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With stories of the Omicron variant permeating the news, it remains to be seen whether this "cause for concern" (in President Joe Biden's words), might be a new tool for the Occupational Safety and Health Administration (OSHA) to use to uphold its Nov. 5 emergency temporary standard (ETS). The ETS requires employers who have at least 100 employees to institute either a mandatory COVID-19 vaccination policy or a weekly testing and mask-wearing policy for their employees. In the days following the establishment of OSHA's ETS, the U.S. Court of Appeals for the Fifth Circuit took the mandate to task, issuing a stay against its enforcement until further court order. Now, with the U.S. Court of Appeals for the Sixth Circuit in line to hear the next challenges to the ETS enforcement, a potential watershed legal battle stands in the way of the Biden administration's efforts to get the United States' population fully vaccinated to the degree originally anticipated.

For employers and those advising them, questions regarding the fate of OSHA's vaccination ETS and how to best prepare for any result are sure to take center stage in the coming month. Threshold to both questions, however, are a few historic backdrops: what is an emergency temporary standard?; what legal authority supports its enforcement?; and, how have such mandates faired in the past? The answers to these questions play a pivotal role in understanding and forecasting the future of this ETS.

By way of brief background, in 1970, Congress passed the Occupational Safety and Health Act (OSH Act), establishing OSHA and giving it the authority to promulgate and enforce administrative regulations aimed at ensuring safe workplace conditions across the United States. Ordinarily, OSHA regulations are created and implemented pursuant to the standard notice and comment procedures outlined in 29 U.S.C. Section 655(b) of the OSH Act. However, the act also vests the Secretary of Labor with the authority to bypass standard public notice and comment procedures to promulgate an "emergency temporary standard"—that is, an emergency rule "necessary" to protect workers from the "grave danger" of exposure to certain "substances or agents determined to be toxic or physically harmful." Such emergency standards take effect immediately upon publication in the Federal Register.

Yet, despite the broad and sweeping power they ostensibly command, OSHA's emergency temporary standards do not enjoy a rich history of success in the courts. Of the 10 times OSHA has exercised its power to promulgate emergency temporary standards, six have faced legal challenges, and only one has survived. This may be, in part, a result of the lack of guidance regarding such terms as what constitutes "grave

danger" and what is "necessary" to protect employees from that grave danger. Neither of these terms are defined in the OSH Act, itself, and courts have taken somewhat scattered approaches to how they should be defined. For example, in reviewing a 1973 ETS designed to protect workers from pesticide residue, the Fifth Circuit commented that a grave danger giving rise to the need for an emergency standard should refer to the danger of "incurable, permanent, or fatal consequences to workers." *See Florida Peach Growers Association v. United States Department of Labor*, 489 F.2d 120, 132 (5th Cir. 1974). Yet roughly a decade later in 1984, the Fifth Circuit, in issuing a stay of enforcement of another ETS, which lowered permissible exposure limits for asbestos in the workplace, commented that the "gravity of danger is a policy decision committed to OSHA, not the courts." *See Asbestos Information Association/ North America v. OSHA*, 727 F.2d 415, 427 (5th Cir. 1984).

Nevertheless, the most recent decision reviewing OSHA's Nov. 5 ETS—a stay of enforcement granted by the Fifth Circuit in *BST Holdings v. OSHA*, (5th Cir. Nov. 12, 2021)—may provide the clearest understanding into how the Sixth Circuit might analyze OSHA's ETS when the time comes. In *BST Holdings*, the Fifth Circuit considered an intra-circuit consolidated petition to grant a stay of enforcement of the vaccination mandate pending judicial review. Particularly instructive to the Sixth Circuit's review will likely be the Fifth's analysis of the first prong of the legal standard for reviewing a petition to grant a stay of enforcement—"whether the stay applicant has made a strong showing that he is likely to succeed on the merits." On this point, the Fifth Circuit concluded that "petitioners give cause to believe there are grave statutory and constitutional issues with the mandate."

With respect to statutory concerns, the Fifth Circuit dismissed its 1984 committal of the "grave danger" question to OSHA and concluded that there were significant questions regarding whether COVID-19 posed a "grave danger" to American workers. In support, the court reasoned that not only was COVID-19 "nonlife-threatening to a vast majority of employees," it also did not rise to the kind of toxic and/or physically harmful "substance" or "agent" contemplated in Section 655(c).

But the statutory analysis did not end there as the Fifth Circuit next laid out its critique of the "necessity" of the ETS, itself. Largely, the court viewed the fatal flaw laid bare by the current construction of the ETS to be one of both over-inclusivity and under-inclusivity. For example, the court found the ETS to be over-inclusive in that it failed to account for differing levels of transmission risk across various industries, instead applying "a one-size-fits-all sledgehammer" approach that requires compliance from all employers with 100 or more employees. At the same time, however, the court found the ETS to be under-inclusive because of its failure to cover workers employed by businesses sitting underneath the 100-employee threshold.

Turning to the constitutional concerns, the court posited that the sweeping power of this particular ETS raised significant questions under the commerce clause and the nondelegation doctrine. The commerce clause creates and defines the power of the federal government to regulate interstate commerce and is perhaps the broadest source of power enumerated in the Constitution. Since the early 1940s, the commerce power has been a means of enacting and enforcing a wide variety of federal laws and initiatives, including the Civil Rights Act of 1964 and the Gun Free School Zone Act. The nondelegation doctrine, however, refers to a guiding separation of powers principle in administrative law that Congress cannot delegate its lawmaking authority to another branch. OSHA is a branch of the Department of Labor, an administrative agency existing under the executive branch. Thus, large scale rulemaking action undertaken by an executive-housed agency such

as OSHA can raise significant separation of powers concerns.

Together, both the statutory and constitutional concerns articulated by the Fifth Circuit provide much in the way of a blueprint for the legal challenge poised in the Sixth Circuit. It remains to be seen how the Sixth Circuit will rule. It is worth noting, however, that the lone ETS to survive legal scrutiny came from the Sixth Circuit in 1978. In *Vistron v. OSHA*, 6 OSHC 1483 (6th Cir. Mar. 28, 1978), the court of appeals upheld an OSHA ETS aimed at regulating workers' exposure to acrylonitrile, also known as vinyl cyanide. It did so, in large part, because multiple studies on both rats and humans demonstrated higher incidence of cancer among workers exposed to the chemical compound. In the court's view, in demonstrating that exposure to the compound led to a higher incidence of cancer, the court found that OSHA had carried its burden of demonstrating that its ETS was "necessary to protect workers" from a "grave danger."

Thus, it remains possible that, in analyzing whether the coronavirus constitutes a sufficiently "grave danger," the Sixth Circuit may, with a view toward its earlier *Vistron* decision, choose to require some evidentiary showing that exposure to COVID-19 has a similar fatality and permanence in its consequences as had been required in the earlier *Vistron* decision. Decisions such as the aforementioned Fifth Circuit case, and *Florida Peach Growers Association*, further support this as a potential framework.

While the Sixth Circuit stands as the next hurdle for OSHA to clear relative to its COVID-19 vaccination ETS, in all likelihood, the final arbitrator of whether or not it will stand and be required to be implemented by employers throughout the country will be the U.S. Supreme Court. The timetable for that process and the highest court's ultimate decision is presently unknown. Nonetheless, employers would be well served to begin discussing and putting the necessary measures in place now to comply with the ETS requirements. As a first step, employers should begin creating all required policies and should explore and secure avenues to testing, in case those will be needed. Employers should continue with steps to ensure they will be ready to comply in the event that OSHA's ETS is upheld. Failure to do so may mean that employers are behind the eight-ball relative to compliance, which could result in significant monetary penalties.

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