

OSHA (Finally) Issues COVID-19 ETS Applicable to Healthcare Industry Along with Updated Guidance for All Workplaces

Alert

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At long last, the Occupational Safety and Health Administration (OSHA) issued its [Emergency Temporary Standard \(ETS\)](#) today, after the Office of Management and Budget concluded stakeholder meetings on Wednesday, June 9. The ETS is OSHA's first significant action since it updated its [Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#) guidance on January 29, though the agency added a disclaimer to the website on May 17 confirming it was reviewing updated guidance from the Centers for Disease Control and Prevention and would update its materials accordingly.

Along with the healthcare ETS, OSHA issued [general COVID-19 guidance](#) applicable to most other workplaces, formalizing its approach following the CDC's guidance for fully vaccinated individuals. This is a dramatic shift, as the guidance now applies to employees who are not fully vaccinated and vaccinated employees who are otherwise at risk from COVID-19 exposure. OSHA relies on the CDC's recent Interim Public Health Recommendations for Fully Vaccinated People and notes that vaccinations are key in a multi-layered approach to protect workers.

OSHA EMERGENCY TEMPORARY STANDARD FOR HEALTHCARE

With the ETS, [OSHA found that COVID-19 causes employers to be in "grave danger" and that an emergency standard is needed to protect them from the danger](#). The ETS is not as broad as expected, applying only to the healthcare industry. The ETS applies to a workplace where any employee provides healthcare services or healthcare support services, except for:

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- Non-licensed healthcare providers providing first-aid
- Retail pharmacies with pharmacists dispensing prescriptions
- Non-hospital ambulatory care settings, well-defined hospital ambulatory care settings, and home healthcare settings where all non-employees are screened prior to entry and those with suspected or confirmed COVID-19 are not permitted to enter
- Healthcare support services not performed in a healthcare setting (e.g., off-site laundry or medical billing)
- Telehealth services performed outside of a direct patient care setting

Employers providing accommodations (such as telework or working in isolation) to employees who cannot be vaccinated due to medical or religious reasons may fall within the exceptions above. And where a healthcare setting is embedded within a non-healthcare setting (e.g., a medical clinic in a manufacturing plant), the ETS applies only to the healthcare setting. Similarly, when a licensed healthcare provider enters a non-healthcare setting to provide healthcare services, the ETS applies only to the provision of care by that employee.

The ETS includes the following components for healthcare workplaces:

- **COVID-19 Plan:** Employers must develop and implement a COVID-19 plan for each workplace. For employers with more than 10 employees, the plan must be written. Workplaces should be monitored and the COVID-19 plans updated as needed. As part of the plan, employers must conduct a workplace-specific hazard assessment. Employers must seek input from non-managerial employees and their representatives in hazard assessment development. Before lessening controls for fully vaccinated employees, the COVID-19 plan must include policies and procedures to determine employees' vaccination status.
- **Patient Screening and Management:** Employers must monitor points of entry and screen patients and facility visitors.
- **Standard Transmission-Based Precautions:** Employers must develop and implement procedures.
- **PPE:** Employers must provide and ensure that employees wear face masks when indoors or when occupying a vehicle with others. There are exceptions including when an employee is alone in a room, when eating or drinking in the workplace if six feet apart from others, and when wearing respiratory protection. Employees exposed to persons with COVID-19 or suspected COVID-19 must be provided a respirator and other PPE.
- **Distancing:** Employers must ensure employees are six feet apart when indoors unless social distancing is not feasible. In addition, physical barriers must be placed outside of direct patient care areas unless this is not feasible. This must be done within 30 days of the effective date of the ETS.

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- **Cleaning and Disinfection:** Specified cleaning measures must be conducted in patient care areas and resident rooms. All other areas must be cleaned at least daily and after a confirmed COVID-19 case.
- **Ventilation:** Employers who own or control buildings must ensure that HVAC systems are used per manufacturer instructions and that air circulation is maximized. This must be completed within 30 days of the effective date of the ETS.
- **Health Screenings and Medical Management:** Employers must screen each employee before each day and shift. This can be done via self-monitoring. Employees with COVID-19 or suspected COVID, loss of taste and/or smell, or experiencing fever and new cough with shortness of breath must notify the employer. When notified, the employer must make notifications to employees in close contact. Employers must also remove employees with COVID-19 symptoms from the workplace in some circumstances. The ETS also includes quarantine/isolation requirements for close contact employees, and requires providing benefits in some circumstances.
- **Vaccination:** Employers must support COVID-19 vaccination by providing reasonable time and paid leave for vaccination and side effects of vaccination.
- **Training:** Employers must ensure each employee receives training at a literacy level and in a language they understand for specified topics. This must be implemented within 30 days of the effective date of the ETS.
- **Anti-Retaliation provisions**
- **Requirements implemented at no cost to employees**
- **Recordkeeping obligations:** Employers must keep records including COVID-19 plans and logs of any employee COVID-19 diagnoses, regardless of whether the instance is connected to workplace exposure.
- **Reporting obligations:** Employers must report work-related fatalities or in-patient hospitalizations.

Unless otherwise noted above, the requirements must be implemented within 14 days of the effective date of the ETS. Note, however, that the ETS exempts fully vaccinated workers from masking, distancing, and barrier requirements when in well-defined areas where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present.

The ETS also includes requirements related to a "mini-respiratory protection program" when employees provide and use their own respirators, and incorporates by reference (i.e., makes enforceable) certain CDC guidelines and International Safety Association Materials.

The signed, pre-publication document was released on OSHA's website and will be issued as an [interim final rule](#) that will be promulgated at 29 CFR 1910, Subpart U. The ETS will not become effective until publication in the Federal Register, which will likely be in the next two weeks. OSHA is also opening a 30-day public comment period, including comment on whether any aspect of the ETS should become a final

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rule.

Non-OSHA State Plan states are required to comply with the ETS upon its effective date—it is an enforceable rule that will remain in place for 180 days after publication in the Federal Register. It is a near-certainty that the ETS will face legal challenges seeking to stay or invalidate it—a fate that has met many prior OSHA emergency standards.

The ETS was originally slated to be completed by March 15, 2021, in accordance with President Biden's first executive order after taking office. Evolving guidance from the CDC, increasing vaccination rates in the United States, falling COVID-19 rates, and a prolonged stakeholder input process by the OMB all appeared to contribute to the months-long delay.

GENERAL COVID-19 GUIDANCE

OSHA also updated its Safe Work guidance on June 10 to incorporate new CDC guidelines for fully vaccinated individuals, applicable to all employers. In this update, OSHA changed its position regarding not differentiating between vaccinated and unvaccinated employees, now stating:

Unless otherwise required by federal, state, local, tribal or territorial laws, rules, and regulations, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at risk from COVID-19 exposure. This guidance focuses only on protecting unvaccinated or otherwise at risk workers in their workplaces (or well-defined portions of workplaces).

The updated guidance includes the following recommendations for employers when workplaces have unvaccinated employees:

- Grant paid time off to get vaccinated
- Instruct unvaccinated employees with COVID-19 or suspected COVID-19, or who were in close contact with someone with COVID-19, to stay home
- Implement physical distancing for unvaccinated and other at risk workers
- Provide unvaccinated and at risk workers with face coverings or surgical masks
- Educate and train workers on COVID-19 policies and procedures in formats and languages they understand
- Suggest unvaccinated customers, visitors and guests wear face coverings
- Maintain ventilation systems
- Perform routine cleaning and disinfection

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- Record and report COVID-19 fatalities and in-patient hospitalizations in accordance with 29 CFR 1904
- Implement protections for retaliation and set up an anonymous process to voice concerns regarding COVID-19-related hazards
- Follow other mandatory OSHA standards: personal protective equipment, respiratory protection, sanitation, medical records, recordkeeping and reporting

OSHA also provides an appendix of measures for high-risk workplaces with mixed-vaccination status workers. High-risk workplaces are those where unvaccinated or at risk employees are in close contact (as example, on a production line), have prolonged close contact or workers who may be exposed to COVID-19 through respiratory droplets in the air or on shared surfaces or equipment. In these workplaces, OSHA recommends:

- Staggering break times, arrival and departure times
- Providing visual clues (signs, floor markings) regarding distancing
- Implementing ventilation strategies
- Providing spacing, where possible (especially in food processing or other assembly line workplaces)
- Suggesting masks for unvaccinated (or status unknown) customers and visitors

NOW WHAT?

Even with the ETS and updated guidance, employers must still consider a variety of issues when updating their COVID-19 safety plans and procedures. For instance, a patchwork of requirements and/or guidance remains in place across the country with many states promulgating their own COVID-19 standards or guidance while OSHA worked toward the ETS ([California](#), Oregon, Washington and Virginia, to name a few). As employers continue navigating safe workplace obligations, here are some tips from our attorneys:

- It is likely some COVID-19-related policies must remain in place in most workplaces. For instance, policies related to symptom screening and staying home when sick, notification of close contact to someone diagnosed with COVID-19, and limits on shared equipment may still be necessary. What remains in place should be clearly communicated to employees along with any changes to existing COVID-19 policies.
- Continue viewing COVID-19 policies as “living documents” and be prepared to modify them if circumstances change, such as outbreaks at the workplace or increased COVID-19 rates in your jurisdiction.
- Pay attention to state legislatures, as more than half of states have pending legislation related to “vaccine passports.” While many of these proposed laws prohibit requiring vaccine verification to obtain

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governmental services or to enter into public spaces as a customer, some pending state legislation purports to prohibit employers from requesting vaccine verification and/or taking adverse action against employees for not providing vaccine verification. This will continue to evolve and keeping an eye on pending bills in your states of operation is critical.

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