

## Sixth Circuit Wins Lottery to Hear Challenges to OSHA's ETS for Large Employers

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The numerous challenges to Occupational Safety and Health Administration's emergency temporary standard (for employers with 100 or more employees) mandating employee vaccinations or weekly testing (the "ETS") have been consolidated and will be heard by the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit was selected through a lottery established according to federal rules for multi-circuit litigation.

On Friday, November 12, 2021, a panel of the United States Court of Appeals for the Fifth Circuit extended its stay on the enforcement of the ETS "until further court order." The Sixth Circuit now has the authority to review and either lift or uphold the Fifth Circuit's stay. The ultimate venue for these challenges will presumably be the United States Supreme Court, but for the time being the Sixth Circuit's decision will apply nationwide. It is not clear when the Sixth Circuit will take action with respect to the Fifth Circuit's stay. Accordingly, employers should continue to prepare for the implementation of the ETS unless and until a more definitive decision is issued.

Please note that the challenges being heard by the Sixth Circuit only relate to the ETS that applies to employers with 100 or more employees. These challenges, and the stay issued by the Fifth Circuit, do not impact the CMS Rules requiring vaccination of Staff members against COVID-19 for various health care providers. Similarly, these challenges do not impact the vaccine mandate for federal contractors.

### ATTORNEYS

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### PRACTICE AREAS

Employee Benefits and ERISA  
Employment and Labor

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As always, the Koley Jessen Employment, Labor, and Benefits Department continues to monitor the developments on the COVID-19 front and will provide additional guidance as needed. Employers with questions are welcome to contact a member of our Department with any questions they may have about this ETS or other COVID-19-related workplace matters.