Legal Update Article

The OSHA ETS Legal Battle Continues: Petitioners Request En Banc Review; Government Files Emergency Motion to Dissolve Stay

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Multiple groups of petitioners in the newly consolidated litigation and renamed challenge to the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS), now known as the "OSHA Covid Rule Case," No. 21-7000, MCP No. 165 (6th Cir.), have asked the court to hear the OSHA challenge *en banc, with all active judges in the circuit. Multiple groups of petitioners have made or joined other groups' requests, including* a coalition of 27 states as well as the Republican National Committee (RNC).

These petitioners argue that the case involves a question of "exceptional importance" implicating constitutional questions about appropriate delegation of authority to OSHA, the Commerce Clause, and state versus federal powers under the Tenth Amendment. The answers to these questions will affect about 80 million people in this country and their right to make personal healthcare decisions. The petitioners also argue that the OSHA ETS conflicts with U.S. Supreme Court and Sixth Circuit precedent in cases heard earlier this year on the Centers for Disease Control and Prevention's (CDC) eviction moratorium. *See, e.g., Alabama Assoc. Realtors et al. v. HHS,* 594 U.S. ___(2021) ("[T]he sheer scope of the CDC's claimed authority under §361(a) [of the Public Health Service Act] would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'"); *Tiger Lily v. HHS*, 5 F.4th 666 (6th Cir. 2021) (holding "CDC cannot nationalize landlord-tenant law" without "exceedingly clear language" from Congress).

The RNC, in particular, argues that the White House has created uncertainty regarding compliance with the ETS because, in a press briefing on November 18, 2021, the Press Secretary told businesses to move forward with compliance and stated "that we are still heading toward the same timeline" notwithstanding the Fifth Circuit's stay of the ETS. The RNC states that this uncertainty comes at a time when it is about to hire 300 employees in preparation for the 2022 election cycle and thus, "the uncertainty created by the Administration's action threatens 'an irreversible … election,'" which is why the Sixth Circuit should hear the case *en banc.*

Federal appellate cases are normally heard by a three-judge panel selected at random. The losing side may then petition for rehearing *en banc*, meaning that all of the active circuit judges would review the case and a majority of those could overturn or affirm the decision of the three-judge panel, prior to petitioning the U.S. Supreme Court for review.

Rule 35 of the Federal Rules of Appellate Procedure is a special procedure that allows parties to request, in rare circumstances, that the circuit court bypass the normal three-judge panel and have the case initially heard by all the active judges.

Having the case heard *en banc* initially will promote judicial efficiency, because the decision of a three-judge panel likely would result in a request for a rehearing *en banc* anyway. The OSHA ETS is hotly contested and politically charged, as evidenced by the various

petitioners on both sides of the issue that have filed 34 petitions to review the ETS in 12 federal judicial circuits. The government has until November 30, 2021, to file one consolidated response to all the petitions for the case to be heard *en banc*.

Meanwhile, the government has filed an Emergency Motion to Dissolve Stay, citing numerous errors with the Fifth Circuit's analysis. The government argues, among other things, that:

- The Fifth Circuit erred in its findings that an airborne virus like COVID-19 did not meet the definitions of "physical agent" and "new hazard" in the Occupational Safety and Health Act;
- Contrary to the Fifth Circuit's findings, OSHA has the authority to regulate hazards that also exist outside of the work environment;
- The ETS does regulate economic activity under the Commerce Clause, because it is regulating conditions of employment for business that affect interstate commerce;
- The Fifth Circuit got it wrong when finding that the government did not properly explain its change in position on the necessity of an ETS from last year, when it told the D.C. Circuit in May 2020 that it did not need an ETS to address the COVID-19 hazard; and
- The difference between then and now is that this ETS is narrowly tailored to the COVID-19 hazard and is not seeking to regulate some generic and undefined category of infectious diseases without notice and comment rulemaking, which is what was in dispute in the 2020 D.C. Circuit case.

Addressing the Fifth Circuit's concern about the ETS arbitrarily regulating employers with at least 100 employees but not smaller employers, the government argues that it is proceeding in a "stepwise fashion," and is considering that option still, which does not undermine the ETS as currently written. The government further argues that COVID-19 still poses a grave danger, because unvaccinated people can become seriously ill and die and "the existence of a 'grave danger'... does not mean that the worst-case scenario is certain to befall every employee." The OSHA Covid Rule Case, No. 21-700, Entry [69], p. 31 (6th Cir). The government argues that, on balance, the risk to employees in staying the ETS outweighs the harm to petitioners of compliance with the ETS and "would likely cost many lives per day, in addition to large numbers of hospitalizations other serious health effects and tremendous expenses."

Lastly, the government argues that if the Sixth Circuit disagrees that the stay should be lifted, the Court should modify the stay so that the masking and testing requirements can remain in effect during the pendency of the litigation. The government also argues that the stay should be limited to the affirmative requirements imposed on employers, and that they should be left with the option to adopt COVID-19 policies. Finally, the government seeks clarification on the scope of the Fifth Circuit's stay, should the Sixth Circuit leave it in place, because the Fifth Circuit ordered OSHA to take no steps to implement or enforce the ETS. The government requests the ability of OSHA to provide pre-enforcement guidance to the public and take internal steps, such as drafting guidance and training employees on enforcement of the ETS, during the pendency of the litigation.

Attorneys at Jackson Lewis are closely monitoring developments in this case. If you have questions about your compliance obligations under applicable federal or state laws, please reach out to a member of our Workplace Safety and Health Practice Group, the COVID-19 Team, or the Jackson Lewis attorney with whom you normally work.

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