

## **EMPLOYMENT LAWSCENE ALERT: SIXTH CIRCUIT LIFTS STAY OF OSHA'S VACCINATION MANDATE-OSHA FOLLOWS BY ANNOUNCING ENFORCEMENT POLICY**

On Friday, December 17, 2021, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit lifted the stay of OSHA's emergency temporary standard (ETS) mandating COVID-19 vaccinations in the workplace or, alternatively, requiring unvaccinated employees to submit to weekly COVID-19 tests. The stay was originally issued by the U.S. Court of Appeals for the Fifth Circuit on November 5, 2021, when the Fifth Circuit held that OSHA had exceeded its statutory and constitutional authorities when it issued its ETS.

The case was later reassigned to the Sixth Circuit pursuant to a lottery-style drawing in accordance with the federal rules for multi-circuit litigation. Given that 11 of the 16 active judges on the Sixth Circuit are Republican political appointees, it was surmised that the Sixth Circuit would most likely follow the Fifth Circuit's decision in halting OSHA's ETS in its tracks. However, once the case was reassigned, the first battle fought between the parties began with whether the case should be decided by a traditional three-judge panel or whether the case would be heard en banc where the entire panel of 16 active judges would hear the case. In a decision (found [here](#)) that appeared to strongly divide the court, the Sixth Circuit denied the petition for an initial hearing en banc reasoning that a three-judge panel of the court had already devoted a significant amount of time to the case and that an initial hearing en banc would only serve to strain the limited resources of the court to have all 16 active judges devote their attention to the case. The Sixth Circuit's decision, however, included a strongly worded 27-page dissenting opinion from the Sixth Circuit's chief judge arguing that Congress had not "clearly" granted the Secretary of Labor authority to impose OSHA's vaccinate-or-test mandate, especially when the authority to regulate public health and safety has traditionally been regulated by the states. The chief judge also argued in his dissenting opinion that the Secretary of Labor had not met the "grave danger" standard for issuance of OSHA's ETS when (1) the key population group at risk from COVID-19—the elderly—no longer works, (2) members of the work-age population at risk—the unvaccinated—have chosen for themselves to accept the risk and any risk is not grave for most individuals in the group, and (3) the remaining group—the vaccinated—does not face a grave risk by the Secretary's own admission, even if they work with unvaccinated individuals. Many legal experts interpreted

the chief judge's dissenting opinion not only as a signal that the three-judge panel assigned to the case was ready to issue a decision to lift the Fifth Circuit's stay, but also could serve as a road map for the U.S. Supreme Court to stop OSHA from implementing its vaccinate-or-test rule.

In a 2-1 decision (found [here](#)) dissolving the Fifth Circuit's stay, the Sixth Circuit recognized that Congress had granted the Secretary of Labor "broad authority . . . to promulgate different kinds of standards" for health and safety in the workplace, even ones to address a pandemic that contemplates the use of medical exams and vaccinations as tools in its arsenal. The Sixth Circuit hinged its decision on two primary findings. First, the court found that Congress had granted OSHA broad authority under the Commerce Clause to regulate infectious diseases and viruses to protect the interests of interstate commerce (see 29 U.S.C. § 651(a)), and with that authority can issue an emergency standard to protect workers from a "grave danger" presented by "exposure to substances or agents determined to be toxic or physically harmful" in the workplace—which includes infectious agents such as COVID-19 even though the virus is not unique to the workplace. Second, the Sixth Court found that the ETS does not require anyone to be vaccinated, but, rather, allows employers, themselves, to determine the best way to minimize the risk of COVID-19 in the workplace—whether by mandatory vaccinations or requiring unvaccinated workers to wear a mask on the job and test for COVID-19 weekly. Based on these findings, the Sixth Circuit held that OSHA had met its burden in issuing the ETS by adequately establishing that: (1) an "emergency" exists relative to the pandemic; (2) the health effects of COVID-19 present a "grave danger" in the workplace; and (3) the ETS is "necessary to protect employees from" the grave danger.

### **Appeal Filed with U.S. Supreme Court**

Those opposing OSHA's ETS immediately appealed the Sixth Circuit's decision to the U.S. Supreme Court by filing an emergency application (found [here](#)) for an administrative stay, or alternatively, writ of certiorari before judgment. It would be anticipated that the U.S. Supreme Court, with its conservative majority, will act relatively quickly on whether to issue the petitioned-for stay or to allow the Sixth Circuit's decision to stand and allow OSHA to move forward to implement its vaccinate-or-test rule.

### **OSHA Moves Forward**

With the Fifth Circuit's stay dissolved by the Sixth Circuit's decision, OSHA did not delay in notifying employers that it intends to proceed with implementation and enforcement of its vaccinate-or-test rule. However, OSHA recognizes that many employers have been waiting for some clear direction from the federal courts as to whether OSHA will be permitted to proceed with implementation of its ETS. As a result, OSHA will delay issuance of any citations for noncompliance with any requirements of the emergency standard before January 10 and will not issue citations for noncompliance with the ETS's testing requirements before

February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.

### **What Employers Need to Know**

We would expect that the U.S. Supreme Court, at some point, will be directly involved with the ultimate fate of OSHA's vaccinate-or-test rule. If and until the U.S. Supreme Court becomes involved, employers should start, now, the process of drafting the required policies to comply with OSHA's ETS should it survive the legal challenges confronting it. Employers, by making efforts now to comply by at least having policies in place, should the ETS become effective January 5, 2022, absent further court action, should be able to demonstrate to OSHA that it has taken the reasonable and good-faith efforts to comply with the rule. This will be true even if some employees remain unvaccinated, or the weekly COVID-19 testing protocol for unvaccinated employees is not yet fully operational by January 5. However, all employers with 100 or more employees will have to require and enforce by January 5 that all unvaccinated employees wear face coverings as required by the ETS unless such employees are fully vaccinated.

As always, we will keep you updated on this important issue as matters develop.