



U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW
Washington, D.C. 20530

Tel: (202) 616-5446

November 8, 2021

By ECF

Lyle W. Cayce, Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *BST Holdings, L.L.C., et al. v. Occupational Safety and Health Administration, et al.*, No. 21-60845

Dear Mr. Cayce:

We write to notify the Court of developments in other courts of appeals related to the above-captioned cases challenging the Occupational Safety and Health Administration's November 4, 2021 Emergency Temporary Standard (ETS) addressing means to protect against the grave danger to certain employees of contracting COVID-19 in the workplace. To date, petitions for review challenging the same ETS have been filed in the Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits. *See* attached list.

In 28 U.S.C. § 2112, Congress set forth procedures governing this situation, *i.e.*, when multiple petitions for review of a single agency order are filed in at least two courts of appeals within ten days after issuance of the order. In such cases, the agency must notify the judicial panel on multidistrict litigation. 28 U.S.C.

§ 2112(a)(3). The panel must then, “by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed . . . , and shall issue an order consolidating the petitions for review in that court of appeals.” *Id.* The various courts with pending proceedings “shall transfer those proceedings” to the court of appeals selected through the lottery. *Id.* § 2112(a)(5). Section 2112 further provides that any court of appeals in which a petition for review is filed “may, to the extent authorized by law, stay the effective date of the order” and that any such “stay may thereafter be modified, revoked, or extended by” the court chosen through the multi-circuit lottery described above. *Id.* § 2112(a)(4).

With respect to the ETS at issue, the United States expects the multi-circuit lottery to take place on or about November 16, after which all petitions for review will be consolidated in one court of appeals responsible for deciding these petitions and considering or reconsidering any stay orders.

Sincerely,

MICHAEL S. RAAB
ADAM C. JED

s/ Brian J. Springer
BRIAN J. SPRINGER
MARTIN TOTARO
Attorneys
Civil Division, Appellate Staff
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 616-5446

Attachment

Case List

Republican National Committee v. OSHA, case no. not yet assigned to our knowledge (D.C. Cir.)

BST Holdings, L.L.C. v. OSHA, No. 21-60845 (5th Cir.)

Bentkey Services, LLC v. OSHA, No. 21-4027 (6th Cir.)

Phillips Manufacturing & Tower v. OSHA, No. 21-4028 (6th Cir.)

Commonwealth of Kentucky v. OSHA, No. 21-4031 (6th Cir.)

Answers in Genesis, Inc. v. OSHA, No. 21-4032 (6th Cir.)

Southern Baptist Theological v. OSHA, No. 21-4033 (6th Cir.)

Tankcraft Corp. v. OSHA, No. 21-3058 (7th Cir.)

Indiana v. OSHA, No. 21-3066 (7th Cir.)

Job Creators Network v. U.S. Department of Labor, No. 21-3491 (8th Cir.)

Missouri v. Joseph Biden, Jr., No. 21-3494 (8th Cir.)

Florida v. OSHA, No. 21-13866 (11th Cir.)

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

s/ Brian J. Springer

Brian J. Springer