The Bounce of a Ping-Pong Ball May Spell Doom for OSHA's Vaccine-or-Test ETS – What Employers Need to Know About Sixth Circuit's Lottery Win

Insights
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With the spin of a wooden raffle barrel in a D.C. court clerk's office and the random selection of a ping-pong ball, the fate of President Biden's ambitious vaccine mandate-or-test rule could have been sealed. Late Tuesday afternoon, the Judicial Panel of Multidistrict Litigation announced that the conservative Sixth Circuit Court of Appeals, which typically hears disputes arising in Ohio, Michigan, Tennessee, and Kentucky, would decide the outcome of OSHA's Emergency Temporary Standard (ETS) that seeks to require covered employers to either mandate the COVID-19 vaccination or test employees weekly. Within a matter of days or weeks, that Court may deliver the next nail in the coffin for the mandate-or-test ETS – a rule that aimed to impact tens of millions of workers and tens of thousands of employers. But is this all just an irrelevant prelude to an inevitable final showdown at the U.S. Supreme Court? This Insight will explore what happened yesterday in more depth and, with the help of a former Sixth Circuit Court insider, provide a glimpse into the possible future that awaits the ETS – and, in turn, the future obligations of many American employers.

What Happened Yesterday?

Yesterday's ping-pong lottery was the culmination of dozens of pieces of litigation filed across the country both opposing and supporting the ETS. After workplace safety officials at the Occupational Safety and Health Administration (OSHA) unveiled the mandate-or-test ETS on November 4, many groups opposing the rule filed actions in federal court in an effort to block the rule – while several groups supporting workplace safety actually filed actions claiming that OSHA's ETS didn't go far enough to protect workers. Their aim in filing such actions was to sprinkle so-called "liberal" Circuits into the litigation mix (New York's Second Circuit, for example, and the west coast's Ninth Circuit, just to name two) for reasons that will soon become apparent.

The conservative Fifth Circuit Court of Appeals was the first to act on November 6, issuing a temporary "stay" that blocked the ETS on a preliminary basis. Late Friday, November 12, the Court extended that stay in a 22-page ruling. It ordered OSHA to take no steps to implement or enforce what it referred to as "the Mandate" pending adequate judicial review of underlying motions to permanently enjoin the ETS.

But the Fifth Circuit may have committed a slight breach of judicial etiquette by issuing its opinions so quickly. That's because federal procedural rules call for a Multidistrict Litigation (MDL) Panel to

consolidate any litigation that spans more than one judicial circuit into one unified action. And despite the fact that active litigation had been filed in just about every federal appeals court across the country, only the Fifth Circuit jumped the line to issue its rulings.

Yesterday the MDL Panel held the selection process to select the judicial circuit that would hear the consolidated claims, and – yes – actually used a wooden raffle drum and a collection of 12 ping-pong balls (one each for the First through Eleventh Circuits, and one additional for the D.C. Circuit, each of which has had ETS litigation filed in its courts). Each Circuit in which litigation had been filed had an equal shot of having its ping-pong ball pulled, which explains why those in favor of the ETS wanted to give the more liberal Circuits a shot in the lottery. The ping-pong ball marked for the Sixth Circuit Court of Appeals – headquartered in Cincinnati but hearing cases arising in Ohio, Michigan, Tennessee, and Kentucky – was selected and the disputes were immediately consolidated and transferred to that Circuit via a three-page order.

A Primer of the Sixth Circuit Court of Appeals

For those unfamiliar with federal appellate litigation in the Sixth Circuit, we have turned to one of our firm's thought leaders who formerly served as a clerk in that court. "The composition of the Sixth Circuit has changed significantly in recent years, and it now ranks among the most conservative circuits in the country," says Benjamin Morrell, an attorney in our Charlotte office and former Sixth Circuit clerk.

Whereas just a decade ago it surpassed the Ninth Circuit as the federal appellate court most often reversed by the Supreme Court – signaling that it often skewed too progressive for the nation's highest court – Morrell notes that it now includes 20 judges appointed by Republican presidents and only six appointed by Democratic presidents. This includes both active judges and judges occupying "senior status" roles (a form of semi-retirement that allows older judges to take a reduced caseload but still participate in much of the court's business position – including the ETS challenge). "And out of the 16 active judge slots in the Circuit, President Trump successfully appointed six of those judges, which gives you an idea of how conservative this court has become," says Morrell.

What are the Options?

We are likely to see one of three developments at the Sixth Circuit in the coming days and weeks.

1. ***Option One: Standard Three-Judge Panel***

   In a typical case, the court would randomly assign a panel of three judges to hear the matter, usually selected via an automated system from both the pool of active and senior status judges. Therefore, while only about a quarter of the court's judges were nominated by Democratic presidents, it is possible for two of the three panelists selected to come from this camp. And, of course, while much of today's society has become polarized and politicized, it is not unheard of for a judge appointed by a Republican president to issue a "liberal" ruling (and vice versa).

meaning it is not easy to predict in a typical Circuit setting how a final decision will be issued. This might lead you to believe there stands a real possibility that the panel selected for this matter could conclude that the ETS should survive.

2. ***Option Two: Full* En Banc *Decision***

   However, there are further steps in Circuit court practice that need to be considered. After the three-judge panel has issued a decision on a particular case, the losing party may file a petition asking the court to rehear the case "*en banc*." In such a situation, every active judge from the Circuit (plus any senior judges who were on the three-judge panel) automatically vacate the panel's decision and hear the case anew, with full briefing and oral argument. Morrell notes that these requests are frequently sought but rarely granted. "The court hears only a handful of *en banc* cases each year, and they typically concern matters of special importance, like the death penalty or abortion. Or they become necessary to resolve intra-circuit splits, where multiple published decisions from the same court conflict with each other." No doubt that this piece of litigation rates highly enough for the Court to conclude that an *en banc* review is necessary, especially if the initial panel of judges issues a progressive-leaning opinion that conflicts with the collective judicial philosophy of the entire panel of active Sixth Circuit judges.

3. ***Option Three: Initial* En Banc *Decision***

   But even rarer than an *en banc* rehearing is an *initial en banc* hearing. In such a case, the court would consider the case *en banc* right out of the gate in the first instance without a three-judge panel issuing an opinion first.

Prediction Time: What Happens Next?

So the million-dollar question: will the Sixth Circuit hear the ETS case *en banc* in an initial setting, or wait to see how a three-judge panel will rule before making a decision regarding a full seating of judges? Morrell says: Time will tell, but an initial *en banc* decision seems likely. "The case is undoubtedly important and far-reaching enough to grab the full court's attention. And for an exceptionally rare case of national importance such as this one, it has a high probability of ultimately being resolved at the U.S. Supreme Court."

Knowing this, Morrell says, the Sixth Circuit will likely choose to hear the case *en banc* as an initial matter. "In addition to allowing all of the active judges to weigh in, it would also expedite the case making its way to the Supreme Court by limiting the Sixth Circuit's involvement to a single round of briefing and oral argument."

As Morrell noted, regardless of what happens at the Sixth Circuit, this dispute seems destined to be decided by the U.S. Supreme Court. If and when that happens, we will have a new analysis to publish and a new set of predictions to unveil. We will continue to monitor this situation and provide updates as warranted. Until then, Fisher Phillips has created a set of comprehensive FAQs for employers on the ETS to help you navigate through this process.

Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our Vaccine Resource Center for Employers or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our FP Vaccine Subcommittee.

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