

# FEDERAL COURT DENIES NURSES' DEMAND THAT OSHA REINSTATE THE HEALTHCARE EMERGENCY TEMPORARY STANDARD

Insights  
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A federal court recently denied a petition from a group of nurses' unions who were seeking to compel OSHA to permanently install the emergency temporary standard to mitigate the risk of COVID-19 transmission in healthcare settings. The August 26 decision from the D.C. Circuit Court doesn't necessarily mean that you won't eventually see a pandemic-related standard for healthcare put into place, however. The agency is expected to move forward with a permanent rule in the very near future. What do you need to know about this recent decision and what to expect going forward?

## Quick History on Healthcare ETS

Following a directive from President Biden, [OSHA issued a Healthcare ETS in June 2021](#), laying out guidelines for social distancing protocols, virus symptom screenings, and paid time off for workers to get vaccinated against COVID-19, among other requirements. In December 2021, OSHA announced its plan to withdraw the Healthcare ETS, but noted it would continue to work on a permanent standard.

Following this announcement, several nurses' unions, including National Nurses United, New York State Nurses Association, and the Pennsylvania Association of Staff Nurses and Allied Professionals, filed an emergency petition in January 2022. They asserted that OSHA had failed to protect nurses by withdrawing the Healthcare ETS without replacing it with a permanent standard.

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The nurses' unions filed a writ of mandamus seeking that the court compel OSHA to:

- issue a permanent standard superseding the Healthcare ETS within 30 days of the writ's issuance;
- retain the healthcare ETS until a permanent standard supersedes it; and
- enforce the Healthcare ETS.

### **How Did the D.C. Circuit Rule?**

Ultimately the court found that it could not mandate that OSHA enact a permanent standard. In so finding, it noted that a court can only grant a writ of mandamus petition, like the one filed, in "drastic" scenarios when a federal agency clearly violates its duty to act. In this case, the court ruled, OSHA has the decision-making authority to determine whether to establish permanent safety standards and is permitted to determine that no standard should issue.

The court also ruled that it lacked jurisdiction to compel OSHA to retain the current Healthcare ETS under the All Writs Act. The court stated that "ordering OSHA to 'retain' the Healthcare ETS, i.e. to refrain from withdrawing it, does not protect our current or prospective jurisdiction because we do not now, nor would we in the future, have jurisdiction to review pre-enforcement challenges to the Healthcare ETS.

Lastly, the Court held that OSHA's decision not to enforce the Healthcare ETS did not violate a clear duty to act and therefore, the Court could not compel OSHA to enforce the Healthcare ETS. It is OSHA's prerogative to decide whether, when and how vigorously to enforce particular standards and these decisions are not subject to judicial review.

### **What's Next?**

Even though the Court denied the nurses' unions' petition, the unions may still receive the relief they were looking for. OSHA is expected to enact a final standard in the coming weeks that will protect healthcare workers from COVID-19 hazards. We expect the permanent standard to largely resemble the temporary standard, with a few modifications likely based on [the Center for Disease Control's latest guidance](#).

## Looking For More Information?

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