

# OSHA withdraws a portion of its vaccine mandate

In response to the Supreme Court's smackdown of the mandate for private employers, OSHA has now [withdrawn](#) a portion of it. However, the story doesn't necessarily end there.

So this isn't the end of the story, it's just the beginning of a much longer story.

## What OSHA says it's going to do now

OSHA's mandate was technically called an Emergency Temporary Standard. The ETS had two purposes—the first was widely known and contested in court: to implement the shot mandate. Secondly, the ETS served as proposed regulations for a more permanent solution to future pandemics.

In the Jan. 26 [Federal Register notice](#) withdrawing its shot mandate, OSHA said it's not withdrawing the ETS to the extent it serves as proposed regulations, subject to the normal notice-and-comment procedures. So it's still alive, but whether it can be maintained as proposed regulations isn't clear, since it still needs to account for the Supreme Court's comment regarding OSHA's inability to regulate public health emergencies.

*Upshot:* OSHA may have to withdraw the ETS and issue new proposed regulations, which would drag the process out the process even longer.

OSHA hasn't conceded defeat entirely. It can still move against employers in [high-hazard industries](#) and it can still attempt to use its [general duty clause](#) against employers that don't ensure their premises are free of recognized hazards that cause or are likely to cause death or serious physical harm to employees.

In our opinion, OSHA would stand a good chance of prevailing in a high-hazard industry case, since it would be enforcing safe workplace standards. It might not be so easy to use the general duty clause in a typical office situation, since, again, it looks an awful lot like responding to a public health emergency, which, according to the Supreme Court, is beyond OSHA's jurisdiction.



## State OSHA plans

Twenty-eight states run OSHA-approved occupational safety and health plans. These 28 states were obligated to revise their plans to include a vax-or-text mandate at least as robust as OSHA's.

While state plans are no longer required to amend their plans, California, at least, has indicated it will enforce a vax-or-test-and-mask standard.

## Your options

OSHA is still strongly encouraging employers to set mandatory vax policies. You can institute your own vax policy, subject to accommodations for employees who can't get shots due to medical conditions or religious objections. And if employees sue you, you're likely to win. Up until now, employers have won all of the vaccination cases brought against them.