FIFTH CIRCUIT EXTENDS STAY OF OSHA MANDATORY VACCINATION STANDARD, CASES MOVE TO SIXTH CIRCUIT NOW

On November 12, 2021, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") extended a stay that it had previously put in place, thereby preventing the enforcement of the recent Emergency Temporary Standards Mandate ("ETS Mandate") issued by the Occupational Safety and Health Administration ("OSHA"). *BST Holdings, LLC et al v. OSHA*, Case No. 21-60845 (5th Cir. Nov. 12, 2021). *BST Holdings* and all other challenges to the ETS Mandate were moved days later, on November 16, 2021, to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit").

As previously reported in last week's In Focus, several Texas businesses won a nationwide stay of the ETS Mandate on November 5, 2021 from the Fifth Circuit. In this most recent order from the Fifth Circuit, the Court stated that the ETS Mandate "threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." Concurrently, the ETS Mandate places companies in an untenable position because they too will be "irreparably harmed in the absence of a stay, whether by the business and financial effects or a lost or suspended employee, compliance and monitoring costs associated with the Mandate, the diversion of resources necessitated by the Mandate, or by OSHA's plan to impose stiff financial penalties on companies that refuse to punish or test unwilling employees."

Due to the proliferation of civil actions involving the ETS Mandate in both conservative and liberal judicial circuits, federal appellate rules required a "lottery" system, to select a Circuit Court where all such cases could be consolidated and decided. On November 16, 2021, the "lottery" system determined that the Sixth Circuit will preside over the instant litigation. The first issue facing the Sixth Circuit is whether it agrees with the Fifth Circuit's stay of the ETS Mandate pending litigation, or whether it will modify or vacate said stay. It should be noted that the Sixth Circuit has five judges appointed by Democratic Presidents (Clinton and Obama) and 11 judges appointed by Republican Presidents (Bush and Trump). If the Fifth Circuit's stay is overturned, then employers subject to the ETS Mandate will be required to begin the compliance process, which entails employers developing a compliance plan, offering paid time off for vaccinations, and requiring unvaccinated workers to wear masks. In the meantime, however, OSHA has suspended its activities related to the implementation and enforcement of the ETS Mandate pending future judicial proceedings.

DUTY TO BARGAIN NOT STAYED BY OSHA RULE OR COVID LITIGATION

On November 10, 2021, U.S. National Labor Relations Board ("Board" or "NLRB") General Counsel Jennifer Abruzzo issued Memorandum OM 22-03 asserting in no uncertain terms that neither COVID-19, nor the Emergency Temporary Standard Mandate ("ETS Mandate") issued by the Occupational Safety and Health Administration ("OSHA"), nor the decisions of federal courts concerning the ETS Mandate, abrogate an employer's

duty to bargain concerning implementation or effects of the ETS Mandate or other discretionary employer decisions affecting terms and conditions of employment.

Providing guidance to NLRB field offices responding to public inquiries, the Memorandum asserts generally that, "Although an employer is relieved of its duty to bargain where a specific change in terms and conditions of employment is statutorily mandated, the employer may not act unilaterally so long as it has some discretion in implementing those requirements." Moreover, to the extent the ETS Mandate does not give covered employers discretion, "the employer is nonetheless obligated to bargain about these effects ..." Last, as to the question whether an employer can act before bargaining reaches agreement or impasse, the Memorandum coyly observes, that "will depend on the facts of any given situation." A guiding principle: "While our country recovers from COVID-19, workers should know they have the right to a safe workplace and to have their voices heard," assured GC Abruzzo.

CHICAGO POLICE UNION SCORES TWO WINS IN ITS FIGHT AGAINST THE CITYWIDE VACCINE MANDATE

On November 1, 2021, the Fraternal Order of Police, Chicago Lodge No. 7 ("FOP") and the Policemen's Benevolent and Protective Association of Illinois, Units 156A, 156B, and 156C, Sergeants, Lieutenants, and Captains ("PBPA") (collectively, "Chicago Police Unions"), were granted a temporary restraining order ("TRO") from the Circuit Court of Cook County, Chancery Division ("Cook County Court") against a citywide vaccine mandate issued by Chicago Mayor Lori Lightfoot. *See Fraternal Order of Police, Chicago Lodge No. 7, et al v. City of Chicago, et al.*, Case No. 2021-CH-5276 (November 1, 2021). An immediate appeal by the City was rejected by the Illinois Appellate Court, First District.

For purposes of background, on October 8, 2021, Mayor Lightfoot issued an order, *inter alia*, requiring all municipal employees to be vaccinated against COVID-19, and said order instituted a deadline of December 31, 2021 for compliance therewith. Further, failure to meet this deadline would result in the particular employee being placed on "no pay" status. Shortly thereafter, the Chicago Police Unions initiated several grievances against the City claiming that the mandate violated the terms and conditions of their respective collective bargaining agreements. Like most such contracts, these types of grievances culminate in the arbitration of said disputes. The Chicago Police Unions then petitioned the Cook County Court seeking a TRO against the enforcement of the December 31, 2021 deadline, amongst other things, pending arbitration.

In the Cook County Court's decision, Circuit Judge Raymond W. Mitchell cited to the long-standing maxim that labor disputes, both at the state and federal levels, should be resolved through arbitration. Further, this court determined that, if a TRO was not issued in connection with the instant dispute, then the prevailing notion of "obey now, grieve later" would be transformed to "obey now and forever" because an arbitration award where the Chicago Police Unions succeed would become "an empty victory"; especially since compliance with the mandate could not undo the receipt of an unwanted

vaccine. Additionally, the Cook County Court held that: "The absence of meaningful arbitration is not just an injury to members, it is also an injury to the union itself."

In deciding in favor of the Chicago Police Unions, the Cook County Court wrestled with "two competing public interests"; one being the strong public policy favoring the arbitration of labor disputes, and the other being the "legitimate (indeed laudable) effort to protect the health of its employees, as well as the public at large." However, Circuit Judge Mitchell stated that "one interest need not be scuttled in favor of another." Accordingly, the Cook County Court crafted "the narrowest possible order to preserve the unions' rights to a meaningful arbitration" and stayed the enforcement of the December 31, 2021 deadline. Essentially, Circuit Judge Mitchell sought to stave off the negative ramifications of non-compliance with the mandate until after the arbitral process had an opportunity to conclude. At the end, explained the Court: "The effect of this Order is to send these parties back to the bargaining table and to promote labor peace by allowing them to pursue the remedies provided for in the Illinois Public Labor Relations Act."

IT TAKES A VILLAGE: NEW YORK STATE RECOGNIZES "SIBLINGS" IN ITS COVERAGE FOR PAID FAMILY LEAVE

The application of New York State Paid Family Leave ("PFL") has been recently expanded by Governor Kathy Hochul, who amended the PFL to include "siblings" under the protections of this law.

For the purposes of background, in 2016, the State amended the Workers Compensation Law to include PFL, thereby providing paid family leave for employees to care for newly born or adopted children, to care for family members with serious medical conditions, and to care for family members when their spouse, partner, child, or parent is deployed because of military service. This paid leave ensured that employees would be able to return to their job, and would ensure compensation during said leave through modest payroll deductions from employees' paychecks.

Originally, PFL was designed to cover children, parents, grandparents, grandchildren, spouses, and domestic partners, but the recent amendment includes "biological or adopted sibling, a half-sibling or stepsibling." The justification noted in this piece of legislation for the amendment was: "When we celebrate a marriage, birth, or promotion, we often celebrate with our sibling(s). That is true when we face hardships such as sickness. The strong bond siblings share is undeniable, and for many single individuals a sibling may be the only surviving family member that they have." Therefore, concluded Governor Hochul: "it is imperative that we add 'sibling' to the definition of 'family member' for the purpose of Paid Family Leave."