

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

### OSHA withdraws vax-or-test mandate for large employers

On January 13, the Supreme Court stayed OSHA's Emergency Temporary Standard (ETS) requiring businesses with 100 or more employees to ensure their workers are fully vaccinated or are routinely tested for COVID-19. After evaluating the Court's decision, OSHA has decided to withdraw the ETS effective immediately.

#### Background

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) issued an [ETS](#) establishing minimum COVID-19 vaccination, vaccination verification, face covering and testing requirements for companies with at least 100 employees. The ETS also served as a proposed rule for promulgating a permanent occupational safety or health standard. (See our [November 12, 2021 FYI Alert](#).) It faced immediate legal challenges from a number of states, businesses, and non-profit organizations.

The U.S. Court of Appeals for the Fifth Circuit initially stayed the ETS. As additional legal challenges were filed across the country, the cases were transferred and consolidated before the U.S. Court of Appeals for the Sixth Circuit. On December 17, the Sixth Circuit lifted the stay, allowing the ETS to take effect. On January 13, the Supreme Court concluded that OSHA likely exceeded its statutory authority in promulgating the broad workplace rule and blocked its enforcement, pending a final decision on its legality. The Court signaled that it likely would strike down the ETS even if the Sixth Circuit upheld it. (See our [January 14 FYI Alert](#).)

#### ETS withdrawn

Citing the Supreme Court's decision and the need to resolve ambiguity for employers and workers alike, OSHA officially [withdrew](#) the ETS as an enforceable temporary standard on January 26, relieving employers of compliance obligations under the ETS. The government also asked the Sixth Circuit to dismiss the pending litigation on the legality of the ETS as moot.

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**Buck comment.** OSHA's withdrawal of the ETS does not affect employers' compliance obligations under OSHA-approved State Plans or other state or local vaccine or testing requirements. While some jurisdictions mandate vaccines or weekly testing, others block mask and vaccine mandates which the federal rule would have pre-empted.

Notwithstanding its withdrawal of the ETS as an enforceable temporary standard, OSHA intends to continue its efforts to regulate COVID-19 in the workplace by making the temporary directive a permanent standard. According to the agency, it is "not withdrawing the ETS to the extent that it serves as a proposed rule under section 6(c)(3) of the [OSH] Act, and this action does not affect the ETS's status as a proposal under section 6(b) of the Act or otherwise affect the status of the notice-and-comment rulemaking commenced by the Vaccination and Testing ETS."

## In closing

OSHA has now withdrawn its vax-or-test ETS as an enforceable emergency temporary standard, but it is not withdrawing the ETS as a proposed rule and continues to strongly encourage the vaccination of workers. While the agency pursues a permanent standard, it is expected to look to existing standards such as those governing respiratory protection and personal protective equipment as well as the OSH Act's General Duty Clause to address dangers posed by COVID-19 in the workplace.

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