

Update on OSHA ETS Litigation

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

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Since OSHA published the Vaccinations, Testing, and Face Coverings ETS in the Federal Register 11 days ago, petitioners have filed more than 30 separate lawsuits challenging the legality of the ETS and moving to temporarily and then permanently enjoin implementation of the ETS. The petitioners across these nearly three dozen challenges include more than half the states in the US, numerous private employers, religious groups, the Republican National Committee, and some labor unions (presumably for strategic reasons—to give more liberal courts a chance to take the lead in hearing the litigation).

By judicial procedure, when a legal challenge to an OSHA standard is filed in more than one US Court of Appeals, the US Judicial Panel on Multi-District/Circuit Litigation will respond to a motion by either party in the challenge to consolidate all of the challenges that were filed within ten days of issuance of the standard, and by way of a true lottery, will assign the consolidated cases to a single circuit court.

Yesterday marked the tenth day since the OSHA ETS was published in the Federal Register, so this morning (November 16th), the Department of Labor gave notice to the MDL Panel of the numerous petitions for review of a single case filed in each of the 1st, 2nd, 3rd, 5th and 10th Circuits, two cases in each of the 4th and 7th Circuits, three cases in the 9th, 11th, and District of Columbia Circuits, four cases in the 8th Circuit, and five cases in the 6th Circuit. For those keeping score at home, that's at least one legal challenge filed in every US Court of Appeals in the country except for the Federal Circuit, which does not have jurisdiction to hear challenges to OSHA standards. Regardless of the number of challenges filed in any given circuit court, each circuit had one chance in the lottery.

Pursuant to the Consolidation Order of the US Judicial Panel on Multi District Litigation that was just issued this afternoon, the 6th Circuit was randomly selected to take custody of the consolidated petitions for review.

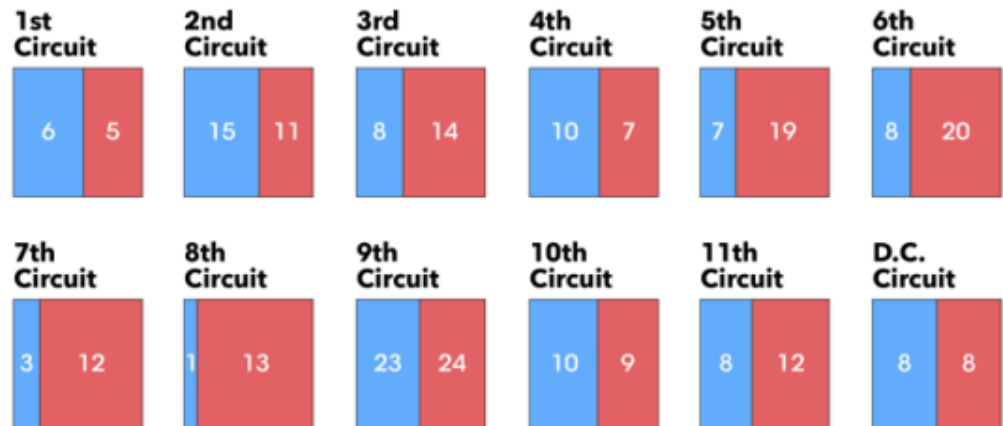
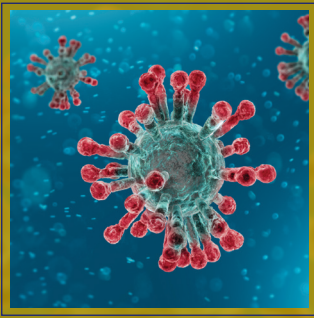
The 6th Circuit sits in Cincinnati, OH, and has jurisdiction over federal appeals arising from Kentucky, Michigan, Ohio, and Tennessee. This Court is generally considered very conservative, with 11 of the 16 active sitting judges appointed by Republican Presidents. Six of the 16 active judges on the court were appointed by President Trump. When factoring in the judges on senior status (who could be called on to serve on the three-judge panel assigned to the ETS challenges), the 6th Circuit is made up of 20 judges appointed by a Republican president vs. only eight appointed by a Democratic president. In short, the 6th Circuit is every bit as conservative as the 5th Circuit, which already granted petitioners' emergency motion for Stay of the OSHA ETS.

As a reminder, though, the Supreme Court will ultimately have a say in what happens with the OSHA ETS, and that could come sooner rather than later. If the 6th Circuit moves quickly like the 5th Circuit did, we could see a ruling on a TRO by the 6th Circuit by the end of this week, or soon after, and upon petition for further review by either party (which ever side loses on the TRO question), the Supreme Court could either take up the Stay in full proceedings, setting a briefing schedule and hearing oral argument, or it could handle it by way of the so-called "shadow docket," as it has done three times already regarding



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other challenges to vaccine-mandates that have come before the Supreme Court this year. If the Supreme Court requires briefing and oral argument, it is still possible to see a decision by the end of the calendar year, but more likely next year. If the Supreme Court address it through the shadow docket, and rules without full briefing, we could have a decision as early as the end of this month.

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