity of COVID-19 cases in the workplace, and effectively ensure that workers are protected from being infected and infecting others.

Employers must now focus their energy on compliance with the rule. What employers should know:

Who is covered by the ETS?

- Private employers with 100 or more employees firm- or corporate-wide.
- In states with OSHA-approved State Plans, state and local-government employers, as well as private employers, with 100 or more employees will be covered by state occupational safety and health requirements.

What must covered employers do to comply with the ETS?

- Develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead establish, implement, and enforce a policy allowing employees to elect either to get vaccinated or to undergo weekly COVID-19 testing and wear a face covering at the workplace.
- Determine the vaccination status of each employee, obtain acceptable proof of vaccination from vaccinated employees, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status.
- Provide employees "reasonable time," including up to four hours of paid time, to receive each primary vaccination dose, and reasonable time and paid sick leave to recover from any side effects experienced following each primary vaccination dose.
- Ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer).
- Require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19.
- Immediately remove from the workplace any employee, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider, and keep the employee out of the workplace until return to work criteria are met.
- Ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances.
- Provide each employee with information, in a language and at a literacy level the employee understands, about the requirements of the ETS and workplace policies and procedures established to implement the ETS; vaccine efficacy, safety, and the benefits of being vaccinated (by providing the CDC document "Key Things to Know About COVID-19 Vaccines"); protections against retaliation and discrimination; and laws that provide for

criminal penalties for knowingly supplying false statements or documentation.

- Report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.

Equal Employment Opportunity Commission

EEOC Clarifies ADA Protections & Long COVID

By Adele L. Abrams, Esq., CMSP

On December 14, 2021, the Equal Employment Opportunity Commission (EEOC) issued clarifying guidance on which "Long COVID" symptoms afford protections for applicants and workers under the federal Americans with Disabilities Act (ADA). The ADA covers employers with 15 or more employees, but some states have analogous statutes that cover smaller workplaces and rely on federal definitions.

A person can be an individual with a "disability" for purposes of the ADA in one of three ways:

- "Actual" Disability: The person has a physical or mental impairment that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning, or operation of a major bodily function);
- "Record of" a Disability: The person has a history or "record of" an actual disability (such as cancer that is in remission); or
- "Regarded as" an Individual with a Disability: The person is subject to an adverse action because of an individual's impairment or an impairment the employer believes the individual has, whether or not the impairment limits or is perceived to limit a major life activity, unless the impairment is objectively both transitory (lasting or expected to last six months or less) and minor.

These same criteria are applied when analyzing a situation involving an applicant or employee who has experienced COVID-19 and has lingering symptoms. The link to the EEOC guidance, which includes additional information on the interface between COVID-19 and other employment laws (e.g., HIPAA, GINA, and religious protections under the Civil Rights Act) is: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#N. This site is updated regularly and should be monitored to ensure continued compliance.

Key information in the revised guidance:

- In some cases, an applicant's or employee's COVID-19 may cause impairments that are themselves disabilities under the ADA, regardless of whether the initial case of COVID-19 itself constituted an actual disability.
- An applicant or employee whose COVID-19 results in mild symptoms that resolve in a few weeks—with no other consequences—will not have an ADA disability that could make someone eligible to receive a reasonable accommodation.
- Applicants or employees with disabilities are not automatically entitled to reasonable accommodations under the ADA. They are 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.
- 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.

Related to the EEOC guidance is the July 26, 2021, the Department of Justice (DOJ) and the Department of Health and Human Services (HHS)' "Guidance on 'Long COVID' as a Disability Under the ADA, Section 504, and Section 1557" (DOJ/HHS Guidance). The CDC uses the terms "long COVID," "post-COVID," "long-haul COVID," "post-acute COVID-19," "long-term effects of COVID," or "chronic COVID" to describe various post-COVID conditions, where individuals experience new, returning, or ongoing health problems four or more weeks after being infected with the virus that causes COVID-19.

According to the EEOC, a person with COVID-19 has an actual disability if the person's medical condition or any of its symptoms is a "physical or mental" impairment that "substantially limits one or more major life activities." An individualized assessment is necessary to determine whether the effects of a person's COVID-19 substantially limit a major life activity. A person infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks—with no other consequences—will not have an actual disability within the meaning of the ADA.

A key consideration is whether the condition limits any of the person's "Major life activities," which include both major bodily functions, such as respiratory, lung, or heart function, and major activities in which someone engages, such as walking or concentrating. COVID-19 may affect such bodily functions, including the immune system, special sense organs (such as for smell and taste), digestive, neurological, brain, respiratory, circulatory, or cardiovascular functions, or the operation of an individual organ. Long COVID-19 also may affect other major life activities, such as caring for oneself, eating, walking, breathing, concentrating, thinking, or interacting with others. An impairment need only substantially limit one major bodily function or other major life activity to be substantially limiting. However, limitations in more than one major life activity may combine to meet the standard.

Whether COVID-19 substantially limits a major life activity is determined based on how limited the individual would have been without the benefit of any mitigating measures–i.e., any medical treatment received or other step used to lessen or prevent symptoms or other negative effects of an impairment. At the same time, in determining whether COVID-19 substantially limits a major life activity, any negative side effects of a mitigating measure are taken into account. These include medication or medical devices or treatments, such as antiviral drugs, supplemental oxygen, inhaled steroids and other asthma-related medicines, breathing exercises and respiratory therapy, physical or occupational therapy, or other steps to address complications of COVID-19. Even if the symptoms related to COVID-19 come and go, COVID-19 is an actual disability if it substantially limits a major life activity when active.

In addition, a person who has or had COVID-19 can be an individual with a "record of" a disability if the person has "a history of, or has been misclassified as having," an impairment that substantially limits one or more major life activities, based on an individualized assessment. Therefore, if the person is subjected to an adverse action (e.g., being fired, not hired, or harassed) because the person has an impairment, such as COVID-19, or the employer mistakenly believes the person has such an impairment, they will also have protections under the ADA.

Finally, regardless of whether an individual's initial case of COVID-19 itself constitutes an actual disability, an individual's COVID-19 may end up causing impairments that are themselves disabilities under the ADA. These include heart inflammation, stroke, adverse neurological or brain function, or even diabetes. COVID-19 may also exacerbate pre-existing conditions to the point where the condition is now covered under the ADA.

If an individual contracts COVID-19 at work, OSHA now requires recording of the condition on the employer's 300/301 logs. Work-related COVID-19 cases that result in hospitalization or death must now be reported to OSHA, regardless of the time elapsing between the workplace exposure event and the hospitalization or death. This is a variation from normal protocol (where hospitalization must occur within 24 hours of the triggering event to be reportable, and fatalities must occur within 30 days of the workplace event).

The change in OSHA reportability, coupled with the EEOC and DOJ/HHS definitions of Long COVID-19 as potentially permanently disabling condition, has additional implications now and in the future under state worker's compensation laws.

For assistance in workplace COVID-19 prevention policies or OSHA defense, contact Adele Abrams at safetylawyer@gmail.com.

Occupational Safety and Health Administration

OSHRC Remands Case Dismissed Due to Not Registering for Electronic Filing

By Gary Visscher, Esq.

Rule 8 (c) of the OSH Review Commission's Rules of Procedure requires the parties in a case before the Commission to file documents through the Commission's Electronic Filing System (EFS). The rule allows an exception for pro se litigants who submit a written statement to the ALJ, requesting exemption from electronic filing "on the grounds that it would place an undue burden on them to comply with the requirement."

In order to file documents through the EFS, each party or intervenor must register with EFS. The lengthy instructions for how to register are on the OSHRC website. Neither Rule 8 nor the instructions specify how early in the case a party must register with the EFS, though the instructions indicate that any filing after the case is assigned to an ALJ must be filed electronically.

Generational Buildings, LLC, a small business (3 employees) located in Missouri, received an OSHA citation in March 2021. The citation alleged four serious violations with a proposed penalty of $21,844.50. Generational Buildings timely contested the citation; the Secretary filed a Complaint with the Commission, and Generational Buildings timely filed a written Answer.

The case was assigned to an ALJ. The August 17 Notice of Assignment included information on Rule 8's requirements for electronic filing. In addition, the ALJ assistant twice called to remind Generational Buildings of the requirement and to register with the EFS. Generational Buildings, which was proceeding pro se, did not immediately register. Eight days after the Notice of Assignment was sent, the ALJ issued an Order to Show Cause as to Generational Buildings' failure to register, and threatening dismissal if Generational Buildings did not respond. When Generational Buildings did not respond to the Order to Show Cause within 14 days, the time set in the Order (the Commission noted that it took 8 of those days for the Order, sent by certified mail, to be delivered), the ALJ dismissed the notice of contest and affirmed the citation.

Generational Buildings, now represented by counsel, appealed the dismissal to the Commission. In a decision dated December 2, 2021, the Commission said that dismissal under the circumstances was too harsh. It reversed the ALJ, and remanded the case for further proceedings.

The Commission cited the short time that the ALJ gave Generational Buildings to register after the Notice of Assignment was sent. The Commission also found that

Generational Buildings' failure to immediately register or respond to the Order to Show Cause "did not support a finding of contumacy or pattern of disregard for Commission proceedings" which would justify dismissal, noting particularly that Generational Buildings had timely responded to the citation and filed its Answer to the Complaint. The Commission also noted that Generational Buildings was now represented by counsel and could no longer seek exemption available to pro se respondents.

Generational Buildings' appeal was successful in having the dismissal of the employer's notice of contest set aside in this case. But the ALJ's harsh sanction in this case is a reminder to employers who represent themselves - and to retained counsel – to be timely about complying with this new step in the process of contesting a citation or penalty before the Commission.

Mine Safety and Health Administration

What on Earth Can MSHA do to Reduce Fatalities? Let Me Tell You…

By Michael Peelish, Esq.

MSHA held its quarterly stakeholder meeting on December 14, 2021 and reported that there have been 37 fatalities year to date versus 29 this time last year. Most alarmingly, there have been 10 fatalities on mine property since October 1, 2021. It is difficult to listen to the MSHA officials reviewing so many fatalities and then listening to a call for help from the agency responsible for enforcing the Mine Act and its regulations. Having been through my fair share of fatal injury investigations over 30 years in this industry, one thing has not changed. MSHA never takes responsibility for anything that happens in the industry because they are an enforcement agency. So, when MSHA tells the industry about the targeted inspection activities, it totally misses the point.

MSHA's focus must change. It must change from one of citing an operator for a small pile of material or a hose in a walkway that one or two miners may encounter during an entire day to focusing on practices and behaviors and how to change them for the better. Perhaps the better approach is to ask the miners what caused the spillage and then ask the miners how to fix the belt or the chute to eliminate the spillage hoping the miner will discuss LOTO, etc. But no, MSHA's responds that they are an enforcement agency. Frankly, it is getting old to listen to the same tune when MSHA has more authority than any other safety agency in our government including the authority to shut down an operator for unsafe conditions or practices in a heartbeat.

In light of the worst year for fatalities in a long time, MSHA initiated a targeted enforcement program on November 1st that obviously did not have the desired effects. Again, MSHA takes the path of enforcement, not on changing behaviors. However, maybe there is hope insofar as MSHA announced a new safety initiative during the stakeholder call - *Take Time, Save Lives* – which officially begins on January 1, 2022, and stresses that many accidents and fatalities can be prevented by proper training and focusing on tasks. By initiating a positive program such as this, MSHA implicitly accepts that enforcement is not the answer in every case.

My humble advice to MSHA is to apply the 80/20 rule that good operators apply when addressing a problem. Spend more time talking to miners and reviewing mine operators' training techniques and practices. Provide information in the form of pocket cards and other information that can be placed in work areas such as at the hopper, in mobile equipment or near the conveyor. The good MSHA inspectors I have traveled with throughout the years did just that. They talked with miners trying to reach their heart and soul. That is what

makes a difference in eliminating accidents, not some warmed up and failed approach to enforcement.

Think about it and do the math. A small sand and gravel quarry may see MSHA for 16 hours every 6 months which is less than 0.4% of a year. Thus, while the Mine Act requires a complete inspection, one can easily see how enforcement is not the complete answer. Start talking to mine operators about why there is a pile of material or hose in the walkway? Why does the hopper become blocked and what do you do if it does? Is there a better way? MSHA inspectors have "prosecutorial discretion", but only use it to their enforcement advantage, not to the advantage of improved safety performance. The bottom line is that MSHA must take responsibility for these fatalities and must be honest with itself in how it can make a difference. Until it does so, the industry is on its own and the best safety results will not be achieved.

Other topics covered during the stakeholder call included:

- MSHA's regulatory agenda, issued on December 10th, included a proposed rulemaking for respirable crystalline silica for May 2022.
- MSHA will continue granting extensions on refresher training until the administration changes the status of COVID. There is no extension for new miner training.
- MSHA has no plans at this time to issue an Emergency Temporary Standard and operators should continue to follow the March 2021 guidance.
- Chris Williamson has been appointed to head MSHA, however it will be some time before he is confirmed by the U.S. Senate.

Occupational Safety and Health Administration

OSHA Proposes New Heat Stress Rule

By Adele L. Abrams, Esq., CMSP

On October 27, 2021, the Occupational Safety and Health Administration (OSHA) published an Advance Notice of Proposed Rulemaking (ANPRM) on "Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings." The ANPRM provides an overview of heat stress in the workplace (both indoors and outdoors) and the various measures taken to prevent it and protect workers from it. Click here to view the ANPRM Federal Register notice.

Extreme heat can be deadly, and Bureau of Labor Statistics data show it killed nearly 1,000 US workers and seriously injured more than 70,000 workers from 1992 through 2017. But heat illness causes many times more workplace injuries than official records capture due to related injuries from falls, being struck by vehicles, and mishandling machinery due to heat stroke/stress and related difficulties in concentration or fainting. Data presented to the US Congress in 2021 (UCLA study) found that on days when temperature is between 85F and 90F, overall risk of injury (regardless of official cause) was 5-7% higher than on days when temps were in 60s, and when temperatures topped 100F, overall risk of injury was 10-15% greater.

Until recently, OSHA had taken enforcement action against employers who exposed workers to excess heat via the General Duty Clause (Section 5(a)(1) of the OSH Act of 1970), but In 2019, OSHA lost a key heat stress case where OSHRC held it could not use the National Weather Services' "Heat Index" for enforcement - *Secretary of Labor v. A.H. Sturgill Roofing, Inc.* This necessitated a rulemaking in order for OSHA to be able to regulate this hazard at the federal level.

Employers should bear in mind that several state-run OSHA programs already require heat stress

prevention programs, either as part of an Injury & Illness Prevention Program (IIPP), or as a state-specific standard (California, Minnesota, Oregon and Washington State). These state standards have provisions requiring access to water and shade for employees during hot temperatures. State standards may be more stringent than any federal rule but must offer at least equivalent protections.

There is also pending legislation that would require OSHA to promulgate a heat stress standard. S 1068 and HR 2193 – *Asuncion Valdivia Heat Illness and Fatality Prevention Act of 2021***.** The legislation defines **"***Excessive heat* " as including outdoor or indoor exposure to heat at levels that exceed the capacities of the body to maintain normal body functions and may cause heat-related injury, illness, or fatality. It would require any OSHA standard to include requirements concerning (1) training and education to prevent and respond to heat illness, and (2) whistle-blower protections.

Stakeholders (employers, contractors, temporary agencies, workers, unions, academics, etc.) may submit comments and attachments concerning the ANPRM, identified by Docket No. OSHA–2021–0009, electronically at www.regulations.gov (Federal e-Rulemaking Portal). All submissions must include the agency's name (OSHA) and the docket number for this ANPRM (Docket No. OSHA–2021–0009). When submitting comments or recommendations on the issues that are raised in this ANPRM, commenters should explain their rationale and, if possible, provide data and information to support their comments or recommendations. Wherever possible, please indicate the title of the person providing the information and the type and number of employees at your worksite.

OSHA seeks public comment on the nature and extent of hazardous heat in the workplace and interventions and controls to prevent heat-related injury and illness, including measuring heat exposures, strategies to reduce it, personal protective equipment and other controls, and worker training and engagement. *The original comment deadline was December 27, 2021, but this deadline has been extended to January 27, 2022.* Following conclusion of the ANPRM stage, OSHA will move forward with a proposed rule, and there will be an additional opportunity for comment and public testimony at that stage.

For further information on heat stress prevention programs, or in developing comments on the ANPRM, contact Adele Abrams at safetylawyer@gmail.com or 301-595-3520.

Occupational Safety and Health Administration

OSHA Clarifies COVID-19 Respiratory Protection Regarding Religious Employees' Facial Hair

By Josh Schultz, Esq.

In a December 16, 2021 Letter of Interpretation, OSHA clarified that loose-fitting powered air-purifying respirators (PAPRs) are a permissible alternative to N95 respirators where respiratory protection is required to protect workers from exposure to COVID-19. Further, the agency noted that the Respiratory Protection Standard does not require the employer to offer alternative respirators to all of its employees in cases where a limited number request an accommodation due to a disability or sincerely held religious beliefs, practices, or observances.

The question to OSHA arose in the context of OSHA's COVID-19 Healthcare Emergency Temporary Standard (ETS), 29 CFR 1910.502, which requires employers to provide respirators in certain circumstances. Both the COVID-19 Healthcare ETS and the Respiratory Protection Standard permit

employers to provide various types of NIOSH-certified respirators, including loose-fitting PAPRs.

Employers are subject to penalties from the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964 for a failure to make reasonable accommodations for sincerely held religious beliefs. Additionally, the EEOC can hold employers liable for a lack of reasonable accommodation in violation of the Americans with Disabilities Act.

To view OSHA's Letter of Interpretation, click here.

Occupational Safety and Health Administration

New OSHA Legislative Proposals

By Adele L. Abrams, Esq., CMSP

GOP opposition to OSHA's emergency temporary standard for COVID-19 and other enforcement initiatives triggered responses from some federal OSHA states, threatening to withdraw from the program and run their own OSHA office. That threat was a nonstarter for a number of reasons – mainly the fact that any state-run OSHA program must be approved by the federal government AND be of equal effectiveness and stringency (although it can be more stringent, as occurs often with California's regulations issued by CalOSHA). But a novel approach is now being pursued: nullification of OSHA itself!

On November 2, 2021, Rep. Andy Biggs along with several Republican cosponsors including Rep. Matt Gaetz, introduced HR 5813, the "NOSHA Act." The bill has only two sentences: "The Occupational Safety & Health Act of 1970 is repealed. The Occupational Safety & Health Administration is abolished." Given that both the House and Senate are in Democratic control, and President Biden would never sign such legislation into law, this bill is aspirational in nature, but does provide insight into future actions depending upon the outcome of the 2022 elections.

Another GOP initiative to block OSHA from regulating COVID-19 vaccines was introduced as HR 5728 by Rep. Madison Cawthorn, with 7 original co-sponsors, in late October. The legislation would block the Secretary of Labor from using any funds to promulgate or enforce a rule mandating COVID-19 vaccines by employers. The "JAB Act' (Justice for All Businesses Act) has similarly dismal chances of enactment.

Meanwhile, on the Democratic side of the aisle, Rep Andy Levin introduced HR 5664, "Keeping Workers Safe Act," which would require the Secretary of Labor to issue a public notice regarding each enforcement action under the OSH Act that results in large penalties or where multiple violations or repeated other-than-serious violations are present. The legislation defines "large penalty" cases as those involving civil penalty assessments in an amount greater than $60,000, and public notice would also be triggered by multiple serious or repeated OTS violations. This legislation has a greater likelihood of passage. While Congress will adjourn at the end of December, legislation introduced in 2021 carries over to the 2022 congressional session.

Under Rep. Levin's bill, OSHA would have to issue press releases no more than 7 days after the date when the citation is issued. Under the Trump administration, the opposite approach was taken, where OSHA was forbidden to issue press releases upon issuance of a citation, and could only do so after a case was finally adjudicated. However, that prohibition was issued as policy and so lapsed upon administration change. HR 5664 would codify this requirement to prevent it from fluctuating depending upon the party in control of the agency.