

# OSHA WITHDRAWS COVID-19 EMERGENCY TEMPORARY STANDARD TO FOCUS ON PERMANENT STANDARD; SIXTH CIRCUIT APPEAL DISMISSED AS MOOT

*Hodgson Russ OSHA and Labor & Employment Alert*  
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The U.S. Occupational Safety and Health Administration (“OSHA”) has withdrawn its Emergency Temporary Standard on COVID-19 Vaccination and Testing (“ETS”), which applied to employers with 100 or more employees. In a statement posted to its website, and as published in the Federal Register (87 Fed. Reg. 3928), OSHA stated the withdrawal would be effective as of January 26, 2022.

The ETS had been mired in controversy and litigation since its issuance on November 5, 2021. And as reported [[here](#)], the United States Supreme Court stayed its enforcement on January 13, 2021, pending review by the United States Court of Appeals for the Sixth Circuit. Notably, however, OSHA thereafter filed a motion in the Sixth Circuit seeking to dismiss the pending appeals as moot in light of the withdrawal of the ETS. On February 18, 2022, the Sixth Circuit granted the motion and dismissed the case.

Although OSHA indicated it was withdrawing the ETS after analyzing the Supreme Court’s stay decision, it offered no other details beyond the following statement on its website:

Although OSHA is withdrawing the vaccination and testing ETS as an enforceable emergency temporary standard, the agency is not withdrawing the ETS as a proposed rule. The agency is prioritizing its resources to focus on finalizing a permanent COVID-19 Healthcare Standard.

So, while the ETS is now a matter of history in its present form, OSHA has made clear its intent to still issue a final rule, presumably after wading through and considering the more than 121,000 comments it received to the ETS as a proposed rule.

Many questions and uncertainties remain as to what elements of the ETS may survive and re-emerge in a forthcoming final rule. OSHA did not indicate when employers should expect its final rule to be published. However, Section 6(c)(3) of the Occupational Safety and Health Act contemplates that a final rule should issue “no later than six months after publication of the emergency standard.” That means

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OSHA should issue a final rule by May 1, 2022 based on the November 5, 2021 issuance date of the ETS.

If you have questions about OSHA's vaccination ETS or COVID-19 guidance, mandatory vaccination requirements, or other general questions about OSHA compliance, please contact [Jason Markel](#) (716.848.1395), [Glen Doherty](#) (518.433.2433), [Charles H. Kaplan](#) (646.218.7513), or any member of our [Labor & Employment Group](#).