

OSHA Throws in Towel on Emergency

Article

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Yesterday, OSHA formally withdrew the ETS (large employer "vaccinate-or-test" rule) as a binding, enforceable emergency temporary standard. OSHA took this action after the U.S. Supreme Court blocked OSHA from implementing its ETS.

What does that mean for pending challenges to the ETS before the Sixth Circuit Court of Appeals? OSHA believes that litigation is now moot and has filed a motion to dismiss.

In its motion, OSHA argued that the ETS's "requirements, which are currently stayed, will no longer be in effect, and petitioners will no longer be subject – or face any risk of being subject – to the challenged requirements from which they sought relief."

Does this mean the ETS is dead?

Yes, the ETS is now dead as an enforceable, binding rule. Further, the Sixth Circuit likely will grant OSHA's motion to dismiss the challenges to the withdrawn ETS.

Will a "vaccinate-or-test" mandate return?

Probably yes, in some fashion. While OSHA has withdrawn the ETS, OSHA confirmed that "the agency is not withdrawing the ETS as a proposed [permanent] rule" (emphasis added) and that it "is prioritizing its resources to focus on finalizing a permanent COVID-19 Healthcare Standard."

In other words, OSHA will still seek to implement a "vaccinate-or-test" mandate through a separate, non-emergency rulemaking process (OSHA's flowchart gives an overview of that process). What that permanent rule will look like at the end of the full rule-making process remains to be seen.

For example, OSHA may seek to specify particular industries, potentially without regard to employer size rather than issue a blanket mandate applicable to all large employers, in light of the U.S. Supreme Court's criticism that the lack of industry specificity in the ETS helped doom it.

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