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OSHA Vaccination and Testing ETS Withdrawn, But Possible Permanent COVID-19 Standard To Come

On January 25, 2022, the Occupational Safety and Health Administration (“OSHA”) [announced](#) the withdrawal of its vaccination and testing Emergency Temporary Standard for employers (“Employer ETS”) issued in November 2021. OSHA also recently [announced](#) a partial withdrawal of provisions in a separate ETS applicable to healthcare workers (“Healthcare ETS”).

The Employer ETS

The Employer ETS was meant to require COVID-19 vaccination or weekly testing for employers with 100 employees or more, and enforcement was set to begin in January 2022. Many large employers were set to comply with this federal mandate, but as we previously [reported](#), the U.S. Supreme Court, in a 5-4 [decision](#), stayed enforcement of the Employer ETS on the basis that it exceeded OSHA’s authority granted by Congress.

Although OSHA announced its employer vaccination or testing mandate is being withdrawn as an ETS, it did not withdraw the ETS as a proposed rule. OSHA intends to “prioritize[] its resources to focus on finalizing a permanent COVID-19 Healthcare Standard.” In the meantime, the Biden administration has asked employers to comply voluntarily with the vaccination mandate to prevent the spread of COVID-19 in the workplace.

The Healthcare ETS

OSHA also announced it is withdrawing the non-recordkeeping portions of the Healthcare ETS, which was originally announced in June 2021. The Healthcare ETS was meant to mandate COVID-19 vaccination for facilities receiving federal funding. The Centers for Medicaid and Medicare Services

(“CMS”) also issued a similar rule for Medicare and Medicaid service providers. The U.S. Supreme Court struck down the OSHA Healthcare ETS vaccination requirement, but upheld a similar rule issued by the CMS.

Although OSHA has withdrawn the non-recordkeeping portions of the Healthcare ETS, it will continue to enforce COVID-19 log and reporting obligations under separate provisions of the Occupational Safety and Health Act (“OSH Act”). In addition, OSHA “strongly encourages all healthcare employers to continue to implement the [Healthcare] ETS’s requirements in order to protect employees from a hazard that too often causes death or serious physical harm to employees.”

OSHA also intends to use the general duty clause of the OSH Act to “vigorously enforce” healthcare standards relating to Personal Protective Equipment and Respiratory Protection, but OSHA considers an employer’s compliance with the partially withdrawn Healthcare ETS to satisfy those obligations. In addition, covered healthcare employers still must comply with the CMS vaccine mandate in light of the U.S. Supreme Court’s ruling, which held the CMS rule requiring healthcare worker vaccinations was justified under the circumstances surrounding COVID-19.

If you have any questions about compliance with OSHA’s recent updates, the U.S. Supreme Court’s recent decision, or your organization’s management of COVID-19, please contact a member of Kutak Rock’s [OSHA Compliance & Workplace Safety Group](#) or [National Employment Law Group](#). You may also visit us at www.KutakRock.com.

