



This document is scheduled to be published in the Federal Register on 01/26/2022 and available online at [federalregister.gov/d/2022-01532](https://www.federalregister.gov/d/2022-01532), and on [govinfo.gov](https://www.govinfo.gov)

: 4510-26-P

## 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](mailto: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](mailto: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.

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**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).

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