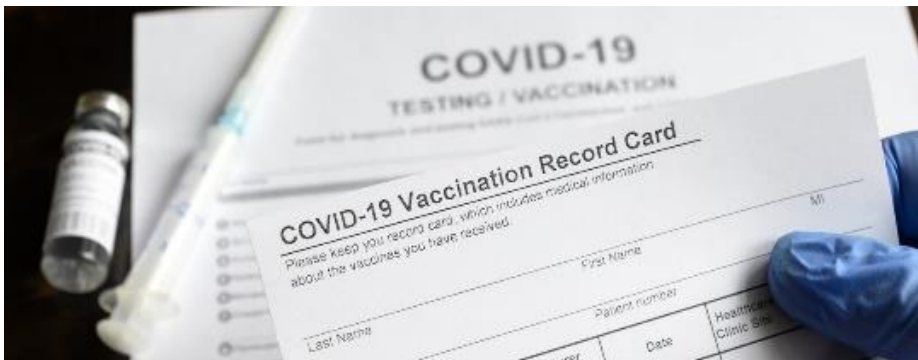


## Rapid Developments for OSHA's COVID-19 Emergency Temporary Standards



One in, one out, one in again.

**One in:** Employers with 100 employees or more should be prepared to comply with OSHA's emergency temporary standard (ETS) that would require them to have their employees fully vaccinated or tested regularly. After extensive litigation, the ETS is currently in effect, although OSHA has delayed the compliance dates. This could change soon, however. The ETS is in the hands of the Supreme Court, which will hear oral arguments on Friday, January 7, 2022. Unless the Court acts immediately, employer compliance with large parts of the ETS will be due the following Monday, January 10.

**One out:** OSHA has withdrawn most of its ETS for healthcare employers, as more than six months have passed without adoption of a permanent standard, as required by section 6(c) of the Occupational Safety and Health Act of 1970 (OSH Act). Withdrawal will likely become official once OSHA publishes a notice to that effect in the Federal Register. OSHA encourages continued voluntary compliance with the healthcare ETS, as it plans to enforce its General Duty Clause using the ETS as guidance.

**One in again:** OSHA is taking the position that with the healthcare ETS withdrawn, healthcare employers with 100+ employees are subject to that ETS. This is likely to take effect once OSHA publishes the Federal Register notice officially withdrawing the ETS.

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### AUTHORS

Mark Duvall

Principal

+1.202.789.6090

[mduvall@bdlaw.com](mailto:mduvall@bdlaw.com)



Jayni Lanham

Principal

+1.410.230.1333

[janham@bdlaw.com](mailto:janham@bdlaw.com)



Heidi Knight

Principal

+1.617.419.2365

[hknight@bdlaw.com](mailto:hknight@bdlaw.com)



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## 100+ Employees Vaccination and Testing ETS - Litigation

As discussed in our previous [alert](#), OSHA published its ETS for employers with 100 or more employees on November 5, 2021, 29 C.F.R. § 1910.501, [86 Fed. Reg. 61402](#) (Nov. 5, 2021). Petitions for judicial review were promptly filed in 12 federal circuits. On November 6, the Fifth Circuit issued a stay of the ETS. It reaffirmed that stay in a published opinion on November 12, [BST Holdings, L.L.C. v. OSHA](#), 17 F.4th 604 (5th Cir. 2021).

A few days later, the Judicial Panel on Multidistrict Litigation held a lottery and issued an order naming the Sixth Circuit as the court that would decide the case. [In re: Occupational Safety and Health Administration, Interim Final Rule; COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, Issued on November 4, 2021](#), MCP No. 165 (Nov. 16, 2021). All other circuits, including the Fifth Circuit, then transferred their cases challenging the ETS to the Sixth Circuit, which consolidated them.

On November 23, OSHA filed with the Sixth Circuit an emergency motion to dissolve the Fifth Circuit's stay of the ETS. Under 28 U.S.C. § 2112(a)(4), a transferee court may modify, revoke, or extend a stay issued by a transferor court. In a 2-1 decision, a panel of the Sixth Circuit granted OSHA's motion and dissolved the stay on December 17. [In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing, 86 Fed. Reg. 61402](#), Nos. 21-7000 and others (6<sup>th</sup> Cir. Dec. 16, 2021).

On December 17 and 18, two consolidated emergency applications for a writ of stay of the Sixth Circuit's order were filed with Justice Kavanaugh, the Circuit Justice for the Sixth Circuit. [National Federation of Independent Business et al. v. OSHA et al.](#), Application 21A244 (S. Ct., docketed Dec. 20, 2021); [BST Holdings, LLC et al. v. OSHA et al.](#), Application 21A248 (S. Ct., docketed Dec. 20, 2021). In a December 22 [order](#), the Supreme Court scheduled oral argument on both applications on Friday, January 7. It is likely to rule on the applications shortly thereafter.

## 100+ Employees Vaccination and Testing ETS – Current Status

In the absence of action by the Supreme Court, the OSHA ETS is now in effect, but OSHA has exercised its enforcement discretion to postpone the compliance dates.

The ETS required employer compliance with most requirements by December 6, 2021, with compliance with the vaccination and testing requirements due by January 4, 2022. 29 C.F.R. § 1910.501(m)(2). Following the Sixth Circuit order dissolving the stay, OSHA posted the following [statement](#) on its website:

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.

If the Supreme Court immediately grants the applications for a stay pending judicial review, OSHA will again have to hold off on enforcing this ETS. Otherwise, compliance with all of the ETS except with the vaccination and testing requirements will be required three days after the Supreme Court hearing.

To assist employers covered by the ETS, OSHA has published extensive [FAQs](#). OSHA has extended the comment period on the ETS to January 18, 2022. [86 Fed. Reg. 68560](#) (Dec. 3, 2022).

## Heading OSHA Healthcare ETS – Now Mostly Withdrawn

OSHA has announced withdrawal of its ETS for the healthcare sector, to become official once the Federal Register publishes a notice to that effect.

Our earlier [alert](#) reported on OSHA's ETS for the healthcare sector, 29 C.F.R. § 1910.502 and following, [86 Fed. Reg. 32620](#) (June 21, 2021) (later amended slightly by the 100+ employees ETS). The ETS required healthcare employers to support employee vaccination by providing reasonable time and paid leave to each employee for vaccination and any side effects experienced following vaccination. 29 C.F.R. § 1901.502(m). It did not require vaccination or regular testing, however.

Under section 6(c)(2) of the OSH Act, an ETS is to remain effective until superseded by a permanent standard. Under section 6(c)(3), OSHA must commence a rulemaking for a permanent standard, using the ETS as the proposed standard, and finalize that permanent standard within six months of publication of the ETS.

OSHA has taken no public action to begin rulemaking on a permanent standard. The six-month deadline for the permanent standard passed on December 21, 2021. On December 27, OSHA posted a [statement](#) withdrawing all of the healthcare ETS except its recordkeeping requirements:

OSHA announces today that it intends to continue to work expeditiously to issue a final standard that will protect healthcare workers from COVID-19 hazards, and will do so as it also considers its broader infectious disease rulemaking. However, given that OSHA anticipates a final rule cannot be completed in a timeframe approaching the one contemplated by the OSH Act, OSHA also announces today that it is withdrawing the non-recordkeeping portions of the healthcare ETS. The COVID-19 log and reporting provisions, 29 CFR 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r), remain in effect. These provisions were adopted under a separate provision of the OSH Act, section 8, and OSHA found good cause to forgo notice and comment in light of the grave danger presented by the pandemic. See 86 FR 32559.

In place of the healthcare ETS, OSHA plans to enforce the General Duty Clause, OSH Act section 5(a)(1), using the healthcare ETS as a resource. It will also rely on its permanent standards, such as its respiratory protection standard, 29 C.F.R. § 1910.134. The OSHA statement continued:

As OSHA works towards a permanent regulatory solution, OSHA will vigorously enforce the general duty clause and its general standards, including the Personal Protective Equipment (PPE) and Respiratory Protection Standards, to help protect healthcare employees from the hazard of COVID-19. The Respiratory Protection Standard applies to personnel providing care to persons who are suspected or confirmed to have COVID-19. OSHA will accept compliance with the terms of the Healthcare ETS as satisfying employers' related obligations under the general duty clause, respiratory protection, and PPE standards. Continued adherence to the terms of the healthcare ETS is the simplest way for employers in healthcare settings to protect their employees' health and ensure compliance with their OSH Act obligations.

OSHA believes the terms of the Healthcare ETS remain relevant in general duty cases in that they show that COVID-19 poses a hazard in the healthcare industry and that there are feasible means of abating the hazard. OSHA plans to publish a notice in the Federal Register to implement this announcement.

## Healthcare Employers with 100+ Employees to Be Subject to the Other ETS

The 100+ employees ETS expressly exempted employers subject to the healthcare ETS:

The requirements of this section do not apply to: ...

(ii) Settings where any employee provides healthcare services or healthcare support services when subject to the requirements of § 1910.502.

Once OSHA officially withdraws the healthcare ETS in a Federal Register notice, it will consider healthcare employers with 100+ employees to be subject to the other ETS, § 1910.501, since they would no longer be subject to the requirements of § 1910.502. One of the FAQs makes this explicit:

2.J. Does the ETS apply to employees in settings covered by the Healthcare ETS (29 CFR 1910.502)?

No, the ETS does not apply to employees in settings covered by the Healthcare ETS while that ETS is in effect .... Note, however, that if the Healthcare ETS is no longer in effect at any point while this ETS is in effect, some employees working in settings covered under section 1910.502 may become covered by this ETS.

Accordingly, healthcare employers with 100+ employees should, like other large employers, prepare to comply with that ETS beginning on January 10, assuming that the Supreme Court does not stay § 1910.501.

Stay tuned.

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