

The Sixth Circuit and the OSHA Vaccine Mandate

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Sometimes federal courts of appeals get to play the lottery. The prize is not millions of dollars, but the chance to adjudicate *every* challenge to a particular federal agency action filed in federal circuit court. The Sixth Circuit won that lottery yesterday afternoon. At issue is OSHA’s highly controversial vaccine mandate. On November 5, 2021, OSHA promulgated the mandate as an emergency temporary standard, which allowed it to sidestep typical notice-and-comment proceedings for six months.

The mandate requires all businesses with 100 or more employees to “develop, implement, and enforce” mandatory COVID-19 vaccination policies. 86 Fed. Reg. 61,402, 61,402. These vaccination policies, in turn, must require unvaccinated employees to undergo weekly testing and to wear face coverings. See *id.* at 61404.

An eclectic mix of States, employers, religious institutions, and others moved to stay the mandate on the afternoon of its publication. Under 29 U.S.C. 655(f), they were able to bypass district court and collectively file 34 petitions to cover each of the twelve regional circuit courts across the country. This broad litigation filing implicated the Multicircuit Petition Statute, 28 U.S.C. 2112(a), which requires the Judicial Panel on Multidistrict Litigation to choose by “random selection” one appellate court to hear all of the cases. [Under the JPML’s decision](#), the Sixth Circuit will now decide everything about the mandate—until the Supreme Court gets involved, which seems likely no matter what the Sixth Circuit does.

The Sixth Circuit will also take over [the recent decision of a Fifth Circuit panel](#) that stayed all enforcement or implementation of OSHA’s vaccine rule. Pending “adequate judicial review of the petitioners’ underlying motions for a permanent injunction,” the panel held that the mandate “grossly exceeds OSHA’s statutory authority” and “raises serious constitutional concerns” under the Commerce Clause and the doctrine of separation of powers. While the stay should remain in effect despite the transfer, the Sixth Circuit now has the power to modify, revoke, or extend that decision. See 28 U.S.C. 2112(a)(4).

We expect that a randomly assembled motions panel will address the various pending motions (including stays and preliminary injunctions) and coordinate briefing across the cases (see 6 Cir. I.O.P. 27). Some parties might also file motions for immediate *en banc* consideration, hoping for a

more favorable ruling from the whole court rather than a randomly assigned panel. But they may have an uphill battle trying to convince the Sixth Circuit to add new complications to issues that are already procedurally and substantively complex.

We will be following these cases closely and will provide additional analysis and follow-up posts on these issues.

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