

January 25, 2022

AFTER SCOTUS DECISION, OSHA TO SEEK PERMANENT VACCINATION OR TESTING MANDATE

Background

On November 5, 2021, OSHA issued Emergency Temporary Standard (ETS) requiring businesses with 100 or more employees to implement a COVID-19 related vaccination or testing mandate policy. On Thursday, January 13, 2022, the United States Supreme Court halted the ETS while lower courts consider the merits of the ETS.

Details

After evaluating the U.S. Supreme Court's decision today, January 25, 2022, OSHA announced that it will no longer seek to enforce the ETS and is withdrawing it as an enforceable emergency temporary standard. However, OSHA is *not* withdrawing the ETS "to the extent that it serves as a proposed rule" under the Occupational and Health Act of 1970. Rather, OSHA will use the ETS as a guideline and proposal to draft a permanent vaccine or testing mandate standard.

Under the November 5, 2021, ETS, OSHA accepted comments on the ETS. It is anticipated that these comments will be analyzed in the drafting of a permanent standard. OSHA has indicated that the following will be considered in drafting the permanent standard:

- Whether the scope of the rule should change to address the significant risk posed by COVID-19 in the workplace; *e.g.* Should portions of the rule, such as masking requirements, apply to fully vaccinated workers?
- OSHA will assess whether it should consider additional scientific information about prior COVID-19 infection and immunity. "Given scientific uncertainty and limitations in testing for infection and immunity, OSHA is concerned that it would be infeasible for employers to operationalize a standard that would permit or require an exception from vaccination or testing and face covering based on prior infection with COVID-19...".
- Whether OSHA should impose a strict vaccination mandate with no alternative compliance options.
- Analysis of employers policies presently in place to protect workers such as whether vaccination is mandatory or voluntary under the policy; what type of leave is offered; and, what percentage of their workforce was vaccinated as a result.
- Whether employers with fewer than 100 employees should be covered by a potential final standard; whether such employers are currently requiring workers to get vaccinated (either with or without offering alternatives, such as testing and masking); and what benefits and challenges they have experienced.

Summary

While OSHA did not provide a timeline for the issuance of a permanent standard, it did note that the priority at this time is healthcare workers.

The ETS and its implementation is a complex and evolving process. Kathleen J. Collins and COVID-19 Resource Team at Litchfield Cavo are here to assist you with your questions and assist with your mandates and compliance needs.

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