



All Eyes on the Sixth Circuit Regarding OSHA's COVID-19 Vaccine or Test Standard

Last week, the Fifth Circuit granted a nationwide stay of OSHA's COVID-19 Emergency Temporary Standard. Yesterday, following the November 12 decision by the U.S. Court of Appeals for the Fifth Circuit, OSHA announced that they have suspended all activities related to the implementation and enforcement of the Standard pending future developments in the litigation. The Emergency Temporary Standard, which applies to most employers with over 100 employees, requires covered employees to be vaccinated or get weekly COVID-19 tests. With the Fifth Circuit stay in place, and OSHA suspending enforcement measures, it is unclear when, or if, the Emergency Temporary Standard will go into effect. The Fifth Circuit will not get the last word on this Emergency Temporary Standard.

The cases pending before the Fifth Circuit are not the only cases concerning the Emergency Temporary Standard. In fact, there are cases pending before multiple appellate courts concerning the enforceability of the Emergency Temporary Standard. Enter the U.S. Judicial Panel on Multi-District Litigation. This panel's job is to try to avoid contradictory rulings on issues pending before multiple appellate courts. This week the panel randomly assigned the Sixth Circuit to decide all issues related to the enforceability of the Emergency Temporary Standard going forward. So while the Fifth Circuit had the first word on the OSHA COVID-19 Standard—the Sixth Circuit's eventual decision of the enforceability of the mandate will be controlling until the time when the Supreme Court chimes in.

The Sixth Circuit Court sits in Cincinnati, Ohio and is comprised of 15 Appellate Judges:

- 6 Trump appointees;
- 4 G.W. Bush appointees;
- 3 Clinton appointees; and
- 2 Obama appointees.

While the President who appoints an Appellate Judge is not necessarily predictive of how an Appellate Judge will rule on any issue, the Sixth Circuit is considered a conservative court. When this Circuit makes any decision regarding the Emergency Temporary Standard, we will, of course, let you know.

For more information, please contact [Tony Stergio](#).