

# NEWS BRIEF

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## Unions File Petitions Supporting COVID-19 Vaccination and Testing ETS

On Nov. 4, 2021, the Occupational Safety and Health Administration (OSHA) [announced a federal emergency temporary standard](#) (ETS) requiring covered employers to develop, implement and enforce a mandatory COVID-19 vaccination policy, or have employees undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination. Affected employers will be required to comply with most provisions of the ETS by **Dec. 6, 2021**, and with its testing requirements by **Jan. 4, 2022**. Affected employers include private employers **with 100 or more employees** (firm- or company-wide count).

Since its announcement, several union lawsuits have been filed in an apparent effort to support (not block) the emergency rule. The union lawsuits—which have been filed in three appeals courts (one with a majority of Democratic-appointed judges and two with a partisan split)—aim to increase the chances of a circuit panel looking favorably upon the mandate. One circuit with a Republican-appointed majority has also received new litigation.

The union-filed lawsuits attempt to add liberal or split venues to the pool of circuit courts being considered for the task of sorting out ETS-related challenges. Union and nonunion petitions have been filed in at least 11 circuit courts—six of which have majorities made up of judges appointed by Republican presidents, three are controlled by Democratic appointees and two have a partisan split. The case will eventually be assigned to a three-

judge panel of whichever circuit wins the lottery, meaning a partisan majority circuit-wide doesn't guarantee the panel will have the same majority.

The Nov. 16 lottery will determine which court has jurisdiction over a case that consolidates the filed petitions. The chosen circuit could play a critical role in determining whether OSHA's rule survives review, considering the inevitable variance in the judges' views of administrative agency power and the need for vaccine mandates. Favorable circuit precedent could impact future litigation.

Unions filing the lawsuits include the National Association of Broadcast Employees and Technicians, United Food and Commercial Workers International, the Massachusetts Building Trades Council, the Service Employees International Union Local 32BJ and the United Association of Union Plumbers and Pipefitters.

