

COVID-19



## **SIDE EFFECTS FROM OSHA'S WITHDRAWAL OF COVID-19 HEALTHCARE ETS**

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By: Donald D. Berner and Forrest T. Rhodes Jr.

Earlier this week OSHA announced its plans to withdraw the substantive aspects of the COVID-19 Healthcare Emergency Temporary Standard (ETS) that was published back in June. This withdrawal will become effective when notice is published in the Federal Register, which we expect to occur within the next week.

While the ETS will be officially withdrawn, OSHA's statement "strongly urges" healthcare employers to continue to comply with the substance of the healthcare ETS, including its PPE, physical distancing, isolation/quarantine, and screening requirements, among others. The agency states that it will view these requirements as part of a healthcare employer's obligations to comply with OSHA's general duty clause.

A critical consequence of OSHA's decision concerns the OSHA COVID-19 Vaccination ETS for large employers (100+ employees), which, among other components, requires covered employers to impose a regimen of weekly testing and masking requirements for all unvaccinated employees. The Vaccination ETS contains a provision that excludes employers who are subject to the Healthcare ETS from its coverage. However, once the Healthcare ETS is officially withdrawn, that exclusion will be inapplicable, and those larger healthcare employers will become subject to the broader OSHA Vaccination ETS. This is noteworthy because the non-testing aspects of that ETS, including having a policy in place, have a practical effective date of Jan. 10, 2022, with testing required for unvaccinated employees by Feb. 9, 2022. Thus, larger healthcare employers who previously didn't have to worry about the broader OSHA Vaccination ETS now have a relatively short period to be in compliance.

This is all complicated by legal challenges to the OSHA ETS, as well as the CMS vaccination mandate, which is presently enjoined as to Kansas healthcare employers. The U.S. Supreme Court is scheduled to hear arguments on both of those mandates on Jan. 7, but it's unclear how soon the Court will issue any rulings after that. We'll follow-up as additional information becomes available, but please reach out to your legal counsel if you have questions in the meantime.

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If you have questions or want more information regarding the OSHA ETS, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact **Donald D. Berner** at 316.291.9738 or [dberner@foulston.com](mailto:dberner@foulston.com) or **Forrest T. Rhodes, Jr.** at 316.291.9555 or [frhodes@foulston.com](mailto:frhodes@foulston.com). For more information on the firm, please visit our website at [www.foulston.com](http://www.foulston.com).

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## RESOURCES

Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#). Sign up to receive these issue alerts straight to your inbox [here](#).

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