Compel OSHA to Issue an Emergency Temporary Standard for COVID-19? The DC Circuit Says No to the AFL-CIO (Twice)

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On July 28, the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit") declined to rehear the unanimous ruling of a three-judge DC Circuit panel that denied the AFL-CIO's request that the court compel the U.S. Occupational Safety and Health Administration ("OSHA") to an emergency temporary standard ("ETS") to protect workers from coronavirus. This rejection of the AFL-CIO's petition for rehearing *en banc,* signals that the AFL-CIO's five-month effort to compel OSHA to issue an ETS has likely come to an end.

Unless the Supreme Court agrees to review the ruling, or OSHA reconsiders its position (both quite unlikely), employers will not be subject to a new workplace health standard for COVID-19. Instead, they will continue to be subject to the Occupational Safety and Health Act's ("OSH Act's") "general duty" to protect their employees from recognized workplace hazards, as well as the myriad of OSHA regulations and guidance that direct employers on specific elements of workplace safety (*i.e.*, PPE, training, recordkeeping). But before we roll the credits on this fast and furious litigation, perhaps a recap is in order.

What is an ETS?

As the name implies, an ETS is an occupational health and safety standard that OSHA can immediately impose on employers in order to protect workers "from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" 29 U.S.C. 655(c). The OSH Act grants OSHA the authority to avoid its normal – and very protracted – standard-setting procedures in order to make an ETS immediately effective.

The standard-setting procedures that cease to apply when OSHA invokes its authority to issue an ETS, include fundamental obligations to provide notice to impacted parties and solicit stakeholder input through public comments and hearings. "Notice-and-Comment" procedures are among the most important and foundational elements of the agency rulemaking process, and therefore the OSH Act did not make it easy for OSHA to avoid them, even on a temporary basis. OSHA can promulgate an ETS only upon issuing a judicially reviewable determination that "employees are exposed to grave danger" and that the ETS is "necessary" to abate that danger.

The AFL-CIO Petition

The AFL-CIO believes that the current coronavirus pandemic meets the OSH Act's high hurdle for issuing an ETS, and on March 6th, petitioned OSHA to do just that. OSHA denied the AFL-CIO petition on April 30th, arguing that an ETS was not necessary given the wide range of regulatory tools and guidelines OSHA was already utilizing to protect workers and assist employers in addressing potential workplace exposures. The AFL-CIO viewed this denial as an "abdication" of OSHA's duty to protect workers, and on June 11th filed an emergency petition with the court requesting issuance of a writ of mandamus ordering OSHA to immediately issue an ETS to address workplace exposures to COVID-19.

This extraordinary request for review was quickly denied by the D.C. Circuit on June 11th , in a tidy four-paragraph *per curium* order, holding that OSHA's decision to not issue an ETS was "entitled to considerable discretion." Consistent with OSHA's April 30th denial of the AFL-CIO's petition, the court went on to hold that:

In light of the unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments . . . the OSHA reasonably determined that an ETS was not necessary at this time.

A week later, the AFL-CIO petitioned the entire D.C. Circuit (i.e., all D.C. Circuit judges, not the just the three-judge panel that ruled against the AFL-CIO on June 11th) for a rehearing *en banc*. This *en banc* petition was then denied by the entire D.C. Circuit without comment on July 28th.

What Next for the AFL-CIO

The AFL-CIO's only remaining option in pursuing this lawsuit is to petition the U.S. Supreme Court to issue a Writ of Certiorari to review the D.C. Circuit decision. That is not a great option. The Supreme Court grants only a very small percentage of the petitions for certiorari it receives, and the AFL-CIO's case is not a strong candidate to be one of the rare exceptions. The AFL-CIO is seeking an extraordinary and unprecedented level of judicial intervention in OSHA's exercise of regulatory authority. OSHA has "considerable discretion" in determining when to issue an ETS, and provided reasonable explanations why an ETS was an unnecessary and ill-suited tool to respond to a rapidly evolving pandemic. The strength of OSHA's arguments and the overreaching nature of the AFL-CIO's demands is reflected in the speed and brevity with which the D.C. Circuit twice denied AFL-CIO's petitions. If the AFL-CIO were to petition the Supreme Court to review these denials, I suspect the Court will reject it with similar alacrity. So cue the credits (maybe).