

Publications

Sixth Circuit Declines to Hear ETS Challenge *En Banc*

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As previously reported, the Sixth Circuit Court of Appeals – the court selected to hear the consolidated challenges to the Occupational Safety and Health Administration’s emergency temporary standard on COVID-19 (the ETS) – needed to decide an important procedural matter before addressing the merits of the challenge to the ETS. On December 15, 2021, the Sixth Circuit decided that procedural matter, ruling that the case would be heard by a three-judge panel chosen at random rather than *en banc* by the entire Sixth Circuit. The sixteen active Sixth Circuit judges split 8-8 on the motion, which thus failed to garner the majority necessary to approve the request to refer the matter directly for *en banc* determination.

While the composition of the panel who will decide the case has not been announced, it apparently has been selected and has already been diligently working through the large volume of materials that have been filed in the matter thus far. It may also be worth noting that three active judges did not sign on to an opinion regarding the *en banc* issue: Judge Gibbons and Judge Griffin (both appointed by President George W. Bush) and Judge Stranch (appointed by President Barack Obama). There is widespread speculation that it is these three judges who comprise the panel.

Presumably not on the panel is Chief Judge Sutton, who issued a lengthy dissent in response to the denial of *en banc* review. In his dissent, which was joined by seven other judges, Judge Sutton focused on the merits, rather than the procedural *en banc* issue, and made clear that he would strike down the ETS.

The first issue up for the panel is whether to lift the Fifth Circuit’s stay on enforcement of the ETS. This issue has been fully briefed and was also addressed by Judge Sutton in his dissent. It is unclear if the panel will schedule oral argument on the motion to lift the stay, but none has yet been scheduled. If the panel were to lift the stay, that ruling is likely to be swiftly appealed to the U.S. Supreme Court or to an *en banc* Sixth Circuit. In the interim period, a lifting of the stay would create a great deal of uncertainty for employers regarding whether and how to comply with the ETS, and OSHA would need to identify promptly its

intentions regarding both enforcement and timing as the matter continues to wind its way through the courts.

We will continue to keep you updated on the status of the ETS as developments warrant.

