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:
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- Joseph E. Gumina:
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- Grant C. Killoran:
    - Super Lawyer
- Dean P. Laing:
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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*:

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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.

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.

O'NEIL CANNON RANKED IN 2022 "BEST LAW FIRMS"

O'Neil Cannon has been ranked in the *2022 U.S. News – Best Lawyers®* "Best Law Firms" list in 16 practice areas:

- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Business Organizations (including LLCs and Partnerships)
- Commercial Litigation
- Construction Law
- Corporate Law
- Employment Law – Management
- Litigation – Bankruptcy
- Litigation – Insurance
- Litigation – Labor and Employment
- Mergers and Acquisitions Law
- Personal Injury Litigation – Plaintiffs
- Product Liability Litigation – Defendants
- Real Estate Law
- Securities / Capital Markets Law
- Tax Law
- Trusts and Estates Law

Firms included in the 2022 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise.

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 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.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Want to Challenge a Will? Here's What You Should Know
- Can I Really Be Sued There?
- What Should You Do If You Are Named Trustee?
- Wisconsin to Allow Municipalities to Waive Property Tax Penalties and Extend Construction and Building Permits
- Established U.S. Public Health Precedent On Mandatory Vaccination Requirements Upheld (At Least For Now)

Firm News:

- The Firm Welcomes Two New Attorneys
- Four Attorneys Named 2022 "Lawyer of the Year" in the Milwaukee Area by Best Lawyers®
- 19 OCHDL Lawyers Selected as 2022 Best Lawyers®; Another 5 Named Best Lawyers: Ones to Watch
- Grant Killoran Elected to the ABA Board of Governors

Click the image below to read more.

TAX AND WEALTH ADVISOR ALERT: WISCONSIN TO ALLOW MUNICIPALITIES TO WAIVE PROPERTY TAX PENALTIES AND EXTEND CONSTRUCTION AND BUILDING PERMITS

Wisconsin Governor Tony Evers has signed Senate Bill 254, which affects building permit holders and late property tax payments. The bill, which Evers signed on Friday, October 15, 2021, and is now known as 2021 Wisconsin Act 80, allows municipalities and other taxation districts to waive interest and penalties on late 2021 property tax payments. It also adds a timely payment requirement for filing certain property tax claims if payment was submitted by October 1, 2021. The Act also allows holders of certain unexpired construction or building permits or approvals to seek extension of the permit or approval term if the permit is subject to administrative, judicial, or appellate proceedings that may result in the invalidation, reconsideration, or modification of the permit or approval.

For questions or further information relating to 2021 Wisconsin Act 80, please contact Attorney Britany E. Morrison.