

Bodman PLC

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OSHA Withdraws the Vaccinate-or-Test Emergency Temporary Standard

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On November 5, 2021, the Occupational Safety and Health Administration (“OSHA”) released its controversial Emergency Temporary Standard (“ETS”), which required “large” employers to implement COVID-19 vaccine mandates or otherwise necessitate weekly testing of unvaccinated employees.

OSHA may promulgate an ETS upon the determination that: (1) employees are subject to a grave danger from the exposure to substances or agents determined to be toxic or physically harmful; and (2) an emergency standard is necessary to protect employees from such danger. OSHA published the ETS upon the conclusion that COVID-19 poses a grave danger to the workplace. OSHA simultaneously announced the ETS as a proposed rule, in accordance with the agency’s typical notice-and-comment rulemaking procedures instead of the grave danger analysis.

There were many legal challenges to the ETS. The issue reached the Supreme Court, and, in an opinion released on January 13, 2022, the Supreme Court enjoined OSHA’s implementation of its ETS until final resolution of the legal challenges on their merits.

In response, OSHA withdrew the ETS, effective January 26, 2022. However, OSHA is still pursuing the proposed rule for a permanent infectious disease standard, explaining: “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.”

A new standard is likely in 2022, but, given the Supreme Court’s rebuke, any new standard will contain different requirements than the ETS.

Employers currently have much more flexibility in designing their COVID-19 policies and procedures. The primary legal obligation now is to provide a “safe and healthful workplace,” as is mandatory under state and federal safety laws.

Bodman's Workplace Law Group continues to monitor for OSHA developments. Employers should contact any member of Bodman's Workplace Law Group for help creating compliant safety policies. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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