

Publications

Sixth Circuit to Decide Whether to Uphold Stay of OSHA ETS

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While most Americans feast on turkey and stuffing this week, the Sixth Circuit Court of Appeals will dig in to motions and briefing regarding the Occupational Safety and Health Administration's emergency temporary standard on COVID-19 (the ETS). That's because the Sixth Circuit won the lottery conducted by the federal Judicial Panel on Multidistrict Litigation, which designated the Court to hear the numerous legal challenges to the ETS filed across the United States.

For now, the temporary stay [previously issued by the Fifth Circuit Court of Appeals](#) remains in place and OSHA has publicly indicated that it will comply with that stay. However, on November 23, 2021, OSHA filed a motion asking the Sixth Circuit to lift the stay while the case is pending. Alternatively, OSHA urged the Sixth Circuit to modify the stay order to allow the ETS testing and masking requirements for unvaccinated employees to go into effect, even if a stay remains on other vaccination-related provisions of the ETS.

The Sixth Circuit, which has jurisdiction over cases arising in Ohio, Kentucky, Michigan, and Tennessee, is viewed as a favorable draw by those hoping to stop OSHA from implementing the ETS. While politics is not a perfect proxy for how a court will rule on these novel issues, it is worth noting that approximately two-thirds of the full-time judges in the Sixth Circuit were appointed by Republican Presidents.

Before the Sixth Circuit issues any substantive rulings, the Court must first decide who will make those rulings. Cases are normally assigned to a randomly chosen three-judge panel. However, multiple petitions have been filed to have the case heard *en banc*, meaning the matter would be heard by the entire Sixth Circuit rather than a three-judge panel. The Court has ordered responses to these petitions to be filed by next Tuesday, November 30, 2021. Even if the Court declines to hear the matter *en banc* initially, it is highly likely that any rulings made by the three-judge panel will ultimately be reviewed *en banc* and then subsequently by the U.S. Supreme Court.

In the meantime, employers are left to decide whether to take a “wait and see approach” or continue to actively prepare to implement the ETS. Please contact your Vorys attorney if you’d like to discuss the benefits and risks of each approach.

We will continue to keep you updated as developments warrant.