

# OSHA's Next Move: Agency at Work on Permanent COVID-19 Safety Standard

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The U.S. Occupational Safety and Health Administration (OSHA) is moving forward with plans to issue a permanent rule aimed at requiring employees of large employers to either be vaccinated against COVID-19 or face weekly testing.



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OSHA announced on January 25 it is withdrawing the emergency temporary standard (ETS) it issued on November 5 and that the U.S. Supreme Court rejected on January 13. But the agency isn't giving up on efforts to increase vaccination of the nation's workforce.

Instead, OSHA's announcement says it "is prioritizing its resources to focus on finalizing a permanent COVID-19 Healthcare Standard."

The ETS—had it been allowed to take effect—would have covered employers with at least 100 employees, estimated to be some 84 million workers across the nation. As a temporary standard, it would have been in effect for six months.

OSHA is allowed to issue an emergency rule quickly without going through all the steps necessary to issue a permanent rule. The ETS's six-month lifespan would have given the agency time to begin permanent rulemaking. The process requires time-consuming steps that include the issuance of a notice of proposed rulemaking and the setting of a period for interested parties to submit comments.

After the comment period, OSHA would have to review and analyze the comments before issuing a final rule, meaning the process could take several months.

The temporary rule would have required covered employees to be vaccinated or face weekly testing and wear a mask in the workplace. People with medical or religious reasons for not getting the shots would have been eligible for exemption from the vaccination requirement.

## **Meaning for Employers**

“If OSHA indeed wants vaccination, testing, masking, etc., to be a permanent standard, and not an emergency temporary standard, the agency must go through rulemaking,” James P. Reidy, an attorney with Sheehan Phinney Bass & Green PA in Manchester, New Hampshire, says.

Reidy explains that the permanent rule process can take several months since it requires the agency to consult with other federal agencies and call for comments from interested parties. Those parties may request a public hearing on the proposed rule when none has been announced in the notice. Then the hearing would have to be scheduled, and then the rule's final text would have to be amended or adopted and an effective date set.

“In short, while OSHA may seek to implement a permanent COVID standard, that process could take several months,” Reidy says. “In the meantime, [the agency] is encouraging employers to implement their own vaccination and testing policies.”

Burton J. Fishman, an attorney with FortneyScott in Washington, D.C., says the Supreme Court's narrow ruling—that OSHA didn't have the authority to issue a vaccine mandate—“has already had enormous impact.”

Fishman points to coffeeshop giant Starbucks' decision to withdraw the policy it had earlier implemented requiring vaccination of workers except those who qualified for an exemption.

General Electric Co. also has suspended its vaccine policy, according to news reports. Some other companies, though, are holding firm on their requirements while others haven't announced what they'll do in light of the Supreme Court's action.

“The plain fact is that the Court has made it even more difficult for individual businesses and even states to sustain vaccine mandates of any kind,” Fishman says. “And note: Within days, the executive order mandating vaccines for federal employees—always considered the province of the president—was blocked. That is emblematic of the impact of the Court’s ruling in the OSHA case.”

## **OSHA’s Next Steps**

It’s hard to know what any new rule from OSHA will look like, Fishman says. The agency could issue a regulation under the general duty clause of the Occupational Safety and Health Act, “but a sweeping rule would face the same response from the Supreme Court,” he says.

Alternatively, OSHA could craft a rule along the lines defined by the Supreme Court, focusing on particular industries, or it could issue a universal mask mandate, Fishman says. “Despite what OSHA says, I think it will take its time before issuing anything, just to absorb what has happened and craft a measured response.”

## **Advice for Employers**

Fishman reminds employers that the law hasn’t changed although the legal “climate” has. “Employers still have the right to impose any rules they wish—in keeping with state and local law. But they are losing the fight for public opinion and public compliance,” he says.

Reidy also says employers are free to implement their own vaccine policies by following guidance from the Equal Employment Opportunity Commission (EEOC), which has said employers can mandate vaccination if it is job-related and consistent with business necessity.

“Now even with the high court’s ruling and OSHA withdrawing the ETS, employers can adopt and enforce their own vaccine mandate following EEOC guidance and applicable state laws,” Reidy says.

There could be legal risks if employees who are denied exemptions or refuse to comply challenge their employers, but “the real risk is the impact on recruitment and retention in this very competitive labor market,” Reidy says.

What steps can companies take? “Employers can, unless prohibited by state law, ask employees if they are vaccinated and to provide proof,” Reidy says. Employers also can provide incentives and offer paid time to get the shots and recover from any side effects.