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MEMORANDUM

TO: Utility & Transportation Contractors Association of New Jersey
FROM: Florio Perrucci Steinhardt Cappelli Tipton & Taylor, LLC
DATE: January 14, 2022
RE: **United States Supreme Court Reinstates the Stay on OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard**

On January 13, 2022, in a 6-3 decision, the Supreme Court of the United States stayed the Occupational Safety and Health Administration ("OSHA") COVID-19 vaccination and testing Emergency Temporary Standard ("ETS"). See National Federation of Independent Business, et al. v. OSHA, 595 U.S. ___ (2022) (slip opinion). The Court, in a *per curiam* opinion, remanded the case to the Sixth Circuit to review the merits of the case.

The Court addressed whether the Sixth Circuit's decision to lift the stay and to allow OSHA's ETS to go into effect should be overturned. Disagreeing with the Sixth Circuit, the Court found that OSHA acted beyond the scope of its authority in promulgating the ETS. The Occupational Safety and Health Act ("OSH Act") "empowers [OSHA] to set workplace safety standards, not broad public health measures." Because the OSH Act does not address "public health more generally," the ETS "falls outside of OSHA's sphere of expertise." "Permitting 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 found that had OSHA narrowly targeted workplaces where COVID-19 "poses a special danger because of the particular features of an employee's job or workplace," then the ETS would have been "plainly permissible." The Court indicated that "[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most." Specifically, OSHA is permitted to "regulate researchers who work with the COVID-19 virus" and workplaces where employees are "working in particularly crowded or cramped environments." The Court noted that the OSHA's "indiscriminate approach" fails to account for the notable difference "between occupational risk and risk more generally." The Court classified the ETS as "a general public health measure, rather than an occupational safety or health standard."

The Court further reasoned that this was not just an “everyday exercise of federal power,” and that Congress did not expressly grant OSHA such authority “to exercise powers of vast economic and political significance.” Congress granted OSHA the authority to regulate “occupational dangers,” but “it has not given [OSHA] the power to regulate public health more broadly.” The Court found that the vaccination and testing mandate, which is applicable to 84 million Americans simply because they work for employers with more than 100 employees, is a general public health regulation. As such, because OSHA’s ETS does not set an occupational safety and health standard, the Court held that OSHA exceeded the scope of its authority under the OSH Act.

Moreover, in the concurring opinion, Justice Gorsuch provides that state and local authorities have considerable power to implement COVID-19 prevention procedures. Justice Gorsuch also notes that “in fact, States have pursued a variety of measures in response to the current pandemic.” Thus, Justice Gorsuch indicates that States—and Congress, not federal agencies, have the right to implement measures to combat the COVID-19 pandemic.

Although the Court reinstated the stay on the COVID-19 vaccination and testing ETS, OSHA is not without other avenues to regulate COVID-19 in the workplace in order to protect employees. Specifically, OSHA may impose COVID-19 requirements on employers under the General Duty Clause in the OSH Act. The broad provision requires employers to maintain a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” The elements of the General Duty Clause may provide a barrier for OSHA to use this provision in the COVID-19 context. To prove a violation of the General Duty Clause, OSHA must show: (1) the employer failed to keep the workplace free of a hazard to which employees were exposed; (2) the hazard was recognized; (3) the hazard was causing or was likely to cause dead or serious physical harm; and (4) there was a feasible and useful method to correct the hazard. In the COVID-19 context, it is not enough for OSHA to show that an employee could have had COVID-19 at work and transmitted it to other workers. Thus, due to the strict standard, OSHA has issued few General Duty Clause violations related to COVID-19.

As a result of this decision, the case is remanded back to the Sixth Circuit to decide whether OSHA has the authority to promulgate the COVID-19 vaccination and testing ETS. It is unlikely that the Sixth Circuit will uphold the ETS based on the fact that in order to issue the stay the Supreme Court had to have found that the challengers had a reasonable likelihood of success on the merits. Although the Court stayed OSHA’s emergency vaccine and testing mandate, employers still need to stay tuned with respect to any future or existing state or local vaccine or testing mandates that may impact their business.

We are available as a resource for any questions or concerns arising from the Supreme Court’s decision discussed herein.