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David Sparkman, Editor | Volume 9, Issue 24 | December 15, 2021

Courts Block Vaccine Mandates

Federal courts have blocked three of the Biden administration's forced vaccination requirements for employees, and the President himself seriously weakened a fourth aimed at federal employees.

When this was written a week ago, none of the administration's vaccine mandates was proceeding as planned. Please keep in mind as you read this that there are new developments taking place every day across the country that impact these policies, both in the courts and administratively.

Biden retreated from his hard stance regarding threatening federal employees with losing their jobs if they remained unvaccinated. At the end of November, he removed this threat for the rest of the holiday season and told agencies to withhold disciplining employees until early next year.

It's still not clear whether the administration will go back to threatening the loss of employment for the 3.5% of the 2.1 million federal employees who are believed to be unvaccinated.

Some observers see this as Biden caving in to the federal civil service union, the American Federation of Government Employees, which for years has been a strong financial supporter of the Democrat Party, including during the last national campaign.

Federal contractors also got a break, this time from federal courts that have granted preliminary injunctions blocking enforcement of their mandate.

A U.S. District Court judge the Southern District of Georgia issued a preliminary injunction on Jan. 7 that prevents enforcement of the contractor requirement nationwide. At the end of November, another federal district court judge also had imposed an injunction blocking the mandate, but that was limited to the states of Ohio, Kentucky and Tennessee.

The Georgia and Kentucky and Georgia-based judges came to the same conclusion that those who are opposing the order are likely to succeed in their argument that the Biden administration had exceeded its authority over the federal procurement of goods and services when it issued the executive order.

Around the same time, other courts enjoined a requirement issued by the Center for Medicare and Medicaid Services (CMS) that applied to the estimated 10.3 million healthcare workers at Medicare- and Medicaid-certified medical facilities

The skepticism with which these courts have greeted the administration's mandates echoes opinions expressed earlier about the OSHA Emergency Temporary Standard when it was enjoined by a federal appeals court.

Although Congress granted the President authority to promote economy and efficiency in contracting, one judge wrote, "this power has its limits."

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In regard to the CMS order, another judge said, "If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency. During a pandemic such as this one, it is even more important to safeguard the separation of powers set forth in our Constitution to avoid erosion of our liberties."

The multiple legal challenges to the OSHA ETS have been consolidated and moved to the Sixth Circuit U.S. Court of Appeals, where lawyers are jockeying for advantage.

So far, the Sixth Circuit has refused the Biden administration's request to lift the preliminary injunction staying the ETS that was issued earlier by the Fifth Circuit Appeals Court. It also declined to move the case to another circuit.

Some parties asked that the case heard by the court's full 20-member complement of judges currently active on the Sixth Circuit, instead of an initial review by a three-judge panel, which is the normal procedure in a federal appeals court.

Those seeking this full court proceeding (called an "en banc review") believe that it will help speed up the inevitable appeal of the court's decision to the U.S. Supreme Court, which certain to be sought regardless of which way the Sixth Circuit rules.

If a decision is delayed, the challenges could become moot if the six-month expiration date for the ETS passes on June 8, 2022.

State governments also have continued to take actions promoting or opposing vaccine mandate in their own jurisdictions.

Joining states like California, Connecticut, Massachusetts, New Jersey, New York, and Oregon, on Nov. 24 the state of Washington required that employees, on-site volunteers or on-site contractors be able to provide proof of vaccination if they work for state agencies and operators of any educational or healthcare setting, including healthcare providers.

Meanwhile, other states like Florida, Texas and Mississippi continue to battle the mandates and have passed laws and issued directives banning private employers from requiring employers to be vaccinated, even where courts have said it is legal for them to do so. Other state legislatures also are mulling legislation banning such mandates.

Fed Contractor Min Wage Rises

The minimum wage for federal contractors and subcontractors will rise from the current $10.95 an hour to $15.00 effective Jan. 30, 2022 and will increase each year after that.

However, the final rule issued by the Labor Department does not apply automatically to all federal contractors, notes attorney Leslie Stout-Tabackman of the Jackson Lewis law firm.

The wage hike was decreed by President Biden in an executive order that he issued earlier this year. Labor unions have sought a nationwide $15 minimum wage for all workers since 2012.

The new wage applies to:

- Procurement contracts for construction covered by the Davis-Bacon Act, (DBA) but not the Davis-Bacon related acts.
- Service Contract Act (SCA) covered contracts.
- Concessions contracts – meaning contracts under which the federal government grants a right to use federal property, including land or facilities, for furnishing services.
- Contracts related to federal property and the offering of services to the general public, federal employees and their dependents.

The minimum wage does not apply to grants and contracts for the manufacturing or furnishing of materials, supplies, articles or equipment to the federal government, as well as contracts excluded from coverage under the SCA or DBA.

The rule includes a "less-than-20% exception" for workers who only perform work in connection with a covered contract, but who do not perform any direct work on the contract.

For workers who spend less than 20% of their hours in a workweek working indirectly in connection with a covered contract, the contractor need not pay the $15 wage for any hours for that workweek.

Employers should plan for wage increases for covered workers who are not currently making $15 per hour, Stout-Tabackman recommends.

New Law Seeks Labor Growth

In addition to funding highways and bridges, the recently enacted $1.2 trillion Infrastructure Investment and Jobs Act has set ambitious goals for workforce development in manufacturing and the transportation industries.

Most notably, the new law targets the truck driver shortage by creating an apprentice pilot program intended to boost the number of professional drivers by allowing recruits under the age of 21 to get behind the wheel under certain circumstances.

"The way the provision works is it's a mentorship type, apprenticeship type of initiative that tries to manage the potential for there to be a safety tradeoff," Secretary of Transportation Pete Buttigieg explained to reporters. "We want as many people to be qualified drivers as possible, but never at the expense of safety."

The initiative enjoys the support of the trucking industry as represented by American Trucking Associations and the Truckload Carriers Association, which have been seeking relaxation of the driver age standard for many years.

Critics of the plan include the Owner-Operator Independent Drivers Association, which says allowing younger drivers behind the wheels of heavy trucks will negatively impact highway safety.

"The younger you are, the more you crash," declared OOIDA spokesperson Norita Taylor.

The program states that these drivers can enter interstate service after completing a 120-hour probationary period. An apprentice also must complete 280 hours of on-duty time, of which not less than 160 hours must consist of driving time in a commercial motor vehicle.

To be allowed to drive professionally, at the end of this training period the apprentice must prove that he or she is competent in such skills as: backing and maneuvering in close quarters; pre-trip inspections; fueling procedures; weighing loads; coupling and uncoupling procedures; and trip planning, truck routes, map reading, navigation and permits.

ATRI Measures MC Covid Costs

Covid 19 had a major impact on trucking costs, according to the 2021 Analysis of the Operational Costs of Trucking published annually by the American Transportation Research Institute.

"The various line-item cost centers clearly document the numerous impacts that the Covid 19 pandemic had on trucking and the economy in general," the ATRI report observed.

In addition to faster truck speeds, other Covid 19 impacts were considerable: Dead-head miles increased to 20.6%, annual operating miles decreased to 89,358 miles per truck, and fuel costs declined by nearly 20% to 30.8 cents per mile.

Independent of Covid 19 impacts, insurance costs continued recent years' climb, rising more than 18% to 8.7 cents per mile – the highest in ATRI's Ops Costs report history.

While truck driver wages increased from 2019 to 2020, benefits costs per mile decreased. Overall truck driver compensation was 73.7 cents per mile.

Separately, safety and retention bonuses increased by 10.5% and 14.2% respectively, but starting bonuses dropped by 10% – reflecting the soft driver marketplace in early 2020 for many sectors.

Overall, the average marginal cost per mile incurred by motor carriers in 2020 decreased five cents per mile to $1.64. When the per-mile costs are converted to hourly costs, the report found that total hourly costs dropped slightly to $66.87.

"In the face of a Covid 19 economy, our industry tightly managed costs and operations, while delivering essential goods to market," said Cully Frisard, chief operating officer of Frisard Cos. "We also led the way out of the Covid 19 recession in the latter half of the year. I expect 2021 to continue the positive trends for our industry."

Logistics Space Said Sold Out

Logistics space in the United States is effectively sold out, according to the global industrial real estate giant Prologis Inc.

Demand pushed the vacancy rate to a new low of 3.9% in the third quarter, the company reported in its Industrial Business Indicator report. "What is available is increasingly more expensive," the company observed. "Logistics customers must move fast to lock down space."

U.S. net absorption reached a record high of 115 million square feet (MSF) in Q3 and 280 MSF year-to-date – more than double the same period in 2020.

"Extreme competition for modern product has pushed rent growth to a new record of 7.1% quarter-over-quarter," Prologis said. "Even though construction pipelines are at all-time highs, construction delays and record pre-leasing point to persistent shortages of space."

Demand is set to outpace new supply through the near term. Prologis forecast net absorption of 375 MSF and deliveries of 285 MSF for the full year.

The vacancy rate is expected to stay near its historic low through 2022, the report said. Elevated demand, rising replacement costs and low supply are likely to produce rent growth of nearly 19% in 2021.

"Looking ahead, we expect that market conditions will remain exceptionally competitive for customers looking to expand, making it essential to plan early and move quickly," Prologis projected.

Construction starts rose to an all-time high of 120 MSF. Speculative construction drove most of that, representing roughly 88% of all starts in Q3. "We do not anticipate significant supply relief in most key locations," the company added, noting that new supply is being concentrated in low-barrier secondary and tertiary markets and the outlying submarkets of inland markets.

DOT Extends HOS Waiver

The Federal Motor Carrier Safety Administration expanded the commercial truck driver hours-of-service regulations waiver through Feb. 28.

The agency first instituted the HOS rules exemption last year in response to the Coronavirus pandemic to ease the way for transportation of verious kinds of emergency and medical supplies needed.

Since then, it has modified the emergency declaration several times to expand and remove categories of supplies, equipment and persons to respond to changing needs for emergency relief.

At the end of August, FMCSA extended and amended the modified emergency declaration and associated regulatory relief through Nov. 30.

The exemption is limited to transporting livestock and livestock feed; medical supplies and equipment related for testing, diagnosis and treatment of Covid 19; along with vaccines, constituent products, medical supplies and equipment.

Also included are ancillary supplies/kits for administering vaccines; supplies and equipment necessary for community safety, sanitation and prevention of transmission, such as masks, gloves, hand sanitizer, soap and disinfectants.

Also: food, paper products and other groceries for emergency restocking of distribution centers or stores; gasoline, diesel, jet fuel and ethyl alcohol; and supplies to assist individuals impacted by the the pandemic (such as building materials for individuals displaced by the emergency)

This does not include non-emergency transportation of these commodities, including mixed loads with a nominal quantity of qualifying emergency relief.

"Although the number of Covid 19 cases began to decline in the United States following widespread introduction of vaccinations, persistent issues arising out of Covid 19 continue to affect the U.S., including impacts on supply chains and the need to ensure capacity to respond to variants and potential rises in infections," FMCSA stated.

NLRB Counsel on the Warpath

If there was any doubt remaining that the Biden administration is the most pro-labor in history, it has been thoroughly obliterated by Jennifer Abruzzo, who he named General Counsel of the National Labor Relations Board.

At the end of September, she wrote a memo declaring college athletes are employees and should be paid accordingly.

She also used that memo to begin laying out a whole new strategy distorting labor law in favor of unions and launching a new enforcement assault on employers at the same time.

Abruzzo insists that the term "student athlete" was concocted by the National Collegiate Athletic Association with the deliberate intention to deceive and she rejected its use in any context.

"While Players at Academic Institutions [PAI] are commonly referred to as 'student-athletes,' I have chosen not to use that term in this memorandum because the term was created to deprive those individuals of workplace protections," she declared.

Abruzzo's memo reverses a position taken by the board during the Trump administration, which had altered the direction set by the Obama-era board.

Abruzzo says she believes players are employees in situations where they generate considerable profit and other benefits for their universities.

In June, the U.S. Supreme Court chose to reject the NCAA's antitrust defense that was based on "amateurism" as the basis of college sports. Although players are not yet paid salaries, they now can receive related benefits previously denied them, such as laptops, tutoring or study-abroad programs.

One result was that the NCAA also approved a names, images or likeness policy allowing athletes to earn money with social media (such as Internet influencers), teaching and signing autographs.

Abruzzo also announced other major NLRB policy changes that she buried in the document's footnotes. For example, she mentions in passing that student teachers and research assistants also should be considered employees under the law.

In another footnote, Abruzzo said she would consider applying a joint employer theory of liability in some cases, which would allow allegations violations of law. This means the NLRB could pursue charges against the NCAA and other college athletic conferences that exercise control over college players.

Seeking Aggressive Enforcement

In a separate memo to the NLRB regional offices that Abruzzo issued on Sept. 8, she instructed the regions to aggressively pursue expanded remedies in a wide array of cases, and to prepare cases for the board to hear to increase the scope of damages imposed various infractions.

The types of remedies specified by Abruzzo that would significantly increase costs employers face in Unfair Labor Practice litigation include:

Consequential damages and front pay for improperly discharged employees. NLRB regional offices are expected to affirmatively seek these expanded remedies in discharge cases.

Expanded union access. In cases involving employer ULPs that occur during union organizing campaigns, required remedies include providing unions with employee contact information and allowing unions to hold "captive audience" employee meetings on company property.

Reimbursement of union organizing costs. New cases may seek to require employers pay business agent wages, attorney fees, travel costs and other costs unions incur where an employer's objectionable conduct results in a union election being re-run.