



The 7 Main Takeaways for Healthcare Employers Now That OSHA Has Finally Unveiled Its Long-Awaited COVID-19 Emergency Temporary Standard

Insights

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Almost six months after President Joe Biden directed the Occupational Safety and Health Administration to determine whether emergency temporary standards (ETS) concerning COVID-19 were necessary, OSHA finally issued the long-anticipated ETS late last week. In an interesting twist, however, the ETS applies only to employers who provide healthcare and healthcare support services. OSHA explained on June 10 that, despite the success of vaccines in helping address the pandemic, data shows that healthcare workers treating patients with suspected or confirmed COVID-19 remain at the highest risk of infection.

The ETS is effective immediately upon publication in the Federal Register, and healthcare employers must comply with most provisions within 14 days. You must comply with other provisions (involving physical barriers, ventilation, and training) within 30 days. It is unclear when the ETS will be published in the Federal Register, but healthcare employers subject to the ETS should start preparing now. Here are the seven key takeaways to ensure your workplace is in compliance with OSHA's requirements.

First, Is Your Workplace Covered by the ETS?

The ETS applies, with some exceptions, to all settings where any employee provides healthcare services or healthcare support services. Thus, most healthcare settings – including hospitals, nursing homes, and assisted living facilities; emergency responders; home healthcare workers; and employees in ambulatory care facilities where suspected or confirmed COVID-19 patients are treated – are subject to the ETS. It is also important to note that even though it may not be directly applicable to other employers, OSHA's ETS and updated guidance for non-healthcare workplaces will still be helpful in preparing for how the agency may approach an inspection or investigation of their workplaces.

In issuing this new rule, OSHA focused on its belief that COVID-19 still poses a grave danger to unvaccinated employees, especially those most likely to be involved in caring for patients who have the virus. Thus, the ETS also excludes certain healthcare settings from the new standard. Specifically, the ETS does not apply to:

- employees providing first aid who are not licensed healthcare providers;

- the dispensing of prescriptions by pharmacists in retail settings;
- non-hospital ambulatory (i.e. outpatient) care settings where all non-employees are screened prior to entry and persons with suspected or confirmed COVID-19 are not permitted to enter;
- well-defined hospital ambulatory care settings where all employees are fully vaccinated, and all non-employees are screened prior to entry and persons with suspected or confirmed COVID-19 are not permitted to enter;
- home healthcare settings where all employees are fully vaccinated and all non-employees are screened prior to entry and persons with suspected or confirmed COVID-19 are not present;
- healthcare support services not performed in a healthcare setting (for example, off-site laundry, off-site medical billing); and
- telehealth services performed outside of a setting where direct patient care occurs.

Additionally, where a healthcare setting is embedded within a non-healthcare setting – such as a medical clinic on an employer’s premises or a walk-in clinic in a retail store – the ETS only applies to the healthcare setting, not to the remainder of the physical location. Further, when an emergency responder or other licensed healthcare provider enters a non-healthcare setting to provide healthcare services, the ETS applies only to the provision of healthcare services by that employee.

As to those exceptions tied to whether “all employees” must be fully vaccinated – which the ETS considers to be at least two weeks after the final dose of a COVID-19 vaccine – OSHA recognizes that some employees may be unable to get vaccinated due to a medical condition or religious belief. In those instances, so long as the employer reasonable accommodates the employee who is unable to be vaccinated, the exception may still apply, so long as all other requirements are met.

The 7 Main Obligations for Covered Employers Under the ETS

Those employers subject to the ETS must familiarize themselves with the following seven main obligations springing from this latest development.

1. Develop a COVID-19 Plan

As we previously predicted, the ETS requires employers to implement a detailed COVID-19 plan for each workplace, setting forth various policies and procedures to minimize the risk of transmission of COVID-19 to employees. If you have more than 10 employees, the COVID-19 plan must be **written**. Among the particulars, you must conduct a workplace-specific hazard assessment to identify hazards that may exist due to COVID-19. Any recognized hazards should be appropriately addressed in the COVID-19 plan. When creating the plan and conducting the hazard assessment, the ETS requires that you seek input and involvement of non-managerial employees. You must also identify at least one safety coordinator who is knowledgeable on controlling the spread of infectious disease and has authority to ensure compliance with all aspects of the COVID-19 plan.

2. **Implement Various Safety Measures**

The ETS also requires you to limit and monitor points of entry to the setting if direct patient care is provided. This would include screening and triaging all clients, patients, residents, delivery people and other visitors, and other non-employees entering the setting. The ETS outlines specific obligations for personal protective equipment (PPE), such as documented training; providing and ensuring employees wear a facemask when indoors and when occupying a vehicle with other people for work purposes; and providing and ensuring employees use respirators and other necessary PPE for exposure to people with suspected or confirmed COVID-19 and in connection with aerosol-generating procedures on a patient with suspected or confirmed COVID-19.

The ETS further requires, where feasible, the practice of social distancing and installation of cleanable or disposable solid barriers at fixed work locations in non-patient care areas where employees are not separated from others by at least six feet. You must also follow standard practices for cleaning and disinfection of surfaces and equipment in accordance with CDC guidelines. In addition, you must ensure that employer-owned or controlled existing HVAC systems are operating in accordance with the manufacturer's instructions and design specifications and that all air filters are rated Minimum Efficiency Reporting Value (MERV) 13 or higher if the system allows it.

3. **Conduct Employee Health Screening and Medical Management**

You must screen each employee before each work day and each shift, either by asking employees to self-monitor before reporting to work or conducting in-person screenings. The ETS mandates that you must require each employee to promptly notify you when the employee is COVID-19 positive, suspected of having COVID-19, experiencing a recent loss of taste and/or smell with no other explanation, or experiencing both fever (100.4° F or above) and new unexplained cough associated with shortness of breath. You must notify potentially exposed employees within 24 hours when you determine a person who has been in the workplace is COVID-19 positive.

You are also required to follow various requirements for the removal of employees who meet the above criteria and subsequently manage their return to work. If you have more than 10 employees, the ETS requires you to provide paid medical removal protection benefits to workers who must isolate or quarantine, meaning the employees must continue to receive the benefits to which they are normally entitled and their same regular compensation had they not been absent from work (up to \$1,400/week). If an employee remains away from the workplace for more than two weeks, those employers with less than 500 employees may then pay just two-thirds of the employee's regular pay (up to \$200 per day). Moreover, the employer's payment obligation is reduced by the amount of compensation an employee receives from any other source (e.g., paid sick leave, administrative leave) or any additional source of income the employee receives that is made possible by virtue of the employee's removal. Finally, the ETS requires you to pay for testing as well.

4. **Support Vaccinations**

OSHA is strongly encouraging vaccinations. Thus, you must support or enable COVID-19 vaccinations for all employees by providing reasonable time and paid leave to each employee to receive the shot(s) and any side effects experienced following vaccination.

5. **Provide Employee Training**

The ETS mandates each employee receives training, in a language and at a level the employee understands, so they comprehend all of the following: (1) COVID-19 transmission; (2) employer-specific policies and procedures on various safety precautions (e.g., patient screening, use of PPE, and cleaning and disinfection); (3) tasks and situations in the workplace that could result in infection; (4) available sick leave policies, any COVID-19-related benefits to which the employee may be entitled under federal, state or local laws, and other supportive policies and practices (e.g., telework or flexible hours); (5) the identity of the safety coordinator(s); and (6) how employees can obtain copies of the ETS and any employer-specific policies and procedures developed under the ETS, including the employer's written COVID-19 plan.

6. **Prohibit Retaliation**

You must also inform employees that they have a right to the protections required by the ETS, and you are prohibited from discharging or in any manner discriminating against any employee for exercising their right to the protections required by the ETS, or for engaging in actions that are required by the ETS. OSHA has indicated that it will cite employers for retaliation and the abatement could include an order to reinstate any terminated workers and provide back pay.

7. **Maintain Recordkeeping and Reporting**

Covered employers with more than 10 employees must establish a COVID-19 log to record all instances in which an employee is COVID-19 positive, regardless of whether the infection resulted from an exposure to COVID-19 in the workplace. The required information must be recorded within 24 hours of you learning that the employee is COVID-19 positive and must be maintained as a confidential medical record. The COVID-19 log must be maintained and preserved for as long as the ETS remains in effect. Moreover, you must retain all versions of their written COVID-19 plan implemented in accordance with the ETS while it remains in effect. The ETS further mandates you to make records available for examination and copying upon request in accordance with certain conditions, in addition to the existing requirement to maintain the 300 log.

Finally, you must report work-related COVID-19 fatalities and in-patient hospitalizations to OSHA. Fatalities must be reported within eight hours of learning about the fatality, and hospitalizations must be reported within 24 hours of learning about the hospitalization. This differs from the existing reporting requirements, as the requirement to report hospitalizations that occurred within 24 hours of a workplace exposure/incident have been removed. Instead, covered employers must now report COVID-19 hospitalizations even if the hospitalization occurs more than 24 hours after the workplace exposure. Similarly, the requirement to report COVID-19 deaths is not subject to the limitation on deaths within 30 days of the workplace exposure found in the existing reporting rule.

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Conclusion

Once the ETS is published in the Federal Register, you only have 14 days to comply with most of the requirements discussed above. You should therefore act immediately and begin preparation of your COVID-19 plan to avoid related difficulties with OSHA. As a reminder, nothing in the ETS limits state or local government mandates or guidance that go beyond the ETS requirements.

Fisher Phillips will continue to monitor the status of the ETS, evolving interpretations, and any future revisions and provide updates as appropriate. Make sure you are subscribed to the Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Healthcare Practice Group or Workplace Safety Practice Group.

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