

21-7000 (lead), 21-4027, -4028, -4031, -4032, -4033, -4080, -4082, -4083,
-4084, -4085, -4086, -4087, -4088, -4089, -4090, -4091, -4092, -4093, -4094,
-4095, -4096, -4097, -4099, -4100, -4101, -4102, -4103, -4108, -4112, -4114,
-4115, -4117, -4133, -4149, -4152, -4157
MCP No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON
COVID-19 VACCINATION AND
TESTING, 86 FED. REG. 61402

On Petitions for Review

RESPONDENTS' MOTION TO DISMISS THE PETITIONS AS MOOT

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The federal government respectfully moves to dismiss the petitions challenging the Vaccination and Testing emergency temporary standard (Vaccination and Testing ETS) issued by the Occupational Safety and Health Administration (OSHA) to address the grave danger of COVID-19 in the workplace. *See* 86 Fed. Reg. 61,402 (Nov. 5, 2021). On January 26, 2022, OSHA will withdraw the Vaccination and Testing ETS. *See* OSHA, *Interim final rule; withdrawal* (attached as Exhibit A, available at <https://perma.cc/GU2T-K36Z>). In light of that withdrawal, the petitions should be dismissed as moot.

1. Petitions for review of the Vaccination and Testing ETS were filed in every regional court of appeals, *see* 29 U.S.C. § 655(f), and were transferred to and consolidated in this Court, *see* 28 U.S.C. § 2112. Before that transfer and consolidation, a Fifth Circuit panel temporarily stayed enforcement of the Vaccination and Testing ETS pending judicial review. *See BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021). After the Fifth Circuit case was transferred, this Court dissolved that stay. *See In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021); 28 U.S.C. § 2112(a)(4).

2. Several petitioners filed applications in the U.S. Supreme Court seeking to enjoin the government from enforcing the Vaccination and Testing ETS pending review. On January 13, 2022, the U.S. Supreme Court stayed the Vaccination and Testing ETS, finding that challengers were likely to prevail on their claims. *National Fed'n of Indep. Bus. v. Department of Labor*, 142 S. Ct. 661, 664-67 (2022). After evaluating

the Court’s decision, OSHA decided to withdraw the Vaccination and Testing ETS as an enforceable emergency temporary standard.¹

3. A case becomes moot “when it is impossible for a court to grant any effectual relief.” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotation marks omitted). “If events occur during the case, including during the appeal, that make it ‘impossible for the court to grant any effectual relief whatever to a prevailing party,’ the appeal must be dismissed as moot.” *Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 713 (6th Cir. 2011) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)). Just such an event occurred here. Because OSHA’s withdrawal of the Vaccination and Testing ETS will become effective when published in the Federal Register tomorrow, this case no longer presents a live case or controversy. The Vaccination and Testing ETS’s requirements, which are currently stayed, will no longer be in effect, and petitioners will no longer be subject—or face any risk of being subject—to the challenged requirements from which they sought relief.²

¹ That ETS also served as a “proposed rule” for a “proceeding” to promulgate an occupational safety or health standard. 29 U.S.C. § 655(c)(3). Although OSHA is withdrawing the binding rule, it has left the proposed rule in place as part of a separate, ongoing rulemaking process that imposes no obligations and is not subject to challenge. *See id.* § 655(b) (describing the process for promulgating a permanent standard); *see, e.g., Action on Smoking & Health v. Department of Labor*, 28 F.3d 162, 165 (D.C. Cir. 1994) (OSHA proposed rulemaking not a final agency action subject to review).

² *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (federal courts “are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong”); *American Foreign Serv. Ass’n v. Garfinkel*, 490 U.S. 153, 158-159 (1989) (per curiam) (forms using the term “classifiable” for purposes of an

Respectfully submitted,

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employee nondisclosure agreement that had been invalidated by a lower court and withdrawn by the agency during the case’s pendency rendered the controversy moot “[a]s to current employees who have been notified that the term ‘classifiable’ no longer controls their disclosure of information”); *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 79 (D.C. Cir. 2011) (holding that it is “impossible to grant any prospective relief” for alleged non-enforcement of an agency decision that was superseded, and dismissing as moot claims based on those allegations); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) (“In its Supplemental Complaint, the Fund claims only that the memo was issued in violation of NEPA. Because the memo has expired, this claim is moot.”); *Everett v. United States*, 158 F.3d 1364, 1367 (D.C. Cir. 1998) (“The withdrawal of the Order mooted [appellant’s] challenge thereto.”); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 414 n.18 (5th Cir. 1999) (“Reconsideration of agency actions by the implementing agency can moot issues otherwise subject to judicial review because the reviewing court can no longer grant effective relief.”).

CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 769 words. This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer

Brian J. Springer

Exhibit A



DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. OSHA-2020-0007]

RIN 1218-AD42

COVID–19 Vaccination and Testing; Emergency Temporary Standard

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Interim final rule; withdrawal.

SUMMARY: OSHA is withdrawing the November 5, 2021, emergency temporary standard (ETS) which was issued to protect unvaccinated employees of large employers (100 or more employees) from the risk of contracting COVID–19 by strongly encouraging vaccination.

DATES: The withdrawal is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: In accordance with 28 U.S.C. 2112(a), the agency designates Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor, U.S. Department of Labor, to receive petitions for review of this agency action. Service can be accomplished by email to zzSOL-Covid19-ETS@dol.gov.

FOR FURTHER INFORMATION CONTACT: *General information and press*

inquiries: Contact Frank Meilinger, Director, Office of Communications, U.S.

Department of Labor; telephone (202) 693-1999; email meilinger.francis2@dol.gov.

For technical inquiries: Contact Andrew Levinson, Directorate of Standards and Guidance, U.S. Department of Labor; telephone (202) 693-1950.

SUPPLEMENTARY INFORMATION:

I. Background and Rationale for Withdrawal

On November 5, 2021, OSHA adopted an emergency temporary standard (the Vaccination and Testing ETS), under sections 4, 6(c), and 8 of the Occupational Safety and Health Act of 1970 (29 USC 653, 655(c), 657), to protect unvaccinated employees of large employers (100 or more employees) from the risk of contracting COVID–19 by strongly encouraging vaccination (86 FR 61402). The Vaccination and Testing ETS required covered employers to develop, implement, and enforce a mandatory COVID–19 vaccination policy, with an exception for employers that instead adopted a policy requiring employees to either get vaccinated or elect to undergo regular COVID–19 testing and wear a face covering at work in lieu of vaccination. That ETS also serves as a “proposed rule” for a “proceeding” to promulgate an occupational safety or health standard. 29 U.S.C. 655(c)(3); see 29 U.S.C. 655(b).

On January 13, 2022, the U.S. Supreme Court stayed the Vaccination and Testing ETS, finding that challengers were likely to prevail on their claims. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 595 U.S. __, __ (2022) (per curium) (slip op. at 5, 9). After evaluating the Court’s decision, OSHA is withdrawing the Vaccination and Testing ETS as an enforceable emergency temporary standard. To the extent that this withdrawal is not already generally exempt from the notice and comment requirements of the Administrative Procedure Act and the OSH Act, OSHA finds good cause that the opportunity for public comment on this withdrawal is impracticable, unnecessary, and contrary to the public interest within the meaning of 5 U.S.C. 553(b)(B), and 29 U.S.C. 655(b) because it would unnecessarily delay the resolution of ambiguity for employers and workers alike. This agency action becomes effective immediately both because there is good cause and because the action removes a requirement on the regulated community. 5 U.S.C. 553(d)(1), (3).

Although OSHA is withdrawing the Vaccination and Testing ETS as an enforceable emergency temporary standard, OSHA is not withdrawing the ETS to the

extent that it serves as a proposed rule under section 6(c)(3) of the Act, and this action does not affect the ETS's status as a proposal under section 6(b) of the Act or otherwise affect the status of the notice-and-comment rulemaking commenced by the Vaccination and Testing ETS. See 29 U.S.C. 655(c)(3).

Notwithstanding the withdrawal of the Vaccination and Testing ETS, OSHA continues to strongly encourage the vaccination of workers against the continuing dangers posed by COVID-19 in the workplace.

II. Minor revisions to § 1910.504 and § 1910.509

OSHA has removed the reference to § 1910.501 from the introductory text of the Mini Respiratory Protection requirements in § 1910.504 because the former section is now removed. The Mini Respiratory Protection Program section is retained, however, because it remains a requirement for respirator use under § 1910.502(f)(4). Similarly, OSHA has revised the incorporation-by-reference list in § 1910.509 by removing the reference to § 1910.501(h) from § 1910.509(b)(5), as the incorporation by reference list now pertains only to documents incorporated by reference in § 1910.502.

Because these minor revisions do not make any substantive change to the duties of employers, OSHA finds good cause that the opportunity for public comment on these revisions is unnecessary within the meaning of 5 U.S.C. 553(b)(B) and 29 U.S.C. 655(b). In addition, OSHA finds that public comment is impracticable in light of the need to provide clarity to the regulated community and to workers.

III. State Plans

The occupational safety and health programs run by the 28 States and U.S. territories with their own OSHA-approved occupational safety and health plans (State Plans) must be at least as effective as Federal OSHA's program. This includes a requirement that, when Federal OSHA makes a program change that renders its program more effective, the State Plan must timely adopt a corresponding change in order to

maintain a safety and health program that is at least as effective as Federal OSHA (29 CFR 1902.32(e); 29 CFR 1902.44(a)). However, where, as here, the Federal program change does not impose any new requirements or otherwise render the Federal program more effective, State Plans are not required to take any action.

List of Subjects in 29 CFR Part 1910

COVID-19, Disease, Health facilities, Health, Healthcare, Incorporation by reference, Occupational health and safety, Public health, Reporting and recordkeeping requirements, Respirators, SARS-CoV-2, Vaccines, Viruses.

Authority and Signature

Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, authorized the preparation of this document pursuant to the following authorities: sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor’s Order 8-2020 (85 FR 58393 (Sept. 18, 2020)); 29 CFR part 1911; and 5 U.S.C. 553.

Signed at Washington, DC, on January 21, 2022.

Douglas L. Parker,
Assistant Secretary of Labor for Occupational Safety and Health.

For the reasons set forth in the preamble, part 1910 of title 29 of the Code of Federal Regulations is amended as follows:

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

Subpart U—COVID–19

1. The authority citation for subpart U continues to read as follows:

Authority: 29 U.S.C. 653, 655, and 657; Secretary of Labor's Order No. 8-2020 (85 FR 58393); 29 CFR part 1911; and 5 U.S.C. 553.

§ 1910.501 [Removed and Reserved]

2. Remove and reserve § 1910.501

3. Amend § 1910.504 by revising paragraph (a) to read as follows:

§ 1910.504 Mini Respiratory Protection Program.

(a) *Scope and application.* This section applies only to respirator use in accordance with § 1910.502(f)(4).

* * * * *

4. Amend § 1910.509 by revising paragraph (b)(5) to read as follows:

§ 1910.509 Incorporation by reference.

* * * * *

(b) * * *

(5) *Isolation Guidance.* COVID-19: Isolation If You Are Sick; Separate yourself from others if you have COVID-19, updated February 18, 2021, IBR approved for § 1910.502(l).

* * * * *