

Employers Face Whipsaw from Shifting Stays on OSHA Vaccine Rule

By: Sean Marotta, George Ingham, and Amy Kett | Nov. 10, 2021

The Fifth Circuit's decision temporarily suspending OSHA's "vaccine-or-test" mandate is the first of what could be more stay decisions to come, say Hogan Lovells' Sean Marotta, George Ingham, and Amy Kett. They explain how multiple appeals may be handled across the country, what employers should be doing during this period, and that the ultimate stay decision could come soon from the U.S. Supreme Court.

The U.S. Court of Appeals for the Fifth Circuit made headlines Nov. 6 by temporarily staying the Occupational Health and Safety Administration's emergency temporary "vaccinate-or-test" mandate nationwide. But the Fifth Circuit's stay likely won't be the last word on whether the OSHA mandate will be stayed pending review as both another circuit court and the U.S. Supreme Court may weigh in.

The potential for a stay to be imposed or lifted by different courts risks whipsawing employers rushing to comply with the mandate and could hinder the mandate's orderly implementation.

The Mandate Requires Employer Planning Now

Although employees won't have to receive their final shot or begin testing until Jan. 4, 2022, employers have to begin planning now. All other mandate requirements take effect on Dec. 6, including establishing a mandatory vaccination policy, ascertaining employees' vaccination status, providing paid time for employees to receive vaccinations, providing employees with required informational materials, and developing a masking protocol.

Also, employers that choose to adopt a "hard" vaccine mandate—requiring vaccination without a testing alternative—will need to quickly develop an exemption process for medical and religious exemptions.

Likewise, employers adopting a "soft" mandate that allows vaccination or testing—and employers with a "hard" mandate that have granted medical and religious exemptions—will need to plan the logistics of weekly testing.

Employees will need to plan, too, since getting two doses of a vaccine will take three to four weeks.

For employers deciding whether to begin those efforts or hold off while challenges are being litigated, knowing whether the mandate will be stayed is an important data point.

‘Multicircuit Lottery’ May Cut Short Fifth Circuit’s Stay

Under the Occupational Safety and Health Act, challenges to OSHA emergency standards like the mandate are heard by the appeals court where the challenger “resides or has its principal place of business.” 29 U.S.C. § 655(f). But there might be multiple suits from challengers in different circuits, and Congress wanted one court of appeals to decide a standard’s legality.

The “multicircuit lottery,” set out in 28 U.S.C. §2112(a), determines which court gets the job. Challengers that file their suits within 10 days of the standard’s issuance and follow certain steps get the circuit where they filed entered into a “lottery” held by the Judicial Panel on Multidistrict Litigation (JPML). The JPML’s clerk selects a circuit at random, and all suits challenging the standard are transferred to and consolidated in that circuit.

The lottery creates gamesmanship opportunities. Mandate opponents have filed suit in circuits with a majority of judges appointed by Republican presidents in the hopes of drawing an ideologically favorable panel.

Over the next week, mandate supporters will likely file suits contending the mandate is not stringent enough in circuits where a majority of judges were appointed by Democratic presidents to have the best chance of strengthening the mandate or at least upholding it in its current form.

The last day for challengers to get a ticket for the lottery is Nov. 15. OSHA will presumably transmit the petitions to the JPML quickly—as soon as Nov. 16—and we may know the lucky circuit the same day or the day after.

Until the JPML conducts its drawing, the circuits where suits are filed are allowed to stay the rule, 28 U.S.C. §2112(a)(4), explaining the Fifth Circuit’s Nov. 6 stay. But the statute allows the JPML’s selected circuit to revoke or extend the Fifth Circuit’s stay—meaning the stay may be short lived.

The Supreme Court Will Likely Have The Final Word

Even then, the courts of appeals are unlikely to have the last say on whether the mandate is stayed. If the JPML’s selected circuit declines to vacate the Fifth Circuit’s stay, expect OSHA to ask the Supreme Court to lift the stay while the challenges are heard on the merits.

By contrast, if the circuit selected in the lottery lifts the Fifth Circuit’s stay, expect the mandate challengers to ask the Supreme Court to re-impose one.

These emergent “shadow docket” applications have been criticized in recent months, but the Supreme Court will probably be the one to decide whether the mandate will go into effect while suits play out.

What Should Employers Do?

The potential for two more courts to decide the mandate’s fate pending appeal is enough to confuse any conscientious human resources



team. So what is an employer to do? Ultimately, it may come down to the employer's workforce and risk tolerance.

The Fifth Circuit's nationwide stay is subject to further review, so there is risk in stopping planning. If either the JPML-selected circuit or the Supreme Court lifts the stay, the implementation dates will not automatically change, so an employer that stops now will have to play catch-up later.

On the other hand, employers with vaccine-resistant workforces or that face other hurdles to mandatory vaccination may fear attrition or other problems in announcing and implementing a mandate. These employers may decide to risk waiting until closer to the mandate's effective dates to see what happens with the stay.

An employer taking this approach should have a contingency plan in place—such as draft policies, exemption forms, and a testing protocol that can be deployed on short notice in case the mandate takes effect.

If the stay or uncertainty drags on—for instance, if the JPML-selected circuit declines to vacate the Fifth Circuit's stay but the Supreme Court lifts it—employers might consider engaging with OSHA and their elected representatives to lobby for a revised implementation date or a grace period that takes into account the period the mandate was stayed.

Finally, with the new lawsuits, stay motions, and interim stay decisions, it seems like there is a new mandate-related story every day. But the ultimate stay decision is most likely going to come from the Supreme Court, and could come as soon as the end of November. The uncertainty isn't forever.

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Sean Marotta

Partner | Washington, D.C.
+1 202 637 4881
sean.marotta@hoganlovells.com



George Ingham

Partner | Northern Virginia
+1 703 610 6286
george.ingham@hoganlovells.com



Amy Kett

Senior Associate | Northern Virginia
+1 703 610 6138
amy.kett@hoganlovells.com

