



Alerts

Sixth Circuit Selected in Lottery Process to Preside Over Legal Challenges to OSHA's Vaccination ETS

November 17, 2021

Insights for Employers

The Sixth Circuit was selected in a lottery to preside over legal challenges to OSHA's Emergency Temporary Standard (ETS) issued earlier this month. The lottery was conducted by the U.S. Judicial Panel on Multidistrict Litigation on November 16, 2021. The jurisdiction of the Sixth Circuit encompasses Kentucky, Michigan, Ohio and Tennessee.

We anticipate the matter first will be heard by a randomly selected three-member panel from the Sixth Circuit after the various petitions are consolidated, and the court decides on the most appropriate method of proceeding. Given the significance of the issue and the consequences on national health policy, it is also possible that the matter will be heard *en banc*.

The Sixth Circuit review follows the [issuance of a decision](#) on November 12, 2021, by the Fifth Circuit, upholding its earlier stay on the enforcement of OSHA's order. The Sixth Circuit can decide in the interim to continue, modify or vacate the stay, and we expect the Department of Justice on behalf of OSHA to seek to vacate the prior order. Legal challenges to the ETS have been filed in almost every circuit, including the D.C. Circuit. The Sixth Circuit has a conservative tilt given its current composition, but that is not necessarily a determinative bellwether given the unique circumstances presented by the global pandemic.

The Fifth Circuit decision was lean in its constitutional analysis (intrusion on the police powers of the states) but more robust in its criticism of the OSHA standard for ETS and how the ETS was both over-inclusive and under-inclusive in its attempt to address a "grave" national health crisis.

Hinshaw still is advising its clients to prepare as if the ETS will survive in some form. We also remind employers that there is nothing preventing employers from mandating the vaccine if they believe that is the proper approach from a safety perspective to protect workers and the communities they serve.

Related Content

- [Fifth Circuit Grants Stay of OSHA's Mandatory Vaccination ETS, Voices "Grave Statutory and Constitutional" Concerns](#), November 15, 2021
- [OSHA Issues ETS Requiring Employee COVID-19 Vaccinations](#), November 5, 2021

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- [FAQs: CMS Issues Emergency Regulation Mandating Workforce COVID-19 Vaccinations by Medicare/Medicaid-Certified Providers and Suppliers, November 9, 2021](#)