

Publications

OSHA Withdraws Vaccine or Testing ETS; Intends to Pursue Permanent Standard

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Having seen the proverbial writing on the wall, the Occupational Safety and Health Administration (OSHA) **announced** today that it will withdraw its COVID-19 Testing or Vaccination ETS effective January 26, 2022. This decision follows OSHA's **stinging defeat** before the Supreme Court earlier this month. The withdrawal is of no practical effect, as enforcement of the ETS was already stayed by the Supreme Court's ruling. However, OSHA's withdrawal should mark the end of the underlying litigation which remained pending at the Sixth Circuit.

OSHA's decision to withdraw the ETS does not entirely end OSHA's potential attempts to further regulate COVID-19 in the workplace. Indeed, OSHA made clear that it was "not withdrawing the ETS as a proposed rule," and the agency "remains focus[ed] on finalizing a permanent COVID-19 Healthcare Standard." In other words, OSHA may use the ETS as a blueprint for a permanent COVID-19 workplace safety standard.

Any future permanent standard faces an uphill struggle, however. While lower courts focused much of their attention on whether the rule was permissible as an emergency standard, the Supreme Court's **opinion** cast doubt on whether OSHA had the authority to issue its shot-or-test mandate at all, suggesting Congress had not clearly delegated such power to the agency, regardless of whether the standard was of a permanent or emergency nature. Employers should expect to hear more from OSHA soon, including information regarding opportunities for commenting on a proposed permanent standard, as well as the scope and requirements of such a proposal.

The Vorys COVID Task Force will provide further insights regarding the promulgation of a permanent standard as additional information becomes available. In the meantime, contact your Vorys attorney if you have any questions regarding a potential permanent standard or other COVID-related questions or concerns. In the interim, OSHA is expected to utilize the General Duty Clause to support its COVID-19 enforcement efforts. Accordingly, employers should continue to maintain robust and up-to-date COVID-19 safety protocols.