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OSHA Adopts Emergency Temporary Standard for Health Care Settings

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In January 2021, President Biden issued an Executive Order directing the Occupational Safety and Health Administration (OSHA) to take action to reduce the risk that workers may contract COVID-19 in the workplace. On June 11th, OSHA finally released its Emergency Temporary Standard (ETS) implementing that directive. Notably, the ETS applies **only** to health care settings because OSHA determined that those workers face the highest COVID-19 hazards. Below is an overview of the ETS.

To whom does the ETS apply?

The ETS generally applies to any settings where health care services are performed. This includes employees in hospitals, nursing homes, and assisted living facilities; emergency responders; home health care workers; and employees in ambulatory care facilities.

Importantly, the ETS does not apply in non-hospital ambulatory care facilities where all non-employees are screened for COVID-19 symptoms prior to entry and individuals with suspected or confirmed COVID-19 are not permitted to enter.

The ETS also does not apply to the provision of first aid by an employee who is not a licensed health care provider, the dispensing of prescriptions by pharmacists in retail settings, health care support services not performed in a health care setting (e.g., off-site laundry, off-site medical billing), and telehealth services performed outside of a setting where direct patient care occurs.

Where a health care setting is embedded within a non-health care setting (e.g., medical clinic in a manufacturing facility, walk-in clinic in a retail setting), the ETS applies only to the embedded health care setting and not to the remainder of the physical location. Similarly, where emergency responders or other licensed health care providers enter a non-health care setting to provide health care services, the ETS applies only to the provision of the health care services by that employee.

OSHA created a flowchart to help employers determine whether they are covered by the ETS: [Is Your Workplace Covered by the COVID-19 Health care ETS?](#)

What does the ETS require of employers?

The ETS requires that employers develop and implement a COVID-19 plan (in writing if the employer has more than 10 employees). The plan must designate a safety coordinator with authority to ensure compliance and must include a workplace-specific hazard assessment along with policies and procedures to minimize the risk of transmission of COVID-19 to employees. The plan must be developed with input from non-managerial employees and their representatives (if applicable).

In addition to the plan, employers must implement all of the following:

- **Patient screening and management:** Limit and monitor points of entry to settings where direct patient care is provided and screen and triage accordingly.
- **Standard and Transmission-Based Precautions** based on CDC guidelines.
- **Personal protective equipment (PPE):** Provide and ensure that each employee wears a medical procedure grade facemask when indoors or when occupying a vehicle with other people for work purposes (subject to certain listed exceptions); provide and ensure employees use respirators and other PPE for exposure to people with suspected or confirmed COVID-19, and for aerosol-generating procedures on a person with suspected or confirmed COVID-19. The ETS also includes a “mini respiratory protection program” for voluntarily respirator use.
- **Aerosol-generating procedures on a person with suspected or confirmed COVID-19:** Limit employees present to only those essential; perform procedures in an airborne infection isolation room, if available; and clean and disinfect surfaces and equipment.
- **Physical distancing:** Keep employees at least 6 feet apart from all other people when indoors, unless such distancing is not feasible for a specific activity.
- **Physical barriers:** Install cleanable or disposable solid barriers at each fixed work location in non-patient care areas where employees are not separated from other people by at least 6 feet.
- **Cleaning and disinfection:** Follow standard CDC practices for cleaning and disinfection.
- **Ventilation:** Ensure that employer-owned or controlled existing HVAC systems are used properly and fitted with MERV 13 or higher filters if possible.
- **Health screening and medical management:**
 - (1) Screen employees for COVID-19 symptoms before each workday and shift.
 - (2) Require each employee to promptly notify the employer if the employee is COVID-19 positive, suspected of having COVID-19, or experiencing certain symptoms.
 - (3) Notify certain employees within 24 hours when a person who has been in the workplace is COVID-19 positive.
 - (4) Follow requirements for removing employees from the workplace if the employee has or is suspected to have COVID-19.

- (5) For employers with more than 10 employees, provide medical removal protection benefits to workers who must isolate or quarantine. Of note, these benefits include **paid** leave in an amount up to \$1,400 per week.
- **Vaccinations:** Provide reasonable **paid** time off for COVID-19 vaccinations and vaccine side effects.
- **Training:** Ensure all employees receive training on the ETS and COVID-19.
- **Recordkeeping:** Establish a COVID-19 log (if more than 10 employees) of all employee instances of COVID-19 and follow requirements for making records available to employees/representatives. Note that this log must contain all employee COVID-19 cases, not just cases where occupational exposure is suspected.
- **Report work-related COVID-19 fatalities and in-patient hospitalizations to OSHA.**
- **Anti-Retaliation:** Inform employees of their rights to the protections required by the ETS and do not retaliate against employees for exercising their rights under the ETS.

What about vaccinated employees?

The ETS exempts fully vaccinated workers from masking, distancing, and barrier requirements only when those employees are in well-defined areas where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present. Unfortunately, the ETS does not provide any guidance on how that should be determined. In related explanatory guidance, OSHA lists administrative offices, break rooms, and meeting areas as potential spaces where the exemption could apply.

When is the ETS effective?

The ETS is effective immediately upon publication in the Federal Register. Employers must comply with most provisions within 14 days, and with provisions involving physical barriers, ventilation, and training within 30 days. OSHA has indicated that it will utilize enforcement discretion for employers who are making a good faith effort to comply with the ETS.

What about state requirements?

OSHA State Plan states with their own COVID-19 rules (i.e. California, Michigan, Oregon, and Virginia) must show that their standards are “at least as effective” as the new ETS or amend their standards to meet that threshold.

Will there be further changes to the ETS?

Probably. OSHA says that it will update the ETS as needed as more of the workforce and the general population become vaccinated and the pandemic continues to evolve. Additionally, there is the possibility of litigation challenging whether OSHA properly issued these regulations under its emergency rule making authority.

Please contact your Vorys lawyer if you have questions about the ETS standard, compliance requirements, and its potential impact on your workplace and employees.

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Vorys COVID-19 Task Force

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).

