EMPLOYEE RETENTION CREDIT (ERC): MAXIMIZING COVID RELIEF BY SUPPLEMENTING PPP

The Paycheck Protection Program has been commonly heralded as the foremost source of financial relief for businesses during COVID-19. However, the Employee Retention Credit or "ERC," is a lesser-known replacement or supplement for PPP that has remained largely unleveraged by employers. Enacted in March of 2020 under the CARES Act, the ERC provides qualifying employers with tax relief and potential refundable tax credits for all or a portion of the 2020 and 2021 tax years, up to $26,000 per full time employee in the best-case scenarios. Although originally created under the CARES Act, the ERC has been the subject of numerous amendments, modifications and IRS interpretations, all of which have muddied the waters for employers seeking to responsibly and accurately file for the credit. With this complex backdrop, this article will describe the general requirements and procedure for claiming the credit in addition to answering frequently asked questions regarding the same. However, any employer seeking to file for the ERC should first coordinate with its advisors, particularly its accountants and attorneys, to ensure accuracy, navigate potential pitfalls, and to avoid liabilities in applying for and claiming the credit.

How to Qualify – Eligible Employers

The threshold question for any business seeking to claim ERC is whether the business constitutes an "eligible employer," a requirement that can be met in one of three ways. Eligible employers must fall into one of the following categories:

1. The business was fully or partially suspended due to a government order during 2020, 2021, or some period therein ("Full or Partial Suspension");
2. The business experienced a significant decline in gross receipts during a 2020 or 2021 quarter ("Sales Testing"); or
3. The business was a "recovery startup."

For clarity, both for-profit as well as non-profit organizations may take advantage of the ERC provided that the entity constitutes an eligible employer.

Full or Partial Suspension: For a business to constitute an eligible employer via Full or Partial Suspension, the Federal government, or a state or local government having

jurisdiction over the business, must have promogulated orders or other mandatory proclamations or decrees that suspend more than a nominal portion of the business's operations. Under Full or Partial Suspension, a business will constitute an eligible employer for those periods of time that the applicable governmental orders caused the business to be fully or partial suspended.

Sales Testing: For a business to constitute an eligible employer via Sales Testing, the business must have experienced a significant decline in gross receipts for each calendar quarter in which the business is claiming the ERC.

- For 2020, a business will be deemed to experience a significant decline in gross receipts beginning as of the first 2020 calendar quarter in which the business's gross receipts measure less than 50% of gross receipts for the same calendar quarter in 2019, and this Sales Testing period will continue to run until the first calendar quarter after the business's gross receipts measure more than 80% of gross receipts for the same calendar quarter in 2019.
- For 2021, a business will be deemed to experience a significant decline in gross receipts for each calendar quarter in which the business's gross receipts measure less than 80% of gross receipts for (i) the same calendar quarter in 2019 or (ii) the immediately preceding calendar quarter in 2019. Additionally, for businesses not in existence in 2019, a business may opt to use 2020 calendar quarters as the comparative quarters for Sales Testing.

Recovery Startups: For a business to constitute an eligible employer as a recovery startup, the business must have begun operations after February 15, 2020, and have less than $1,000,000 in revenue for the applicable calendar year(s).

Extent of Employee Retention Credit – Qualified Wages

For those businesses that constitute an eligible employer, the ERC is (i) limited to a percentage of "qualified wages" paid to employees during the applicable calendar quarter, and (ii) first credited against "applicable employment taxes," with the remainder refunded to the taxpayer, all with different rules applicable in different calendar quarters.

- **2020 Q1 – Q4:**
  - For eligible employers with no more than 100 full time employees, qualified wages mean all wages paid to any W-2, full time employee, during the Full or Partial Suspension or Sales Testing Period.
  - ERC is limited to $5,000 per employee, equivalent to 50% of the qualified wages paid to each employee during the applicable Full or Partial Suspension or Sales Testing period up to $10,000 in qualified wages per employee for the entire 2020 calendar year.
- **2021 Q1 – Q3:**
  - For eligible employers with no more than 500 full time employees, qualified wages mean all wages paid to any W-2, full time employee, during the Full or Partial

Suspension or Sales Testing Period.
    - ERC is limited to $7,000 per employee per fiscal quarter, equal to $21,000 across the first three quarters of 2021, equivalent to 70% of the qualified wages paid to each employee during the applicable Full or Partial Suspension or Sales Testing period up to $10,000 in qualified wages per employee per fiscal quarter.
- **2021 Q3 – Q4:**
    - The same rules as 2021 Q1 – Q3 apply, but recovery startup businesses may claim ERC not to exceed $50,000 for quarters 2021 Q3 and 2021 Q4, provided that the recovery startup does not qualify for or claim ERC under Full or Partial Suspension or Sales Testing.
    - Additionally, for 2021 Q4, ERC is only available for businesses that constitute post recovery startups and is no longer available for businesses via Full or Partial Suspension or Sales Testing.

Coordination with Other Programs – PPP and ERC

ERC may be limited for otherwise eligible employers when the business took part in other COVID relief or tax credit programs. Although an eligible employer may claim ERC even if the business received PPP loan forgiveness, the employer's qualified wages taken into account for ERC purposes must be reduced by any qualified wages constituting "payroll costs" in connection with PPP loan forgiveness. Additionally (among several other limitations), to avoid double-dipping on wage-based tax credits, wages taken into account for various other tax credits, including the following, may not also be utilized in claiming ERC: (i) R&D tax credit; (ii) Indian Employment Credit; (iii) Active-Duty Members Credit; (iv) Work Opportunity Tax Credit; and (v) Empowerment Zone Employment Credit.

Claiming the Employee Retention Credit – Procedure and Applicable Deadlines:

Today, the method by which an eligible employer claims the ERC is by amending its Form 941 quarterly federal tax returns (via Form 941-X). Additionally, businesses will generally have to amend their income tax returns in connection with claiming the ERC as any deductions taken for qualified wages will have to be reduced to the extent of the ERC received. The credit is available for as long as a business is able to amend its original form 941s. For an eligible employer's 941s filed in connection with the 2020 fiscal year, the business will generally have until April 15, 2024, to file a 941-X, three years after the general deemed filing date for such 941s. For an eligible employers 941s filed in connection with the 2021 fiscal year, the business will generally have until April 15, 2025, to file a 941-X, three years after the general deemed filing date for such 941s. However, due to the lead time associated with filing for, being approved for and receiving any applicable refund in connection with the ERC, as well as the general requirement that the business's applicable income tax returns be amended, businesses desiring to claim the ERC should consider taking steps to claim the credit sooner rather than later, allowing for significant lead time.

Disclaimer – Seek Legal and Accounting Advice

Given the legal and accounting complexity associated with the Employee Retention Credit, any individual or business seeking to claim the credit must reach out and coordinate with their attorneys and accountants to determine the extent to which they qualify for ERC, if at all. This article is for informational purposes only and should not be relied on as either legal or accounting advice.

For questions or further information relating to the Employee Retention Credit please contact Attorney Samuel D. Nelson or Attorney Chad J. Richter.

TAX & WEALTH ADVISOR ALERT: ESTATE AND TAX PLANNING DURING MARKET TUMULT

The worldwide equity market tumult is creating some unique and unprecedented challenges. However, plunging asset values are presenting some rare opportunities in wealth planning that are often only seen once in a generation. Below are some strategies you may wish to incorporate into your estate and tax planning during this time.

Basic Estate Planning: Now, more so than ever, it is important to make sure your family is provided for in your estate plan. This means reviewing your current estate planning documents to ensure the principal documents are in order. Wills, revocable trusts, powers of attorney, beneficiary designations and health care directives should all be reviewed to ensure that these documents reflect your current wishes.

Make an Annual Gift Exclusion: You can make an annual tax-free gift of $16,000 per person (for married couples, a combined $32,000) that does not count against your lifetime gift tax exclusion (currently $12.06 million per person). Using marketable securities as the gifted asset when volatility is so high, and valuations are down, can offer you some extra stretch on gifts made now before valuations rise in the future.

Place Assets into Existing Irrevocable Trusts or Fund a New Irrevocable Trust: Like making an annual gift, funding an irrevocable trust with securities while valuations are low allows for more assets to be placed in the trust (when measured against the lifetime exclusion) and allows you to transfer more of your wealth tax-free.

Make Roth IRA Rollovers: The “cost” of converting a traditional IRA into a Roth IRA is paying taxes now on the current value of the IRA, therefore, it is best to make these conversions when the market is down.

Tax-Loss Harvesting: Some may consider lowering their tax liability by selling a security now at a loss to offset gains from earlier this year or in the future. However, you should be aware of the wash-sale rules. The wash-sale rule states that when you harvest losses, you cannot repurchase substantially identical investments for 30 days. Even though you may have separate accounts with different advisors, the rule considers all accounts to be the same. Therefore, it is important to make sure that all your advisors are aware of the securities you are buying and selling.

Intra-Family Transactions: When asset values are low, wealth transfer planning techniques involving intra-family transactions, such as selling assets to your children or grandchildren, are very effective if the sold assets appreciate at a rate greater than the interest rate charged. When asset values recover, all the asset appreciation will be outside of your taxable estate and will be held by or for the benefit of your children or grandchildren transfer tax free.

GRATs: A grantor retained annuity trust (GRAT) is an estate planning vehicle that allows you to freeze the value of your estate while transferring any future appreciation to the next generation free of tax. With a GRAT, you transfer certain assets to a trust and retain the right to receive annuity payments for a term of years. The transfer of property to a GRAT constitutes a gift for gift tax purposes, but the value of that gift is only the value of the trust assets on the date of the transfer plus an assumed rate of return. Any appreciation of the assets more than the hurdle rate passes to the beneficiaries free of gift tax. GRATS are most effective when interest rates and market values are low. While the economy isn’t currently experiencing low interest rates, it is experiencing low market values, which still makes it beneficial to set up a GRAT. For clients who have existing GRAT terms that are ending, it is probably beneficial to keep them going. Those without GRATs should strongly consider funding them in this current market climate.

CLATs: Those with charitable inclinations should consider a charitable lead annuity trust (CLAT). A CLAT works like a GRAT, however, a CLAT is designed for a charity to receive the annuity payments for a term of years, rather than an individual. At the end of the term, the balance of the assets remaining in the trust passes to the beneficiaries you indicate in the trust agreement. As with all the strategies discussed above, low equity values result in more assets passing to your intended beneficiaries free of transfer tax.

If you are interested in learning more about estate and tax planning during these unprecedented times, please contact Attorney Britany E. Morrison at O’Neil, Cannon, Hollman, DeJong & Laing S.C.

ATTORNEY JOSEPH GUMINA RECENTLY QUOTED IN THE MILWAUKEE BUSINESS JOURNAL

Attorney Joseph Gumina was recently quoted in the Milwaukee Business Journal published on January 14, 2022, in an article titled "Employers relieved that SCOTUS ruling nixes potential for costly employee COVID-19 tests: Attorneys." The article outlines the Supreme Court's recent ruling against OSHA's vaccination-or-test rule that would have required large employers, starting February 9, to mandate employee vaccinations or require weekly COVID-19 testing of unvaccinated workers.

In the article, Gumina discusses what employers should expect and what he has experienced in his management-side employment practice. "The surge in Omicron variant cases might cause some employers to take temporary measures including shutdowns to keep their workforces healthy," Gumina said. "They've had to adjust and change to address COVID-19 in the workplace on a moment's notice," noting the ongoing adjustments employers have made throughout the pandemic on how they operate. Being mindful that OSHA still retains several enforcement tools in its arsenal to address COVID-19 in the workplace, Gumina stated: "I think employers should remain vigilant in making sure they create a safe work environment for all employees."

For more information on the ruling, read our previous article detailing the decision.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT ISSUES STAY OF OSHA'S VACCINATION-OR-TEST RULE

On January 13, 2022, the Supreme Court of the United States issued a split decision (found here) staying the Occupational Safety and Health Administration's (OSHA) Vaccination-or-Test Emergency Temporary Standard (ETS) that would require employers with 100 or more employees to either impose a mandatory vaccination policy or, alternatively, mandate that unvaccinated workers wear a face covering while at work and be subject to a COVID-19 test every seven days. The decision was issued *per curiam* by the Court with conservative Justices Neil Gorsuch, Clarence Thomas, and Samuel Alito issuing a separate concurring opinion and the Court's three liberal Justices, Stephen Breyer, Elena Kagan, and Sonia Sotomayor, all dissenting.

The Court found in its decision that OSHA's vaccination-or-test rule operated "as a blunt instrument" across businesses of all different kinds without "distinction based on industry or risk of exposure to COVID-19." In exercising its authority under § 655(c)(1) of the Occupational and Safety Health Act (OSH Act) to issue an emergency temporary standard, the Court found that OSHA can only exercise the authority that Congress had provided to it. OSHA's ETS would have required 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense. The Court found that OSHA's exercise of such authority under § 655(c)(1) "is no 'everyday exercise of federal power,'" but, rather, "a significant encroachment into the lives—and health—of a vast number of employees." The Court held that OSHA had overstepped its authority in issuing its vaccination-or-test mandate because the OSH Act empowers OSHA to set *occupational* safety standards in the workplace, but not broad public health measures. Because COVID-19 can and does spread at home, in schools, during sporting events and everywhere else that people gather, the Court ruled that, while COVID-19 is a hazard, it is not an *occupational* hazard in most workplaces. The Court stated that by "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization." The Court concluded that, while "Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly."

The Department of Labor quickly issued a statement (found here) from the U.S. Secretary of Labor, Marty Walsh, appearing on OSHA's website addressing the Department of Labor's disappointment in the Court's decision. Secretary Walsh rejected the Court's premise of its ruling that OSHA did not have the authority established by Congress to enact the ETS. Secretary Walsh stated:

> OSHA promulgated the ETS under clear authority established by Congress to protect workers facing grave danger in the workplace, and COVID is without doubt such a danger…We urge all employers to require workers to get vaccinated or tested weekly to most effectively fight this deadly virus in the workplace. Employers are responsible for the safety of their workers on the job, and OSHA has comprehensive COVID-19

guidance to help them uphold their obligation.

Secretary Walsh, in his statement, reminded all employers that OSHA will do everything within its authority to hold employers accountable for protecting workers under its arsenal of enforcement tools, including under OSH Act's General Duty Clause.

For now, the case heads back to the U.S. Court of Appeals for the Sixth Circuit where that court will determine the final disposition of the applicants' petitions for review of OSHA's ETS. Depending on the action of the Sixth Circuit, the case could head back to the Supreme Court of the United States for final disposition. We will keep you updated as matters develop in this ongoing case.

As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you to protect your interests. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues related to workplace safety issues arising from or related to COVID-19.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT HALTS OSHA'S VACCINATION-OR-TEST EMERGENCY TEMPORARY STANDARD

The U.S. Supreme Court just issued a decision blocking the Occupational Safety and Health Administration's Emergency Temporary Standard that would require employers with 100 or more employees to impose either a mandatory vaccination policy or, alternatively, mandate that unvaccinated workers be required to wear a face covering while at work and be subject to a COVID-19 test every seven days. The Court's three liberal Justices, Stephen Breyer, Elena Kagan, and Sonia Sotomayor all dissented. This is a breaking story and we will provide updates as soon as possible.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT TO HOLD SPECIAL SESSION ON JANUARY 7, 2022 TO REVIEW FEDERAL VACCINE MANDATES

On Wednesday, the U.S. Supreme Court issued an order (found here) that it would hold a special session to hear arguments on OSHA's vaccine-or-test rule that mandates employers with 100 or more employees require its employees to be fully vaccinated against the COVID-19 virus or be subject to weekly tests. The Court issued its order in response to emergency applications for an administrative stay in response to the U.S. Court of Appeals for the Sixth Circuit's 2-1 decision lifting the stay on OSHA's emergency temporary standard issued by the U.S. Court of Appeals for the Fifth Circuit back on November 6th.

The U.S. Supreme Court's one-page order simply reads:

> Consideration of the applications (21A244 and 21A247) for stay presented to Justice Kavanaugh and by him referred to the Court is deferred pending oral argument. The applications are consolidated, and a total of one hour is allotted for oral argument. The applications are set for oral argument on Friday, January 7, 2022.

It is extremely unusual for the Court to hear arguments on an application for a stay, as it is the Court's customary practice to issue such a ruling based solely on the submission of written briefs.

For now, the U.S. Supreme Court has decided to defer its decision on whether to grant a stay until after the January 7th oral arguments. Although the Court is moving on an expedited basis to hear arguments on whether to grant a stay, with OSHA having previously announced that it would begin enforcement on January 10, but would not issue citations for noncompliance with the standard's testing requirements before February 9 so long as an employer is exercising reasonable good faith efforts to comply, employers hoping for a stay before the holidays will have to diligently continue their efforts to take the necessary steps to implement by January 4th either a mandatory vaccination policy or adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.

As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: SIXTH CIRCUIT LIFTS STAY OF OSHA'S VACCINATION MANDATE–OSHA FOLLOWS BY ANNOUNCING ENFORCEMENT POLICY

On Friday, December 17, 2021, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit lifted the stay of OSHA's emergency temporary standard (ETS) mandating COVID-19 vaccinations in the workplace or, alternatively, requiring unvaccinated employees to submit to weekly COVID-19 tests. The stay was originally issued by the U.S. Court of Appeals for the Fifth Circuit on November 5, 2021, when the Fifth Circuit held that OSHA had exceeded its statutory and constitutional authorities when it issued its ETS.

The case was later reassigned to the Sixth Circuit pursuant to a lottery-style drawing in accordance with the federal rules for multi-circuit litigation. Given that 11 of the 16 active judges on the Sixth Circuit are Republican political appointees, it was surmised that the Sixth Circuit would most likely follow the Fifth Circuit's decision in halting OSHA's ETS in its tracks. However, once the case was reassigned, the first battle fought between the parties began with whether the case should be decided by a traditional three-judge panel or whether the case would be heard en banc where the entire panel of 16 active judges would hear the case. In a decision (found here) that appeared to strongly divide the court, the Sixth Circuit denied the petition for an initial hearing en banc reasoning that a three-judge panel of the court had already devoted a significant amount of time to the case and that an initial hearing en banc would only serve to strain the limited resources of the court to have all 16 active judges devote their attention to the case. The Sixth Circuit's decision, however, included a strongly worded 27-page dissenting opinion from the Sixth Circuit's chief judge arguing that Congress had not "clearly" granted the Secretary of Labor authority to impose OSHA's vaccinate-or-test mandate, especially when the authority to regulate public health and safety has traditionally been regulated by the states. The chief judge also argued in his dissenting opinion that the Secretary of Labor had not met the "grave danger" standard for issuance of OSHA's ETS when (1) the key population group at risk from COVID-19–the elderly–no longer

works, (2) members of the work-age population at risk–the unvaccinated–have chosen for themselves to accept the risk and any risk is not grave for most individuals in the group, and (3) the remaining group–the vaccinated–does not face a grave risk by the Secretary's own admission, even if they work with unvaccinated individuals. Many legal experts interpreted the chief judge's dissenting opinion not only as a signal that the three-judge panel assigned to the case was ready to issue a decision to lift the Fifth Circuit's stay, but also could serve as a road map for the U.S. Supreme Court to stop OSHA from implementing its vaccinate-or-test rule.

In a 2-1 decision (found here) dissolving the Fifth Circuit's stay, the Sixth Circuit recognized that Congress had granted the Secretary of Labor "broad authority . . . to promulgate different kinds of standards" for health and safety in the workplace, even ones to address a pandemic that contemplates the use of medical exams and vaccinations as tools in its arsenal. The Sixth Circuit hinged its decision on two primary findings. First, the court found that Congress had granted OSHA broad authority under the Commerce Clause to regulate infectious diseases and viruses to protect the interests of interstate commerce (see 29 U.S.C. § 651(a)), and with that authority can issue an emergency standard to protect workers from a "grave danger" presented by "exposure to substances or agents determined to be toxic or physically harmful" in the workplace–which includes infectious agents such as COVID-19 even though the virus is not unique to the workplace. Second, the Sixth Court found that the ETS does not require anyone to be vaccinated, but, rather, allows employers, themselves, to determine the best way to minimize the risk of COVID-19 in the workplace–whether by mandatory vaccinations or requiring unvaccinated workers to wear a mask on the job and test for COVID-19 weekly. Based on these findings, the Sixth Circuit held that OSHA had met its burden in issuing the ETS by adequately establishing that: (1) an "emergency" exists relative to the pandemic; (2) the health effects of COVID-19 present a "grave danger" in the workplace; and (3) the ETS is "necessary to protect employees from" the grave danger.

Appeal Filed with U.S. Supreme Court

Those opposing OSHA's ETS immediately appealed the Sixth Circuit's decision to the U.S. Supreme Court by filing an emergency application (found here) for an administrative stay, or alternatively, writ of certiorari before judgment. It would be anticipated that the U.S. Supreme Court, with its conservative majority, will act relatively quickly on whether to issue the petitioned-for stay or to allow the Sixth Circuit's decision to stand and allow OSHA to move forward to implement its vaccinate-or-test rule.

OSHA Moves Forward

With the Fifth Circuit's stay dissolved by the Sixth Circuit's decision, OSHA did not delay in notifying employers that it intends to proceed with implementation and enforcement of its vaccinate-or-test rule. However, OSHA recognizes that many employers have been waiting

for some clear direction from the federal courts as to whether OSHA will be permitted to proceed with implementation of its ETS. As a result, OSHA will delay issuance of any citations for noncompliance with any requirements of the emergency standard before January 10 and will not issue citations for noncompliance with the ETS's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.

What Employers Need to Know

We would expect that the U.S. Supreme Court, at some point, will be directly involved with the ultimate fate of OSHA's vaccinate-or-test rule. If and until the U.S. Supreme Court becomes involved, employers should start, now, the process of drafting the required policies to comply with OSHA's ETS should it survive the legal challenges confronting it. Employers, by making efforts now to comply by at least having policies in place, should the ETS become effective January 5, 2022, absent further court action, should be able to demonstrate to OSHA that it has taken the reasonable and good-faith efforts to comply with the rule. This will be true even if some employees remain unvaccinated, or the weekly COVID-19 testing protocol for unvaccinated employees is not yet fully operational by January 5. However, all employers with 100 or more employees will have to require and enforce by January 5 that all unvaccinated employees wear face coverings as required by the ETS unless such employees are fully vaccinated.

As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: SIXTH CIRCUIT SELECTED TO HEAR CHALLENGES TO OSHA'S COVID-19 VACCINATION MANDATE

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

On Tuesday, November 16, 2021, the U.S. Judicial Panel on Multidistrict Litigation held a lottery-style drawing to select which of the 12 federal circuit court of appeals where petitions for review are currently pending as to which circuit will hear the challenges to OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. Through that lottery process, the U.S. Court of Appeals for the Sixth Circuit was selected. As a result,

the U.S. Judicial Panel on Multidistrict Litigation issued a consolidation order consolidating before the Sixth Circuit all of the petitions for review now pending in the various federal circuit court of appeals.

On Friday, November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a 22-page decision (linked here) continuing its November 6th order that stayed the implementation and enforcement of OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. Subsequently, OSHA issued a statement in response to the Fifth Circuit's decision that it would suspend the implementation and enforcement of its emergency temporary standard pending the outcome of the litigation. Relative to the Fifth Circuit's decision, the Sixth Circuit has three options as it can either adopt, modify, or vacate the Fifth Circuit's decision.

The Sixth Circuit, located in Cincinnati, Ohio, oversees the federal district courts covering the states of Kentucky, Michigan, Ohio, and Tennessee. There are 16 total judges on the Sixth Circuit: 11 Republican appointees and 5 Democratic appointees. Six of the Republican appointees were appointed by President Trump and five were appointed by President George W. Bush, while the five Democratic appointments were made by Presidents Clinton and Obama. Although the consolidated petitions for review will be heard by a randomly selected three judge panel, based on the overall makeup of the Sixth Circuit, the chances are relatively high that the mandate will continue to be blocked.

Despite the possible variations of the makeup of the randomly selected judicial panel from the Sixth Circuit, the case could be heard by the Sixth Circuit *en banc* (meaning that the full judicial panel consisting of all judges in regular active service could decide the case). The Sixth Circuit disfavors *en banc* proceedings unless the proceeding involves a question of exceptional importance. To hear a case *en banc*, a majority of the circuit judges who are in regular active service and who are not disqualified may order that the case be heard or reheard by the court *en banc*. It will be interesting to see if the Sixth Circuit decides to permit the consolidated petitions for review to proceed before a randomly selected three-judge panel or if it will decide to initially hear the case *en banc*. For now, the Fifth Circuit's stay remains in place.

As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: FIFTH

CIRCUIT ISSUES STRONG REBUKE OF OSHA'S AUTHORITY TO MANDATE VACCINATIONS IN THE WORKPLACE–OSHA SUSPENDS EFFORTS

On Friday, November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a 22-page decision (linked here) continuing its November 6th order that stayed the implementation and enforcement of OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. In a strong rebuke of the Biden's Administration's desire to vaccinate as many Americans as possible through use of OSHA's emergency temporary standard provision (29 U.S.C. § 655(c)) found in the Occupational Safety and Health Act, the Fifth Circuit found that OSHA exceeded its statutory and constitutional authorities when it issued its emergency temporary standard by finding that "[t]here is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority, and this court will not infer one…[n]or can the Article II executive breathe new power into OSHA's authority–no matter how thin patience wears." The Fifth Circuit further found that continuing the stay was in the public interest because it "is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions–even, or perhaps *particularly*, when those decisions frustrate government officials." (Emphasis original).

The Fifth Circuit concluded that the Constitution vests Congress with limited legislative powers; and these powers cannot be usurped by federal regulatory action. The Fifth Circuit stated:

> *The Constitution vests a limited legislative power in Congress. For more than a century, Congress has routinely used this power to delegate policymaking specifics and technical details to executive agencies charged with effectuating policy principles Congress lays down. In the mine run of cases–a transportation department regulating trucking on an interstate highway, or an aviation agency regulating an airplane lavatory–this is generally well and good. But health agencies do not make housing policy, and occupational safety administrations do not make health policy. Cf. Ala. Ass'n of Realtors, 141 S. Ct. 2488-90. In seeking to do so here, OSHA runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty.*

The Fifth Circuit ordered that OSHA take no steps to implement or enforce its emergency temporary standard mandating COVID-19 vaccinations in the workplace until further order of the court. In response, OSHA issued the following statement on its website:

> *On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.*

Despite the Fifth Circuit's decision, the issue is far from being resolved as challenges to OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace is now pending in multiple federal circuits. On Tuesday, November 16, 2021, pursuant to the federal rules for multi-circuit litigation, a lottery will be held by the Judicial Panel on Multidistrict Litigation randomly selecting the federal circuit that will host and decide the ultimate fate of OSHA's emergency temporary standard–albeit the U.S. Supreme Court will most likely have the final word in this important debate on the reach of federal regulatory authority. As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: OSHA ISSUES DETAILS OF VACCINE MANDATE

Today, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") released the Emergency Temporary Standard regarding COVID-19 Vaccination and Testing, which has commonly been referred to as the Vaccine Mandate. It will officially be published on November 5, 2021. Announced by President Biden in September, the Vaccine Mandate requires all employers with more than 100 employees to either require that employees be fully vaccinated or require unvaccinated employees to submit to weekly COVID-19 tests, both of which are subject to reasonable accommodations for disabilities and sincerely held religious beliefs. The Vaccine Mandate does not apply to individual employees who do not report to a workplace where other individuals such as coworkers or customers are

present, employees while they are working from home, or employees who work exclusively outdoors. Although the majority of the Vaccine Mandate officially goes into effect on January 4, 2022, employers need to start preparing immediately in order to be in full compliance by that date, including establishing and implementing the required written policies. Certain provisions, including the fact that employers must offer paid time-off for employees to receive the COVID-19 vaccinations and recover from any side-effects and must require unvaccinated employees to wear masks, go into effect on December 5, 2021.

For employees who opt to utilize the testing requirement, employers must keep records of each test unvaccinated employees take. If an employee is not vaccinated and does not receive a weekly test or if the employee tests positive for COVID-19, the employer must remove that employee from the workplace. A covered employer may require employees to pay for their own COVID-19 testing.

In order to assess whether or not an employer has 100 employees, employers are required to count all full-time and part-time employees at all of their locations, whether or not they work at the company's facility or remotely. Employers are not required to count independent contractors or leased employees, such as those from staffing agencies. Additionally, franchisees may count their employees separately from the franchisor and from other franchisees. Here are some examples provided in the ETS:

- If an employer has 75 part-time employees and 25 full-time employees, the employer would be within the scope of this ETS because it has 100 employees.
- If an employer has 102 employees and only 3 ever report to an office location, that employer would be covered.
- If a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees assigned to work there.
- If a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the host employer would not count the staffing agency employees for coverage purposes and therefore would not be covered. (So long as the staffing agency has at least 100 employees, however, the staffing agency would be responsible for ensuring compliance with the ETS for the jointly employed workers.)
- Generally, in a traditional franchisor-franchisee relationship, if the franchisor has more than 100 employees but each individual franchisee has fewer than 100 employees, the franchisor would be covered by this ETS but the individual franchises would not be covered.

The Centers for Medicare and Medicaid Services issued its own emergency rule requiring healthcare workers at hospitals, nursing homes, and other facilities that participate in Medicare and Medicaid to be fully vaccinated by January 4, 2022, but its rule does not allow for a weekly testing option. In the event of an overlap between the CMS rule and the OSHA rule, the CMS rule will govern. Additionally, in any overlap between the OSHA rule and the

requirement that federal contractors be vaccinated, the federal requirement will govern.

The Vaccine Mandate, which has already received significant pushback from certain lawmakers, attorneys general, and business groups, is likely to be challenged in court, and it could be enjoined prior to its effective date. However, employers should not rely on that possibility and should begin preparing now. As always, O’Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you and will keep you updated on developments on the Vaccine Mandate as they happen. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID-19 and related issues.