ATTORNEY GRANT KILLORAN PUBLISHED BY THE ASSOCIATION OF CORPORATE COUNSEL

Attorney Grant Killoran recently published an article for the Association of Corporate Counsel's (ACC) resource library. Headquartered in Washington, D.C., the ACC is a global legal association serving the needs of in-house legal counsel around the world.

The article, entitled "Ten Considerations Regarding State Government Public Health Powers to Mandate COVID-19 Protective Measures and Vaccination in the United States," discusses the existing public health law framework in the United States and summarizes recent decisions by the United States Supreme Court arising from cases challenging public health measures to combat the COVID-19 pandemic.

Read the full article here.

O'NEIL CANNON ELECTS BRITANY E. MORRISON AND NICHOLAS G. CHMURSKI AS SHAREHOLDERS

O'Neil Cannon is pleased to announce that Attorney Britany E. Morrison and Attorney Nicholas G. Chmurski were recently elected as shareholders of the firm. Britany has been with the firm since 2019. Prior to joining OCHDL, she worked at a "Big Four" public accounting firm utilizing her certified public accounting license to help clients manage regulatory compliance risks and enhance returns. Britany focuses on helping clients effectively manage one of their most significant costs—taxes—by advising clients on a variety of federal, state and local, private wealth, employee benefit, real estate, tax-exempt and controversy tax matters. Britany has recently been selected for inclusion on the 2021 Wisconsin Super Lawyers Rising Stars List.

Learn more about Britany by visiting her full profile.

Nick has been with the firm since 2017 and is a member of the firm's Business Law and Real Estate and Construction Groups. Nick focuses his time helping businesses and developers acquire, sell, and lease real estate. Nick also works closely with issues related to creditors' rights, including business receiverships and bankruptcies. Nick has also recently been selected for inclusion on the 2021 Wisconsin Super Lawyers Rising Stars List.

Learn more about Nick by visiting his full profile.

Both Britany and Nick are tremendous additions to the shareholder group, and we are proud to have them on our team.

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 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.

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24 OCHDL ATTORNEYS RECOGNIZED BY SUPER LAWYERS

Each year, *Super Lawyers* surveys the State of Wisconsin's 15,000 attorneys and judges, seeking the State's top attorneys. In November 2021, *Super Lawyers* published its lists for 2021, which include the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, Super Lawyers (consisting of the top 5% of attorneys in Wisconsin), and Rising Stars (consisting of attorneys who are 40 years old or younger or who have been in practice for 10 years or less).

Twenty-four of our attorneys were recognized by *Super Lawyers*, which has referred to the firm as "the Milwaukee mid-sized powerhouse." Those attorneys are the following:

- Nicholas G. Chmurski:
    - Rising Stars
- Douglas P. Dehler:
    - Super Lawyer
- James G. DeJong:
    - Super Lawyer
- Seth E. Dizard:
    - Top 50 Attorneys in Wisconsin
    - Top 25 Attorneys in Milwaukee
    - Super Lawyer
- Peter J. Faust:
    - Super Lawyer
- John G. Gehringer:
    - Super Lawyer
- Joseph E. Gumina:
    - Super Lawyer
- Grant C. Killoran:
    - Super Lawyer

- Dean P. Laing:
    - Top 10 Attorneys in Wisconsin
    - Top 50 Attorneys in Wisconsin
    - Top 25 Attorneys in Milwaukee
    - Super Lawyer
- Gregory W. Lyons:
    - Super Lawyer
- Patrick G. McBride:
    - Super Lawyer
- Britany E. Morrison:
    - Rising Stars
- Joseph D. Newbold:
    - Super Lawyer
- Chad J. Richter:
    - Super Lawyer
- John R. Schreiber:
    - Super Lawyer
- Jason R. Scoby:
    - Super Lawyer
- Steven J. Slawinski:
    - Super Lawyer
- JB Koenings:
    - Rising Stars
- Trevor C. Lippman:
    - Rising Stars
- Erica N. Reib:
    - Rising Stars
- Christa D. Wittenberg:
    - Rising Stars

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations. One court recently had this to say about *Super Lawyers*:

"[T]he selection procedures employed by [*Super Lawyers*] are very sophisticated, comprehensive and complex.

It is abundantly clear . . . that [*Super Lawyers* does] not permit a lawyer to buy one's way onto the list, nor is there any requirement for the purchase of any product for inclusion in the

lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists."

We are proud to be one of the few firms in Wisconsin that had over 50% of its attorneys receive recognition by *Super Lawyers.*

DETERMINING THE CITIZENSHIP OF BUSINESSES

People forming a new business and selecting between the different entity types may be unaware of the impact the formation choice can have on future lawsuits. In particular, the citizenship of the business can be critical to determining whether a case belongs in state court or federal court when a dispute involves over $75,000. With the many considerations business owners have to weigh when forming a new entity, the effect on hypothetical litigation is unlikely to be of primary importance, but it is useful to keep in mind.

The key inquiry when determining whether a federal court has jurisdiction over many business disputes, especially contract disputes, is whether the parties are citizens of different states—that is, whether there is diversity jurisdiction. A business's citizenship for purposes of diversity jurisdiction often is *not* the same as where the business is registered, especially for limited liability companies (LLCs) and partnerships.

Corporations are citizens of both the state where it is incorporated and the state where its principal place of business is located. For an LLC, the analysis is more complicated, and depends on the citizenship of each member. For example, if an LLC has four members—two citizens of Wisconsin, one a citizen of Illinois, and one a citizen of Iowa—the LLC is a citizen of Wisconsin, Illinois, and Iowa. Occasionally, an LLC has so many members it is difficult to assess its citizenship, especially when any members are themselves LLCs or other corporate entities. Similarly, the citizenship of a partnership depends on the citizenship of each partner. That means an LLC or partnership with members or partners in multiple states may be more limited in the ability to invoke the jurisdiction of federal courts for ordinary contract disputes, because disputes with citizens of any of the same states that are not based on federal causes of action will not be within the jurisdiction of federal courts. Whether that is good or bad strategically depends in large part on the circumstances of the particular dispute.

Sometimes parties have tried to get around the complications of the citizenship analysis by appointing an agent to enforce their rights, often when there are many real parties in interest. Though cases have reached conflicting results, several courts have held that the

citizenship of the agent does not control. Courts then analyze the citizenship of each represented business or individual.

For many businesses, planning for unforeseen litigation can be like planning to be struck by lightning—you never want to experience it, you can't predict it, and if you're lucky, you can avoid it. Even still, it can be useful to know what to expect if a lawsuit arises.

For more on jurisdictional issues or a variety of other legal matters, contact Christa Wittenberg at 414-276-5000 or christa.wittenberg@wilaw.com.

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

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.