

OSHA Withdraws the Vaccination and Testing ETS

Thursday, February 10, 2022

On January 25, 2022, OSHA withdrew the COVID-19 vaccination and testing Emergency Temporary Standard (“ETS”), ending the litigation regarding the OSHA vaccine mandate.

The agency announced that it will treat the withdrawn ETS as a proposal for a permanent standard. Unlike the ETS, which took immediate effect upon publication in the Federal Register, a permanent standard requires notice, comment, and an opportunity for a hearing.

The standard of scrutiny for permanent rules is lower than the “grave danger” standard required for emergency temporary standards. Nevertheless, a permanent rule that mirrors the ETS still is likely to run afoul of the Supreme Court’s decision on the ETS. Specifically, the Supreme Court ruled that OSHA only has the authority to issue workplace safety standards and not broad health measures. And, the language of the ETS was considered a broad health measure.

The agency also announced that it is prioritizing its resources to focus on finalizing a permanent COVID-19 Healthcare Standard. The ETS for healthcare has expired.

In the absence of the ETS, OSHA may enforce CDC guidance through its General Duty Clause. Also, many other OSHA standards can apply to COVID-19 related workplace issues (such as [requirements for PPE](#) , [respiratory protection](#) , recordkeeping, and in some circumstances, bloodborne pathogens). Some state OSHA plans, like CA and VA also have

their own temporary or permanent COVID-19 standards that remain in place.