

LEGAL ALERT

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OSHA WITHDRAWS EMERGENCY VACCINE-OR-TEST RULE, CONTINUES TO DEVELOP PERMANENT STANDARD

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On January 26, 2022, the Occupational Safety & Health Administration (OSHA) withdrew its emergency temporary standard (ETS), which required large employers to either mandate vaccination or weekly COVID-19 testing. The ETS faced numerous legal challenges and ultimately, the U.S. Supreme Court found it went beyond OSHA's authority to regulate "the hazards of daily life." OSHA officially ended the litigation by withdrawing the ETS with a notice of withdrawal published in the *Federal Register*.

Although OSHA withdrew the ETS as an enforceable emergency temporary standard, the ETS remains a proposed rule for a permanent standard. The Occupational Safety and Health Act (OSH Act) requires that an emergency temporary standard as published *automatically* serves as a proposal for a permanent standard. This process is in place to provide OSHA the ability to quickly address a "grave danger" while the agency engages in the lengthy, formal rulemaking process. This process requires OSHA to seek public comment and hold hearings before publishing a final rule.

For the permanent vaccine-or-test standard, OSHA received over 120,000 comments before the January 19 submission deadline. Next, OSHA will set dates for public hearings. OSHA also has the authority to issue an updated proposal and to re-open the comment period before implementing a permanent standard.

Given the Supreme Court's suggestion that a more targeted approach could survive judicial scrutiny, a narrower permanent standard is anticipated. For example, the Supreme Court acknowledged in its decision that OSHA could "regulate risks associated with working in particularly crowded or cramped environments." Thus, OSHA may revise the proposed rule to focus on specific industries in line with the Court's description.

Although the ETS has been withdrawn and the specifics of a permanent standard are unclear, employers cannot be lax in their response to the risk of COVID-19. Employers remain accountable for providing a work environment “free from recognized hazards” under the general duty clause of the OSH Act and must implement and adapt policies and procedures appropriate for their workplace. Employers must also remain attentive to any changes or updates to state COVID-19 regulations.

Hahn Loeser’s Labor & Employment group will continue to monitor for any developments and is available to assist employers in developing and implementing a COVID-19 policy that best fits the needs of the organization.

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