

Client Alert

DECEMBER 10, 2021

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Environmental, Health and Safety
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OSHA Pushes Ahead With Final Vax Or Test Rule Despite Court Challenges

On November 5, 2021, the U.S. Occupational Safety and Health Administration (“OSHA”) published an Emergency Temporary Standard (“ETS”) mandating employers implement “vax or test” policies for COVID-19¹. The ETS went into immediate effect but has been stayed by the Fifth Circuit². Although the merits of the ETS are still under judicial review, on December 3, 2021, OSHA extended the ETS’ public comment period for 45 days to allow for further “comments on any aspect of the ETS and whether the ETS should be adopted as a permanent standard.”³ Comments are due January 19, 2022.

While all eyes are on the judiciary, the Agency’s decision to continue engaging with public comments may signal a COVID-19 vaccination and testing standard is coming one way or another.

OSHA’s History with Emergency Temporary Standards

Until this year, OSHA had leveraged its unique power to issue an ETS in response to new and “grave” occupational dangers nine times since 1971⁴. A legal challenge was initiated in six of the nine instances and only one ETS challenge has survived judicial review⁵. However, history shows us that a permanent judicial stay is not the end of the road for ETS hazards. Almost all risks identified in an OSHA ETS were ultimately regulated by the agency⁶. What’s more, those final standards have gone into effect faster than a typical OSHA process allows.

The Standard-Issuing Process

OSHA estimates their rulemaking process takes four years, at a minimum, from identifying a hazard to publishing the final standard⁷. This is not the case when it comes to the hazards subject to an ETS. By statute, an ETS functions as a proposed rule, skipping at least two years of the formal rulemaking process, and leaves only an advisory committee and the public comment period between it and a final standard⁸.



Historically, a reviewing court’s adverse ruling appears to have no impact in slowing this down. For example, OSHA published an ETS in June of 1976 with respect to commercial diving operations⁹. The ETS was stayed, but OSHA went on to issue a final standard by the end of July 1977, less than one year after the ETS was published, relying partially on public comments to the ETS¹⁰.

Warning Signs for Employers

Invocation of its ETS authority has allowed OSHA to substantially shorten the rulemaking process in the past; COVID-19 may be no exception. OSHA’s extension of the public comment period allows it to simultaneously work toward issuing a final COVID-19 standard while the ETS undergoes judicial review. Taking these steps may indicate the Agency intends to push forward with issuing a formal standard regardless of the outcome in the pending lawsuit.

King & Spalding’s OSHA practitioners are closely monitoring the developments of federal COVID-19 “vax or test” mandate and how they may impact business operations.

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¹ 86 FR 61402, November 5, 2021.

² 29 U.S.C. § 655(c)(3); *BST Holdings, LLC et al. v. Occupational Safety and Health Administration et al.*, No. 21-60845 (5th Cir. 2021).

³ 86 FR 68560, December 3, 2021.

⁴ Cong. Rsch. Serv., Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19, at 34 tbl. A-1 (Nov. 10, 2021), available at <https://crsreports.congress.gov/product/pdf/R/R46288>

⁵ *Id.*; *Vistron v. OSHA*, 6 OSHC 1483 (6th Cir. 1978) (denying stay of Acrylonitrile ETS).

⁶ There is only one exception: Organophosphorous pesticides, which are regulated under FIFRA. *Florida Peach Growers Ass'n v. United States Department of Labor*, 489 F.2d 120 (5th Cir. 1974).

⁷ OSHA Rulemaking Process Flow Chart, available at https://www.osha.gov/sites/default/files/OSHA_FlowChart.pdf.

⁸ *Id.*

⁹ 41 FR 24271, June 15, 1976.

¹⁰ *Taylor Diving & Salvage Co. v. Department of Labor*, 537 F.2d 819 (5th Cir. 1976); 42 FR 37668, July 22, 1977.