

New OSHA COVID-19 Rule and Agency Guidance for Both Healthcare and Non-Healthcare Employers

Working Together

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The Occupational Safety and Health Administration (“OSHA”) has finally released its much-anticipated federal COVID-19 safety regulation for employers of healthcare workers (the unofficial version is available here). The regulation, known as the COVID-19 Emergency Temporary Standard (ETS), will be effective immediately upon publication in the Federal Register by the Office of the Federal Register (OFR). Although the official date of publication has yet to be announced, the Rule has already been sent to the OFR and will likely be

published very soon. Employers must comply with most provisions within 14 days of publication, although for provisions involving physical barriers, ventilation, and training, they will have 30 days to comply. OSHA has already stated that it will use its enforcement discretion for employers who are making a good faith effort to comply with the ETS.

OSHA has also released updated guidance intended to help employers and workers not covered by the ETS to identify COVID-19 exposure risks to workers who are unvaccinated or otherwise at-risk, and to help them take appropriate steps to prevent exposure and infection.

Emergency Temporary Standard

OSHA’s new rule targets the healthcare industry. The ETS applies “to all settings where any employee provides healthcare services or healthcare support services.” This includes employees in hospitals, nursing homes and assisted living facilities, as well as emergency responders and home health care workers.

There are some exceptions to the ETS. For example, the rule does not apply to “well-defined hospital ambulatory care settings where all employees are fully vaccinated[1] and all non-employees are screened prior to entry, and people with suspected or confirmed COVID-19 are not permitted to enter those settings,” such as a hospital radiology department, dialysis center or laboratory that is distinct from the rest of the hospital and has a separate entrance. Another exception excludes “non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings.”

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The ETS requires subject employers to develop and implement effective COVID-19 plans. Key requirements of the plan include:

- A designated safety coordinator with authority to ensure compliance;
- A workplace-specific hazard assessment; and
- Policies and procedures that address the hazards identified by the assessment to:
 - Minimize the risk of transmission;
 - Effectively communicate and coordinate with other employers when employees of different employers share the same physical location; and
- Protect employees who in the course of their employment enter into private residences or other physical locations controlled by a person not covered under the Occupational Safety and Health Act of 1970 (e.g., homeowners, sole proprietors), including procedures for employee withdrawal from that location if those protections are inadequate.

The employer must seek the input and involvement of non-managerial employees when conducting its hazard assessment, and designing and implementing the required COVID-19 plan.

OSHA's new rule also requires what many employers have already been doing for some time now: limiting and monitoring points of entry to settings where direct patient care is provided; screening patients and visitors; and implementing physical distancing of six feet. Employers subject to the ETS must also provide each employee with a sufficient number of facemasks that ensures the employee can change the facemask at least once per day. Although the rule requires that the employer ensure that facemasks are worn, there are a number of circumstances in which a facemask is not required (e.g., when an employee is alone in a room or eating and drinking.). Employers must also provide respirators and other personal protective equipment (such as gloves, isolation gowns or protective clothing and eye protection) for workers exposed to people with suspected or confirmed COVID-19, for employees involved in aerosol-generating healthcare procedures on people with suspected or confirmed COVID-19, and as necessary to comply with standard and transmission-based precautions under the ETS.

The ETS contains additional requirements related to maintaining physical barriers; cleaning and disinfection; ventilation; health screening and medical management for employees who experience COVID-19 symptoms; training to ensure employees understand COVID-19 transmission; recordkeeping requirements; and anti-retaliation protections for employees who exercise their rights under the ETS. Significantly, healthcare employers must support COVID-19 vaccination for their employees by providing reasonable time and paid leave to each employee to get vaccinated, *as well as paid leave for any employee experiencing post-vaccination side effects.*

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New Guidance for Employers Not Covered by the ETS

OSHA has also recently issued updated guidance applicable to workers and employers who are not subject to the ETS. Under this guidance, these employers no longer need to take steps to protect their fully-vaccinated workers who are not otherwise at-risk from COVID-19 exposure. However, employers should still maintain protections for unvaccinated or otherwise at-risk workers.

The updated guidance contains recommendations as well as descriptions of mandatory safety and health standards and notes that employers should engage with workers and their representatives to determine how to implement multi-layered interventions to protect unvaccinated or otherwise at-risk workers and mitigate the spread of COVID-19, including:

- Granting paid time off for employees to get vaccinated;
- Instructing infected workers and those with symptoms of COVID-19, as well as unvaccinated employees who have had close contact with someone who tested positive for COVID-19, to stay home from work;
- Implementing physical distancing for unvaccinated and otherwise at-risk workers in communal work areas;
- Providing face masks for unvaccinated and otherwise at-risk workers;
- Educating and training workers on COVID-19 policies;
- Suggesting that unvaccinated customers, visitors, or other guests wear face coverings;
- Maintaining ventilation systems; and
- Performing routine cleaning and disinfection.

The guidance also contains specific recommendations for higher risk workplaces (including manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing). These recommendations include, among others, staggering break times and shift start and stop times to avoid congregations of unvaccinated or otherwise at-risk workers and providing visual cues to maintain physical distancing.

Additional resources for complying with the ETS are available from OSHA. Both the ETS and the updated guidance for non-ETS employers reflect OSHA's desire to continue protections for workers who face the highest risk of contracting COVID-19: healthcare workers and unvaccinated or otherwise high-risk workers generally. Employers in the healthcare industry will have to carefully review the ETS to comply with its extensive requirements. Other employers who still have unvaccinated or otherwise high-risk workers in the workplace should continue to implement procedures designed to limit the spread of COVID-19. For assistance with ETS compliance, workplace vaccination policies, or general COVID-19 issues, please contact any of the attorneys in our Labor, Employment, and Employee Benefits practice.

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[1] According to the ETS, people are considered fully vaccinated for COVID-19 two weeks or more following the final dose of a COVID-19 vaccine.

Posted in COVID-19

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