EMPLOYMENT LAW

CASES AND MATERIALS

NINTH EDITION

2022-2023 SUPPLEMENT

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CHAPTER 3

THE HIRING PROCESS

Page 89. Please add the following to the end of note A, Want Ads.

Job postings may be regulated in other ways as well. For example, Washington and Colorado now require most employers to include in their job listings the prospective wage or salary scale. What purpose do you think this requirement serves?

Page 114. Please update the statistics in the first sentence of the first full paragraph under heading 5, "Hiring the Unemployed."

According to the Bureau of Labor Statistics, as of May 2022, the mean duration of unemployment in the United States was 22.5 weeks, and the percentage of individuals unemployed for 27 or more weeks was 23.2%. www.bls.gov/news.release/pdf/empsit.pdf.

CHAPTER 4

DISCRIMINATION

Page 282. Please add as note 14.

In March 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. The Act amended the Federal Arbitration Act to prohibit employers from unilaterally enforcing arbitration agreements for disputes involving sexual harassment or sexual assault. As a result, employees subject to arbitration agreements have the right to choose to bring covered claims in arbitration or in court. Employees also have the right to bring sexual harassment or sexual assault claims individually or on behalf of a class.

Page 446. Please insert at the end of the section: *Minor and transitory impairments*.

During the COVID-19 pandemic the EEOC issued a guidance saying that COVID-19 could qualify as an actual disability under the ADA as long as it was sufficiently severe to impair major life activities. The Department of Health and Human Services and the Department of Justice issued similar guidance. In Brown v. Roanoke Rehabilitation & Healthcare Center, 2022 WL 532936 (D. Ala., Feb. 22, 2022), the court denied the employer's motion to dismiss and held that an employee who was fired for failing to return to work after contracting COVID and while still experiencing symptoms could bring a claim alleging her discharge violated the ADA.

Page 470. Please insert as new note 3.

Religious employers have already begun to challenge the impact of *Bostock.* In Bear Creek Bible Church v. EEOC, 2021 WL 5449038 (N.D. Tex., Nov. 22, 2021), a Christian church and a Christian-owned business in Texas sought class certification and a declaratory judgment asserting their right to discriminate against employees who engaged in homosexual or transgender conduct. The court certified a class of religious business-type employers and a class of church-type employers who objected to hiring individuals who engaged in homosexual or gender non-conforming conduct.

CHAPTER 5

WAGES AND HOURS

Page 506. Please add the following to note 2.

However, *Berger* may not be the last word on the subject. In an ongoing case, another group of student-athletes have sued the NCAA and a group of colleges and universities, arguing that they are employees who are entitled to be paid the minimum wage for the time they spend on their sports. In their complaint, the athletes say that they spend more than 30 hours per week on games, practices, and other sports-related activities, and that their participation in athletics limits what classes they can take and even their choice of major. Further, college sports are big business for both schools and the NCAA.

The defendants filed a motion to dismiss, relying in part on the "tradition of amateurism in college sports," but the district court rejected that reasoning. It then considered the *Glatt* factors, concluding that, taking the allegations in the complaint as true, three factors weighed in favor of a conclusion that the student-athletes were employees. Johnson v. National Collegiate Athletic Ass'n, 556 F.Supp. 3d 491 (E.D. Pa. 2021). The district court then certified for interlocutory appeal its decision refusing to dismiss the case, and the Third Circuit agreed to hear the appeal.

Which *Glatt* factors do you think are most likely to help the student athletes? Which factors might cut the other way?

Page 521. Please add a new note following note 2.

In *Hewitt v. Helix Energy Solutions Group*, 15 F.4th 289 (5th Cir. 2021), the court concluded that a highly paid executive was not exempt from overtime because his pay was calculated on a daily basis, and his employer did not comply with a rule stating that an "exempt employee's earning may be computed on an hourly, a daily, or a shift basis, without losing the exemption . . . , if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis . . . and a reasonable relationship exists between the guaranteed amount and the amount actually earned." 29 C.F.R. § 541.604(b). The Supreme Court has agreed to hear the case during its 2022-23 Term.

Page 578. Please add a new note after note 9.

One of the most high-profile equal pay fights in recent years involved the US Women's National Soccer Team, which filed a lawsuit alleging that its players were illegally paid less than players on the Men's National Team. In 2020, a district court granted summary judgment for the US Soccer Federation as to most of the case, concluding that the women were paid more than the men on a cumulative and a per-game basis. *Morgan v. US Soccer Federation*, 445 F.Supp. 3d 635 (C.D. Cal. 2020). This conclusion was widely criticized, because, as one commentator put it, "this ruling ignored the reality that the women players were not paid at an equal rate . . . and that

they consistently received lower bonuses for winning games than their male counterparts, and had to consistently outperform their male counterparts in order to earn roughly as much as they did." *Milestone Agreement to Pay U.S. Women's National Soccer Team Equally: Implications, and the Equal Pay Act in 2022*, National Law Review (May 23, 2022), https://www.natlawreview.com/article/milestone-agreement-to-pay-us-women-s-national-soccer-team-equally-implications-and. In May 2022, the men's and the women's teams negotiated parallel collective bargaining agreements under which players on the two teams will be paid according to the same formula.

CHAPTER 6

HEALTH BENEFITS

Page 607. Please add at the end of the first paragraph of the Introduction section.

In 2021, more than a year after the start of the COVID-19 pandemic, an estimated 155 million Americans still obtained health insurance through an employer-sponsored group health plan. The average annual premium for single coverage under employer plans rose to $7,739 in 2021, and the average annual premium for family coverage rose to $22,221.

Page 612. Please add to the subsection entitled "Employer Mandate" in the new section on Employer Responsibilities (see 2021 annual supplement).

The 2022 threshold percentage of an employee's household income is 9.61% for purposes of determining the "affordability" of employer coverage under the ACA's shared responsibility mandate. The annual $2,000 penalty under 26 U.S.C. § 4980H(a) per full-time employee (after the first 30 full-time employees) for failure to provide MEC is adjusted to $2,750 for 2022. penalty (after the employer penalty for failure to provide MEC, and the annual $3,000 penalty under 26 U.S.C. § 4980H(b) for each full-time employee who qualifies for an ACA subsidy is adjusted to $4,120.

In the subsection entitled "Other Employer Plan Changes" in the new section on Employer Responsibilities (see 2021 annual supplement), the 2022 limit on employee contributions to healthcare FSAs is $2,850.

In the subsection entitled "Litigation over contraceptive coverage" in the new section on Employer Responsibilities (see 2021 annual supplement), references to "Masterpiece Cake" should read "Masterpiece Cakeshop".

Add the following to the end of the subsection entitled "Litigation over contraceptive coverage" in the new section on Employer Responsibilities (see 2021 annual supplement):

Although not involving employee benefit plans, several U.S. Supreme Court decisions in the first half of 2022 suggest a significant shift in favor of deference to religious beliefs. See, e.g., Kennedy v. Bremerton School District, __ S. Ct. __, 2022 WL 2295034 (2022) (holding in part that public school district impermissibly burdened employee's rights under First Amendment's Free Exercise Clause by suspending employee for midfield prayer during/after football games), Carson as next friend of O.C. v. Makin, __ S. Ct. __, 2022 WL 2203333 (2022) (holding in part that Maine's state tuition assistance program for private secondary schools violated First Amendment's Free Exercise Clause by imposing "nonsectarian" requirement on recipient schools), and Shurtleff v. City of Boston, Massachusetts, 142 S. Ct. 1583 (2022) (holding in part that Boston violated the First Amendment's Free Speech Clause by refusing to allow an organization to fly its self-described "Christian flag" as part of program allowing private groups to use city-owned flag poles to fly flags in front of city hall).

Page 615. Please add to the new section on Individual Mandate (see 2021 annual supplement).

The reference to the American Rescue Plan Act of 2021's expanded eligibility for premium tax credit assistance for individuals should include 2022 in addition to 2020 and 2021.

Page 617. Please add to the new section on Health Insurance Marketplaces (see 2021 annual supplement).

A total of 14.5 million Americans in 2022 obtained health insurance coverage through a plan purchased through one of the ACA health insurance marketplaces. A majority of states for 2022 continued to use the federal government marketplace, but several states transitioned in 2021 and 2022 to state-based marketplaces.

Page 647. Please add to the end of note 9 (see 2021 annual supplement).

Following *Rutledge*, the Eighth Circuit in November 2021 upheld various North Dakota statutory provisions that targeted PBMs managing prescription drug benefits on behalf of health benefit plans, rejecting arguments that ERISA preempted the statutory provisions. Pharmaceutical Care Management Association v. Wehbi, 18 F. 4th 956 (2021).

Page 654. Please add after note 4 (see 2021 annual supplement).

5. The U.S. Supreme Court's decision in Dobbs v. Jackson Women's Health Organization, __ S. Ct. __ 2022 WL 2276808 (2022), which reverses Roe v. Wade, 410 U.S. 113 (1973), returns regulation of abortion to the individual states. As a result, as of July 2022, abortion is either banned altogether or significantly limited in more than half of the states. Employer health plans now face complicated coverage decisions related to abortion, including questions as to how ERISA preemption may apply. Immediately following the *Dobbs* decision, a number of large employers announced that they would pay for travel expenses for employees (and covered dependents) seeking abortions to states where the procedures remain legal. Such large employers' health benefit plans are almost always self-insured and thus exempt from state insurance regulation under ERISA's so-called "deemer clause" (see note 3). If employers provide coverage through their health benefit plans for abortion-related travel, might ERISA preemption apply to state legislative efforts to stop such abortion travel assistance? Texas in 2021 adopted a statute that permits citizens of the state to sue anyone who "aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise." Texas S.B. 8 (2021). Other states have already adopted, or are considering, similar legislation. Might ERISA preemption shield company employees who are involved in administering a company health plan that provides for abortion coverage, including travel expenses, for employees and their covered dependents who reside in a state that now prohibits abortion? What about employer plans that cover drugs commonly used in medication-induced abortions?

Page 664. **Please add to the end of note 15 (as updated in 2021 annual supplement).**

Under the American Rescue Plan Act of 2021, certain small and midsize employers and some governmental employers were eligible for federal tax credits to offset the cost of paid FFCRA

leave from April 1 through September 30, 2021, including leave taken to receive or recover from COVID-19 vaccinations, if an employer opted to provide such leave.

Page 670. Please add to note 3.

The reference to “Masterpiece Cake” should read “Masterpiece Cakeshop”. See also the discussion above related to the subsection entitled “Litigation over contraceptive coverage” in the new section on Employer Responsibilities (see 2021 annual supplement).

CHAPTER 7

EMPLOYEE LIBERTY

Page 708. Please add to end of Note 7.

In November 2021, New York enacted a law requiring private employers to provide employees with prior written notice, upon hiring, of any electronic monitoring—including that of telephone conversations, emails, and internet usage--to which they will be subjected. In January 2022, New Jersey enacted a law requiring employers to provide written notice to employees prior to using tracking devices in vehicles used by employees.

Page 710. Please add after first full paragraph.

A NOTE ON BODILY PRIVACY

In 2008, Illinois passed the Biometric Information Privacy Act (BIPA). Several states, including California, New York, Texas and Washington have similar laws providing biometric protections, but the Illinois law is the most stringent. The BIPA requires that employers and other private entities that collect or maintain fingerprints, retinal or iris scans, voiceprints, hand scans, or face geometry first receive written consent from the individual before doing so. The statute also establishes damages for negligent or willful violation of the Act. In McDonald v. Symphony Bronzeville Park, 2022 WL 318649 (Feb. 3, 2022), the plaintiff alleged that her employer violated BIPA by requiring its employees to scan their fingerprints on a fingerprint-based time clock system without following BIPA's procedural notice and waiver requirements. The employer argued that because the employee's claims arose during the course of her employment, the claims were barred by the Illinois Worker's Compensation Act (IWCA). In *McDonald*, the Illinois Supreme Court held that the IWCA did not bar a claim for statutory damages under BIPA.

CHAPTER 8

OCCUPATIONAL SAFETY AND HEALTH

Page 789. Please insert the following case before part C.

National Federation of Independent Business v. Department of Labor
142 S. Ct. 661 (2022).

Per Curiam.

The Secretary of Labor, acting through the Occupational Safety and Health Administration, recently enacted a vaccine mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID–19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here.

Many States, businesses, and nonprofit organizations challenged OSHA's rule in Courts of Appeals across the country. The Fifth Circuit initially entered a stay. But when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA's rule to take effect. Applicants now seek emergency relief from this Court, arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.

I

* * *

B

On September 9, 2021, President Biden announced "a new plan to require more Americans to be vaccinated." As part of that plan, the President said that the Department of Labor would issue an emergency rule requiring all employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test at least once a week." The purpose of the rule was to increase vaccination rates at "businesses all across America." In tandem with other planned regulations, the administration's goal was to impose "vaccine requirements" on "about 100 million Americans, two-thirds of all workers."

After a 2-month delay, the Secretary of Labor issued the promised emergency standard. . Consistent with President Biden's announcement, the rule applies to all who work for employers with 100 or more employees. There are narrow exemptions for employees who work remotely "100 percent of the time" or who "work exclusively outdoors," but those exemptions are largely illusory. The Secretary has estimated, for example, that only nine percent of landscapers and groundskeepers qualify as working exclusively outside. The regulation otherwise operates as a blunt instrument. It draws no distinctions based on industry or risk of exposure to COVID–19. Thus, most lifeguards and linemen face the same regulations as do medics and meatpackers. OSHA estimates that 84.2 million employees are subject to its mandate.

Covered employers must "develop, implement, and enforce a mandatory COVID–19 vaccination policy." . The employer must verify the vaccination status of each employee and maintain proof of it. . The mandate does contain an "exception" for employers that require unvaccinated workers to "undergo [weekly] COVID–19 testing and wear a face covering at work in lieu of vaccination." . But employers are not required to offer this option, and the emergency regulation purports to pre-empt state laws to the contrary. . Unvaccinated employees who do not comply with OSHA's rule must be "removed from the workplace." . And employers who commit violations face hefty fines: up to $13,653 for a standard violation, and up to $136,532 for a willful one.

C

OSHA published its vaccine mandate on November 5, 2021. Scores of parties—including States, businesses, trade groups, and nonprofit organizations—filed petitions for review, with at least one petition arriving in each regional Court of Appeals. The cases were consolidated in the Sixth Circuit, which was selected at random pursuant to 28 U.S.C. § 2112(a).

Prior to consolidation, however, the Fifth Circuit stayed OSHA's rule pending further judicial review. It held that the mandate likely exceeded OSHA's statutory authority, raised separation-of-powers concerns in the absence of a clear delegation from Congress, and was not properly tailored to the risks facing different types of workers and workplaces.

When the consolidated cases arrived at the Sixth Circuit, two things happened. First, many of the petitioners—nearly 60 in all—requested initial hearing en banc. Second, OSHA asked the Court of Appeals to vacate the Fifth Circuit's existing stay. The Sixth Circuit denied the request for initial hearing en banc by an evenly divided 8-to-8 vote. A three-judge panel then dissolved the Fifth Circuit's stay, holding that OSHA's mandate was likely consistent with the agency's statutory and constitutional authority. * * *

Various parties then filed applications in this Court requesting that we stay OSHA's emergency standard. We consolidated two of those applications—one from the National Federation of Independent Business, and one from a coalition of States—and heard expedited argument on January 7, 2022.

II

The Sixth Circuit concluded that a stay of the rule was not justified. We disagree.

A

Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." It is instead a significant encroachment into the lives—and health—of a vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 141 S.Ct. 2485, 2489, (2021) (*per curiam*) (internal quotation marks omitted). There can be little doubt that OSHA's mandate qualifies as an exercise of such authority.

The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures. Confirming the point, the Act's provisions typically speak to hazards that employees face at work. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.

* * *

The Solicitor General does not dispute that OSHA is limited to regulating "work-related dangers." She instead argues that the risk of contracting COVID–19 qualifies as such a danger. We cannot agree. Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. 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 dissent contends that OSHA's mandate is comparable to a fire or sanitation regulation imposed by the agency. But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, "cannot be undone at the end of the workday." Contrary to the dissent's contention, imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not "part of what the agency was built for."

That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could

OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an "*occupational* safety or health standard."

* * *

It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This "lack of historical precedent," coupled with the breadth of authority that the Secretary now claims, is a "telling indication" that the mandate extends beyond the agency's legitimate reach.

B

* * *

The applications for stays presented to Justice KAVANAUGH and by him referred to the Court are granted.

* * *

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, concurring.

The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.

* * *

The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA's mandate. was not adopted in response to the pandemic, but some 50 years ago at the time of OSHA's creation. Since then, OSHA has relied on it to issue only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals. As the agency itself explained to a federal court less than two years ago, the statute does "not authorize OSHA to issue sweeping health standards" that affect workers' lives outside the workplace. Yet that is precisely what the agency seeks to do

now—regulate not just what happens inside the workplace but induce individuals to undertake a medical procedure that affects their lives outside the workplace. Historically, such matters have been regulated at the state level by authorities who enjoy broader and more general governmental powers. Meanwhile, at the federal level, OSHA arguably is not even the agency most associated with public health regulation. And in the rare instances when Congress has sought to mandate vaccinations, it has done so expressly. We have nothing like that here.

Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

* * *

Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN, dissenting.

Every day, COVID–19 poses grave dangers to the citizens of this country—and particularly, to its workers. The disease has by now killed almost 1 million Americans and hospitalized almost 4 million. It spreads by person-to-person contact in confined indoor spaces, so causes harm in nearly all workplace environments. And in those environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk. COVID–19, in short, is a menace in work settings. The proof is all around us: Since the disease's onset, most Americans have seen their workplaces transformed.

So the administrative agency charged with ensuring health and safety in workplaces did what Congress commanded it to: It took action to address COVID–19's continuing threat in those spaces. The Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (Standard), requiring *either* vaccination *or* masking and testing, to protect American workers. The Standard falls within the core of the agency's mission: to "protect employees" from "grave danger" that comes from "new hazards" or exposure to harmful agents. OSHA estimates—and there is no ground for disputing—that the Standard will save over 6,500 lives and prevent over 250,000 hospitalizations in six months' time.

Yet today the Court issues a stay that prevents the Standard from taking effect. In our view, the Court's order seriously misapplies the applicable legal standards. And in so doing, it stymies the Federal Government's ability to counter the unparalleled threat that COVID–19 poses to our Nation's workers. Acting outside of its competence and without legal basis, the Court displaces the judgments of the Government officials given the responsibility to respond to workplace health emergencies. We respectfully dissent.

* * *

III

* * *

B

The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. In other words, the majority does not contest that COVID–19 is a "new hazard" and "physically harmful agent"; that it poses a "grave danger" to employees; or that a testing and masking or vaccination policy is "necessary" to prevent those harms. Instead, the majority claims that the Act does not "plainly authorize[ ]" the Standard because it gives OSHA the power to "set *workplace* safety standards" and COVID–19 exists both inside and outside the workplace. In other words, the Court argues that OSHA cannot keep workplaces safe from COVID–19 because the agency (as it readily acknowledges) has no power to address the disease outside the work setting.

But nothing in the Act's text supports the majority's limitation on OSHA's regulatory authority. Of course, the majority is correct that OSHA is not a roving public health regulator, It has power only to protect employees from workplace hazards. But as just explained, that is exactly what the Standard does. And the Act requires nothing more: Contra the majority, it is indifferent to whether a hazard in the workplace is also found elsewhere. The statute generally charges OSHA with "assur[ing] so far as possible ... safe and healthful working conditions." That provision authorizes regulation to protect employees from all hazards present in the workplace—or, at least, all hazards in part created by conditions there. It does not matter whether those hazards also exist beyond the workplace walls. The same is true of the provision at issue here demanding the issuance of temporary emergency standards. Once again, that provision kicks in when employees are exposed in the workplace to "new hazards" or "substances or agents" determined to be "physically harmful." The statute does not require that employees are exposed to those dangers only while on the workplace clock. And that should settle the matter. When Congress "enact[s] expansive language offering no indication whatever that the statute limits what [an agency] can" do, the Court cannot "impos[e] limits on an agency's discretion that are not supported by the text." That is what the majority today does—impose a limit found no place in the governing statute.

* * *

IV

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Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID–19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?

Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action is needed. The agency has thoroughly evaluated the risks that the disease poses to workers across all sectors of the economy. It has considered the extent to which various policies will mitigate those risks, and the costs those policies will entail. It has landed on an approach that encourages vaccination, but allows employers to use masking and testing instead.

It has meticulously explained why it has reached its conclusions. And in doing all this, it has acted within the four corners of its statutory authorization—or actually here, its statutory mandate. OSHA, that is, has responded in the way necessary to alleviate the "grave danger" that workplace exposure to the "new hazard[ ]" of COVID–19 poses to employees across the Nation. The agency's Standard is informed by a half century of experience and expertise in handling workplace health and safety issues. The Standard also has the virtue of political accountability, for OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public.

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we "lack[ ] the background, competence, and expertise to assess" workplace health and safety issues. When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.

The *OSHA COVID-19 Case* and the Scope of the Occupational Safety and Health Act

Mark A. Rothstein, J.D.

Forthcoming in the *Journal of Law, Medicine & Ethics* vol. 50, no. 2 (2022).

* * *

The *OSHA COVID-19 Case*

* * *

The Supreme Court granted emergency review to consider whether the Sixth Circuit erred in dissolving the stay imposed by the Fifth Circuit. In *National Federation of Independent Business v. Department of Labor*, the Supreme Court stayed the ETS pending a decision on the merits by the Sixth Circuit. The Court's rationale for reimposing the stay, the challengers' likelihood of success on the merits, was a *de facto* invalidation of the ETS.

The *per curiam* opinion of six justices stated that the Secretary of Labor lacked statutory authority to issue such a sweeping standard in the absence of an explicit congressional directive. "It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind – addressing a threat that is untethered, in any casual sense, from the workplace."

In articulating this narrow view of the permissible scope of OSHA's authority to regulate workplace hazards, the Court's rhetoric and reasoning may be questioned. First, the opinion asserted that "[t]he Act empowers the Secretary to set *workplace* safety standards, not broad public

health measures." The OSH Act not only empowers the Secretary to set "workplace safety standards," it authorizes the Secretary to set workplace safety *and health* standards. After all, it is the Occupational Safety *and Health* Act, and the legislative history of the OSH Act clearly indicates that occupational illness was a major concern of Congress in enacting the OSH Act. The statute also created the National Institute for Occupational Safety and Health in the Department of Health and Human Services to conduct research on occupational health hazards such as asbestosis, byssinosis, lead, and pesticides.

Second, the opinion used and repeated an oversimplified characterization of the ETS as a "vaccine mandate." Although vaccination was its most controversial element, the ETS contained many other measures designed to protect workers, such as personal protective equipment and testing. Vaccination was the preferred option of the ETS, but as an alternative to vaccination, employers could implement a policy of allowing employees to have weekly testing and wear a face mask while at the workplace.

Third, the opinion stated that OSHA is limited to regulating hazards unique to or at least especially problematic in the workplace. "Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather." This assertion overlooks the fact that OSHA regulates many safety and health hazards that exist both in and beyond the workplace, including fire, noise, asbestos, lead, and toxic chemicals. Furthermore, in the "Rationale for the ETS" section of its *Federal Register* filing, OSHA described the particular workplace risks of transmission. "Workplace factors that exacerbate the risk of transmission of SARS-CoV-2 include working in indoor settings, working in poorly-ventilated areas, and spending hours in close proximity with others." The background text of the ETS discussed several workplace-based COVD-19 disease clusters documented in various industries and in multiple states, including the heightened risks posed by the Delta variant.

* * *

Major Questions Doctrine

Several of the judicial opinions holding or advocating for a narrow view of OSHA's statutory authority rely on the major questions doctrine. However, this is a relatively recent, ill-defined, and largely unexamined judicial canon with major implications. The origins of the doctrine go back to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* in which the Supreme Court held that unless Congress has said otherwise, the courts should defer to administrative agencies if the agency's interpretation of the enabling legislation is not unreasonable. The major questions doctrine emerged as a way to limit deference to administrative agencies. Thus, in two subsequent cases the Court said that in extraordinary cases agency interpretations carry little weight and are not entitled to *Chevron* deference. Then, in *King v. Burwell,* in upholding the constitutionality of the Affordable Care Act, the Supreme Court relied on the major questions doctrine to hold that *Chevron* deference did not apply. Nevertheless, the Court did its own statutory analysis and reached the same result as the agency.

In its two most recent applications of the major questions doctrine, both dealing with

COVID-19, the Court extended the doctrine beyond the issue of whether deference should be afforded to the agency to ruling on whether the agency action was beyond the scope of its statutory authority. In *Alabama Association of Realtors v. Department of Health and Human Services*, the Supreme Court applied the major questions doctrine to invalidate a nationwide moratorium on evictions in counties with high levels of COVID-19 transmission. The Court held that there was no evidence that Congress intended for a vague section of the Public Health Service Act to authorize the Centers for Disease Control and Prevention to regulate landlord-tenant relations, a traditional domain of state law. Then, in applying the doctrine to strike down the OSHA COVID-19 ETS, the Court expanded the doctrine to strike down a workplace safety and health regulation imposed by an agency explicitly created by Congress to regulate workplace safety and health.

There are two main problems with the expansive major questions doctrine. First, it is not clear what a major question is. As Judge Stranch wrote in her majority opinion for the Sixth Circuit panel, "The doctrine itself is hardly a model of clarity, and its precise contours – specifically, what constitutes a question concerning deep economic and political significance – remain undefined." Furthermore, using the number of public comments submitted as a metric for "political significance" is an invitation to mass, fraudulent, and computer-generated comments.

Second, the major questions doctrine represents an extraordinary level of judicial activism that undermines fundamental aspects of the separation of powers. "The doctrine has nothing to do with preserving self-government and everything to do with increasing the reach of the juristocracy." In the *OSHA COVID-19 Case*, the Supreme Court attacked the fundamental principle that Congress establishes federal administrative agencies with the expertise to design and implement specific measures to complete a regulatory picture only sketched by Congress. There are vast implications for health policy of this unconstrained constitutional doctrine. "By limiting the federal government's ability to flexibly protect public health, the justices gave themselves an outsize role in formulating health policy, with significant ramifications that will remain long after the pandemic ends."

* * *

Conclusion

The *per curiam* opinion in the *OSHA COVID-19 Case* stated that the COVID-19 ETS was unprecedented. "This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." The Court did not mention that in the last century the United States has never faced such a dire threat to public health, one in which deaths directly attributable to COVID-19 in the United States will soon reach one million. Nor did the Court mention that many – if not most -- of the fatalities could have been prevented if millions more Americans were vaccinated, including with booster shots, at no cost to them and using vaccines with an unprecedented level of safety and efficacy. The Court also was unpersuaded by evidence that the workplace played a significant role in the transmission of COVID-19.

The essence of public health is balancing the interests of the public and the individual. With

the extraordinary severity of the pandemic self-evident, judicial decisions opposing vaccination requirements have emphasized the supposed burdens of vaccination. A Sixth Circuit opinion characterized vaccination as "permanent and physically intrusive" and asserted that a "vaccine may not be taken off when the workday ends." According to the Fifth Circuit, "the Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." The reasonable liberty interests of individuals deserve protection in the workplace and beyond, but they do not trump the interests of the population. As Justice John Marshall Harlan wrote, "There are manifold restraints to which every person is necessarily subject for the common good of its members. On any other basis, organized society could not exist with safety to its members."

The immediate implication of the *OSHA COVID-19 Case* is to prohibit OSHA from comprehensive regulation of working conditions that contribute to transmission of COVID-19. But the repercussions extend beyond this case. The Supreme Court has unabashedly entered the realm of politics and embraced a doctrine that ostensibly shifts power from federal agencies to Congress and the states. In reality, at least for the foreseeable future, instead of a shift in regulatory responsibility there will be a void in essential public health protections.

NOTES AND QUESTIONS

1. After the Supreme Court's decision, OSHA withdrew the emergency temporary standard. It is still working on promulgating a permanent standard for workers exposed to infectious agents in the workplace.

2. In *Biden v. Missouri,* 142 S. Ct. 647 (2022) (per curiam), decided the same day as the OSHA COVID-19 case, the Supreme Court upheld a rule of the Centers for Medicare and Medicaid Services providing that healthcare facilities receiving Medicare and Medicaid funding must ensure that staff members are vaccinated against COVID-19. In a per curiam opinion of five justices, the Court imposed a stay on lower court rulings enjoining enforcement of the new rule. The majority held that the Secretary of Health and Human Services had the statutory authority to impose such a rule to protect the health and safety of health care personnel and their patients. In two dissenting opinions, Justices Thomas, Alito, Gorsuch, and Barrett argued that the rule failed under the major questions doctrine, *id.* at 658 (Thomas, J., dissenting) and failed to afford an opportunity for notice and comment, *id.* at 659 (Alito, J., dissenting).

3. Both *National Federation of Independent Business v. Secretary of Labor* and *Biden v. Missouri* were decided on an emergency basis, what has become known as the "shadow docket." The term was coined by University of Chicago law professor William Baude to describe a "range of orders and summary decisions that defy [the Court's] procedural regularity." William Baude, Forward: The Supreme Court's Shadow Docket, 9 N.Y.U.J.L. & Liberty 1, 2 (2015). Unlike regular or "merit" docket cases, shadow docket orders and decisions are issued without oral argument or full briefing. See Paul J. Larkin & Doug Badger, The First General Federal Vaccination Requirement: The OSHA Emergency Temporary Standard for COVID-19 Vaccinations, 6 Admin. L. Rev. Accord 375 (2022). The Court's growing use of its shadow docket has been criticized. See Steve Vladeck, The Supreme Court's Most Partisan Decisions Are Flying under the Radar, SLATE

(Aug. 11, 2020), 12:12 pm), https://www.slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html.

CHAPTER 9

DISABLING INJURY AND ILLNESS

Page 834. Please insert the following note.

3A. An alarm technician was in a serious auto accident while driving the company van, and he sustained a fractured neck, a torn rotator cuff, multiple fractured ribs, and other injuries. Approximately three months after the accident, when his recovery was slower than he hoped and his pain level higher, he took his own life. Is his estate entitled to death benefits under workers' compensation or was his suicide an independent intervening cause? See Appeal of Pelmac Industries, Inc., 267 A.3d 395 (N.H. 2022) (holding that suicide was a direct and natural result of decedent's work-related injury).

CHAPTER 10

DISCHARGE

Page 877. Please insert at the end of note 4.

In late 2021, New York state amended its whistleblower statute to make it one of the most expansive in the country. A worker may blow the whistle on any conduct the individual reasonably believes violates any law, rule, regulation, executive order or judicial or administrative decision. Workers are also protected for reporting conduct they reasonably believe constitutes a substantial danger to public health or safety. The law provides protections and remedies, including potentially punitive damages, to employees, former employees and independent contractors. See New York Labor Law Section 740.

CHAPTER 11

EMPLOYEES' DUTIES TO THE EMPLOYER

Page 1039. Please insert at the end of note 7.

During the Covid-19 pandemic, with many employees working from home, it became less clear which state law to apply to restrictive covenants. If employees are living and working in a state different from that of their employer, it may not be clear that the state law of the employer governs.

Page 1039. Please insert at the end of note 8.

Effective January 1, 2022, Illinois amended its Freedom to Work Act to provide that covenants not to compete are only enforceable against individuals making more than $75,000 per year.

CHAPTER 13

RETIREMENT

Page 1181. Please add the following before the last paragraph on the page (as updated in 2021 annual supplement).

For plan years beginning in 2022, the PGGC flat-rate insurance premium was set at $88 per participant in a single-employer plan and at $32 per participant in a multi-employer plan. The maximum insured PBGC benefit for an unmarried employee retiring at age 65 in 2022 is $74,454.60 per year.

Page 1190. Please add the following at the end of note 4 (as updated in 2021 annual supplement).

As of July 2022, pending federal legislation, popularly referred to as SECURE 2.0, will (if enacted) further raise the age at which minimum distributions are required.

Page 1191. Please add the following at the end of note 6 (as updated in 2021 annual supplement).

The U.S. Supreme Court in early 2022 denied the Howard Jarvis Taxpayers Association's petition for a writ of certiorari, leaving the Ninth Circuit's decision in effect. Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program, 142 S. Ct. 1204 (Mem.) (2022).

Page 1199. Please add the following at the end of the second paragraph of note 7 (as updated in 2021 annual supplement).

In October 2021, the DOL issued a new proposed rule addressing, among other issues, fiduciary duties such as prudence and loyalty in selecting plan investments. The proposed rule includes language "specifying that consideration of the projected return of the portfolio relative to the funding objectives of the plan may often require an evaluation of the economic effects of climate change and other ESG factors on the particular investment or investment course of action." 86 FR 57272, 57276.

Page 1203. Please add the following at the end of note 17.

The American Rescue Plan Act of 2021 included bailout funds intended to rescue severely underfunded multi-employer pension plans, with an expected cost of approximately $94 billion. Since then, the Pension Benefit Guaranty Corporation has been working on a financial assistance rule to provide guidance on use of the bailout money.

Page 1204. Please add the following after note 20.

21. In Hughes v. Northwestern University, 142 S. Ct. 737 (2022), the Supreme Court considered an appeal from the Seventh Circuit's dismissal of a breach of fiduciary duty claim by a group of defined contribution plan participants against plan fiduciaries. The participants argued that the fiduciaries "violated their duty of prudence by, among other things, offering needlessly expensive investment options and paying excessive recordkeeping fees." The Seventh Circuit Court of Appeals ruled against the plan participants on the theory that the retirement plans at issue offered other lower-cost investment options and that the availability of such lower-cost alternatives "eliminated any concerns that other plan options were imprudent." In a unanimous decision, the Supreme Court overruled the Seventh Circuit, holding that ERISA requires plan fiduciaries "to monitor all plan investments and remove any imprudent ones," and remanded the case for further proceedings. The participants resumed their case against Northwestern with a brief filed in the Seventh Circuit in June 2022.

Page 1222. Please add the following at the end of the first paragraph of note 11 (as updated in 2021 annual supplement).

The Internal Revenue Code dollar threshold for determining highly compensated employees in 2022 is $135,000.

Page 1236. Please add the following, in the second paragraph, line 6.

Note that in 2022 a worker earned one Social Security "credit" for each $1,510 of earnings, up to a maximum of 4 credits per year.

Page 1237. Please add the following at the end of the first full paragraph.

For an individual retiring in 2022 at full retirement age, the maximum allowable benefit is $3,345. An individual retiring in 2022 at age 62 (the earliest retirement age) is eligible for a maximum benefit of $2,364, and an individual retiring in 2022 at age 70 is eligible for a maximum benefit of $4,194. The Social Security tax rate on wages remains at 6.2% in 2022, but the Social Security taxable wage base has increased to $147,000. The 2021 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, commonly referred to as the OASDI Trustees Report, stated that the OASI trust fund (which pays retirement and survivors' benefits) is expected to be able to pay scheduled benefits on a timely basis until 2033.

Page 1245. Please add the following after note 2.

3. Dual-benefit retirees – individuals eligible for Social Security retirement benefits and pension benefits based on employment not subject to Social Security taxes – continue to pose challenges. In Babcock v. Kijakazi, 142 S. Ct. 641 (2022), the Supreme Court evaluated the claim of a retiree eligible for federal civil service pension benefits and military pension payments. The retiree had worked as a dual-status military technician whose civilian government job had required that he maintain membership in the National Guard, for which he received military pay and pension benefits. The Social Security Administration applied the windfall elimination provision of the Social Security Act and reduced his Social Security benefits to reflect his receipt of civil service pension benefits. No reduction was made for the military pension payments due to a Social Security Act exemption for payments "based wholly on service as a member of a uniformed

service." The retiree argued that his civil service pension should fall within the same exemption and should not reduce his Social Security retirement benefits. A unanimous Supreme Court disagreed and upheld the Social Security Administration's application of the windfall elimination provision to the civil service pension benefits.

Page 1250. Please add the following at the end of the second paragraph of section 4 (as updated in 2021 annual supplement).

In their 2021 report, the OASI (Social Security) trustees predicted that the fund will be able to pay full benefits until 2033, at which time the fund will be depleted and benefits will be paid based on incoming tax funds. They estimated further that continuing tax income will suffice to pay only 75% of scheduled benefits once the trust fund is depleted.

The average monthly Social Security benefit in 2022 is approximately $1,657 ($19,884 per year). A study by the National Institute on Retirement Security in 2020 found that Social Security benefits constituted the only source of income for 40.2% of Social Security beneficiaries.

The Social Security wage base, on which the 6.2% Social Security tax is levied, increased to $147,000 for 2022.