



Hospitals, Skilled Nursing Facilities Targeted for COVID-19 Scrutiny – 5 Steps to Help Ensure You are Ready for Federal Initiatives

Insights

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For the second time in a week, key members of the healthcare provider community are the focus of an announcement promising more pandemic-related scrutiny from a federal agency. The Occupational Safety and Health Administration (OSHA) just announced an enforcement memorandum changing its COVID-19 Inspection Targeting from general industry and healthcare to primarily focusing on hospital and skills nursing care facilities that treat or handle COVID-19 patients. OSHA's aggressive effort, announced yesterday, follows last week's [presidential plan to set minimum staffing requirements for nursing homes and to prevent room overcrowding](#) in an effort to reduce the spread of infectious diseases such as COVID-19. What are the five most important things you could be doing today to ensure you are ready for the spotlight being shined in your direction?

OSHA's New (and Unusual) Initiative: An Overview

OSHA's Focused Initiative is unusual in its allotment of agency resources. From March 9 to June 9, OSHA is required to devote a full 15% of all of its inspections per region to those healthcare organizations falling under the following NAICS classifications:

- 622110 General Medical and Surgical Hospitals
- 622210 Psychiatric and Substance Abuse Hospitals
- 623110 Nursing Care Facilities (Skilled Nursing Facilities)
- 623312 Assisted Living Facilities for the Elderly

The agency has made clear to Region and Area Office Leadership that it will hold offices accountable to meet this target. OSHA reserves the right to increase or decrease these goals depending on case rates and other factors in a specific Region. Such a focus makes the likelihood of an inspection very possible, even for healthcare employers who rarely deal with OSHA.

As infection patterns change, OSHA is focusing on healthcare workers who are at heightened risk for contracting the virus. This appears to be an interim step until OSHA finalizes an anticipated permanent infectious disease standard for the healthcare industry. These actions are a response to union and third-party pressure, as well as a more logical use of limited OSHA resources. Although the agency withdrew the non-recordkeeping portions of its Healthcare Emergency Temporary

Standard (H-ETS) in December, it says it will accept continued compliance with the H-ETS as satisfying employers' obligations under OSHA's general duty clause.

Criteria for Conducting Focused Healthcare Inspections

Facilities that need to prepare for the impending scrutiny are those that fall in the NAICS codes listed above. You may be selected for inspections under this initiative if you meet one of the following criteria:

1. You are in line for a follow-up inspection of any prior inspection where a COVID-19-related citation or hazard alert letter (HAL) was issued;
2. You are subject to follow-up or monitoring inspections after being randomly selected for closed COVID-19 unprogrammed activity (UPA), or you are targeted because of COVID-19 complaints or Rapid Response Investigations (RRIs); or
3. You receive a monitoring inspection under randomly selected, remote-only COVID-19 inspection principles where COVID-19-related citations were previously issued at your organization.

Targeted employers are not exempted from other OSHA inspection programs for COVID-19 or other subjects even if you fall on this Focused Target List. Over 20 states have State OSHA programs which may not immediately adopt this Focused Initiative Program or may do so later. However, most State OSHA programs likely will adopt all or part of the initiative.

But Wait – There's More

More details are forthcoming regarding President Biden's announcement made during his State of the Union (SOTU) address where he called for increased scrutiny on nursing homes. The Centers for Medicare & Medicaid Services (CMS) will oversee implementation and enforcement of those standards as they are developed. According to the president, nursing homes that fail to meet those standards will be "held accountable."

On top of these announcements, implementation of the COVID-19 vaccine requirement for all staff of CMS-certified healthcare providers is also ongoing, even as the Centers for Disease Control and Prevention (CDC) has loosened its general masking recommendations.

What Should You Do? A 5-Step Preparation Plan

Thus, despite facing both COVID fatigue and staff shortages, nursing homes, hospitals, and all covered healthcare employers must ensure they are prepared to deal with the applicable aspects of these federal requirements. Your preparation should include the following steps:

1. **Confirm which rules and standards apply to your operations**

These federal requirements do not apply to every healthcare provider. For example, states with their own OSHA-approved State Plan may proceed differently than in states that are subject to federal OSHA. However, all healthcare employers should take note of this focus on high-risk settings with the goal of being prepared to deal with future infectious disease outbreaks.

The plan announced during the president's SOTU address is focused specifically on nursing homes. And even though it covers a very large swath of people working in healthcare settings, the CMS vaccination mandate applies only to Medicare- and Medicaid-certified providers. It is therefore possible that an employer could be covered by all, some, or none of these initiatives. The first step is to determine which, if any of these initiatives, apply to your operations.

2. Review and confirm compliance with all applicable COVID-19 protocols, including documentation

Even if your operations are not directly covered by any of these new initiatives, you should ensure that you have current procedures and written protocols firmly in place to safeguard employees, patients, visitors, and everyone else from the ravages of COVID-19. Although the pandemic has tested everyone's endurance, now is not the time to become lax or let policies become outdated. Maintaining current, effective protocols is critical to ensuring the integrity of your operations going forward, particularly in a healthcare setting.

OSHA looks for evidence that an employer continues monitoring not only public health guidance but changing infection rates at its sites and the communities from which it draws employees. While an employer may have phased out some mitigation efforts as infection rates declined and state and local government officials relaxed requirements, OSHA expects employers to be prepared to reinstitute mitigation tools as needed. If your policy and procedures have not been revised since May 2020 or even last year, OSHA may believe that the documents no longer represent actual practices or that you are not anticipating potential future challenges.

3. Confirm your status regarding the vaccine mandate

Again, the vaccination mandate applies only to CMS-certified Medicare and Medicaid participants. It provides for specific medical and religious accommodations as "required by law" and sets forth how accommodation requests should be documented. The vaccine mandate also applies to a wide definition of staff, which extends well beyond just your employees. The mandate includes other detailed policy requirements, all of which will be important to demonstrating compliance as CMS moves forward with its enforcement activities. Accordingly, you should ensure you are ready to demonstrate not only that all staff have been vaccinated (or have been granted an appropriate accommodation or delay), but that your policies and record-keeping comply with CMS's Interim Final Rule.

4. Constantly evaluate recruiting and retention status

It is no secret that the challenges of the past two years have tested the endurance of front-line healthcare workers. This has led some employees to leave for other jobs and made recruitment and retention a critical priority for their employers. The controversial nature of COVID-19 vaccination mandates has added a layer of complexity to the challenges that healthcare employers face. Managing these challenges requires thoughtful communications, creative use of technology, and the investment of financial resources. Staff recruitment and retention remains a critical issue that demands continual attention and will continue to do so for the foreseeable future.

5. **Review your procedures for managing OSHA inspections**

Finally, many employers rarely experience an OSHA inspection. You may need to figure out the essential balance of being professional and cooperative while limiting the scope of inspection and ensuring that the correct facts are provided. You do not want to needlessly create bad evidence of noncompliance. Don't judge the challenges of an OSHA inspection based upon a visit 10 years ago.

Conclusion

Although recent announcements regarding additional federal scrutiny shine a spotlight on their operations, healthcare employers are accustomed to working and succeeding under pressure. The key steps listed above simply help keep you moving toward the inevitable light at the end of the tunnel.

We will monitor the situation and provide updates as developments occur, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions about how to ensure that your policies comply with workplace and other applicable laws, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Healthcare Industry Team.

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