

EMPLOYMENT LAWSCENE ALERT: SIXTH CIRCUIT SELECTED TO HEAR CHALLENGES TO OSHA'S COVID-19 VACCINATION MANDATE

On Tuesday, November 16, 2021, the U.S. Judicial Panel on Multidistrict Litigation held a lottery-style drawing to select which of the 12 federal circuit court of appeals where petitions for review are currently pending as to which circuit will hear the challenges to OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. Through that lottery process, the U.S. Court of Appeals for the Sixth Circuit was selected. As a result, the U.S. Judicial Panel on Multidistrict Litigation issued a consolidation order consolidating before the Sixth Circuit all of the petitions for review now pending in the various federal circuit court of appeals.

On Friday, November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a 22-page decision (linked [here](#)) continuing its November 6th order that stayed the implementation and enforcement of OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. Subsequently, OSHA issued a statement in response to the Fifth Circuit's decision that it would suspend the implementation and enforcement of its emergency temporary standard pending the outcome of the litigation. Relative to the Fifth Circuit's decision, the Sixth Circuit has three options as it can either adopt, modify, or vacate the Fifth Circuit's decision.

The Sixth Circuit, located in Cincinnati, Ohio, oversees the federal district courts covering the states of Kentucky, Michigan, Ohio, and Tennessee. There are 16 total judges on the Sixth Circuit: 11 Republican appointees and 5 Democratic appointees. Six of the Republican appointees were appointed by President Trump and five were appointed by President George W. Bush, while the five Democratic appointments were made by Presidents Clinton and Obama. Although the consolidated petitions for review will be heard by a randomly selected three judge panel, based on the overall makeup of the Sixth Circuit, the chances are relatively high that the mandate will continue to be blocked.

Despite the possible variations of the makeup of the randomly selected judicial panel from the Sixth Circuit, the case could be heard by the Sixth Circuit *en banc* (meaning that the full judicial panel consisting of all judges in regular active service could decide the case). The Sixth Circuit disfavors *en banc* proceedings unless the proceeding involves a question of

exceptional importance. To hear a case *en banc*, a majority of the circuit judges who are in regular active service and who are not disqualified may order that the case be heard or reheard by the court *en banc*. It will be interesting to see if the Sixth Circuit decides to permit the consolidated petitions for review to proceed before a randomly selected three-judge panel or if it will decide to initially hear the case *en banc*. For now, the Fifth Circuit's stay remains in place.

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