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OSHA Issues New COVID-19 Safety Rules for Healthcare Sector and New Guidelines for All Industries

On June 10, 2021, the Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) released a long-anticipated [COVID-19 Emergency Temporary Standard \(ETS\)](#) establishing workplace safety rules aimed at preventing workplace spread of the virus. OSHA also updated its COVID-19 guidance for all employers not covered by the ETS, with a specific carve-out for fully-vaccinated employees.

New Emergency Safety Rules for Healthcare Sector

Which employers are covered by the ETS?

The new ETS applies to all settings where any employee provides health care services or health care support services. Healthcare services include those services that are provided by professional healthcare practitioners, such as doctors, nurses, emergency medical personnel, and oral health professionals. Healthcare support services include those that facilitate the provision of healthcare services, such as patient intake, patient food services, equipment and facility maintenance, and housekeeping services.

Are any healthcare services or healthcare support services excluded?

Yes. The ETS is intended to cover only those settings where suspected or confirmed COVID-19 patients are treated. Therefore, non-hospital ambulatory care settings, such as doctor offices and clinics, are not covered so long as all non-employees are screened before entry and people with suspected or confirmed COVID-19 are not permitted to enter. A medical clinic in a manufacturing facility or retail store that screens all non-employees and does not treat or

permit entry of those who have or are suspected to have COVID-19, are not covered by the ETS.

The following services are also excluded from the ETS in its entirety:

- The provision of first aid by an employee who is not a licensed healthcare provider
- The dispensing of prescriptions by pharmacists in retail settings
- Well-defined hospital ambulatory care settings where all employees (not including those who are exempted from a vaccination policy as an accommodation under the Americans with Disabilities Act (ADA) and/or anti-discrimination laws) are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings
- Home healthcare settings where all employees (not including those who are exempted from a vaccination policy as an accommodation under the ADA and/or anti-discrimination laws) are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not present
- Healthcare support services not performed in a healthcare setting (e.g., off-site laundry, off-site medical billing)
- Telehealth services performed outside of a setting where direct patient care occurs

What about portions of an otherwise covered facility where COVID-19 patients are not treated?

If there is no reasonable expectation that any person with suspected or confirmed COVID-19 will enter any such well-defined areas, an employer does not have to enforce the requirements of the ETS pertaining to personal protective equipment (e.g., facemasks), physical distancing, and physical barriers for employees who are fully vaccinated.

How much time do I have to comply with the ETS?

The ETS will become effective immediately when it is published within the Federal Register, a date which is currently unknown, but likely within seven days of OSHA's release of the ETS. Covered employers will then have 14 days thereafter to come into compliance with the requirements of the ETS, except those requirements pertaining to physical barriers, ventilation, and training where compliance will be required within 30 days. Covered employers therefore have some time to implement the requirements summarized below.

If I am a covered employer, what must I do to comply with the ETS?

Those employers not exempted from the new rule must do the following:

- Develop a **COVID-19** plan incorporating the following elements: (i) a designated safety officer; (ii) workplace-specific hazard assessment; (iii) involvement from non-managerial employees in developing the plan; (iv) ongoing monitoring to ensure effectiveness; and (v) policies and procedures to minimize risk of transmission. For employers with ten or more employees, this plan must be in writing;
- Implement **patient screening and management** strategies to control access to the employer's facilities and treatment areas;
- Utilize **standard and transmission-based precautions** in accordance with Centers for Disease Control (CDC) guidelines;
- Provide and mandate **personal protective equipment (PPE)** for employees, including facemasks for all employees when indoors and respirators and other PPE for those employees exposed to COVID-19 patients;
- Perform **aerosol-generating procedures** on patients with confirmed or suspected COVID-19 in airborne infection isolation rooms, if available; limit employee access to these

procedures, and clean and disinfect all equipment after the procedure;

- Ensure that the employer's **ventilation and HVAC systems** are maintained and operated in accordance with the manufacturer's instructions;
- Conduct **employee screening and medical management** by (i) screening employees for COVID-19 before each shift (such as self-monitoring); (ii) providing no-cost employee testing; (iii) requiring prompt notification of employee symptoms or positive test results; (iv) notifying employees within 24 hours of an employee positive test result; (v) removing employees from the workplace and returning them in accordance with CDC guidelines; and (vi) continuing to pay removed employees in most instances;
- Provide **paid leave and reasonable time off** for employee vaccinations and vaccine side effects;
- Follow **reporting and recordkeeping** requirements, including keeping a log of all employee instances of COVID-19 and reporting all work-related COVID-19 fatalities within 8 hours and work-related in-patient hospitalization within 24 hours; and
- **Continue practicing** physical distancing, utilizing physical workplace barriers, and cleaning and disinfecting policies.

Employers must also **train** all employees on these requirements and inform employees that they **will not be retaliated against** for exercising their rights or engaging in the actions required under the ETS.

Do any special respiratory protection rules apply under the ETS?

Yes. The ETS requires certain employers to implement a "mini respiratory protection program." The requirements of the mini respiratory protection program generally apply when an employee, who is otherwise required to wear a facemask under the ETS and is not exposed to suspected or confirmed sources of COVID-19, either chooses to supply his or her own respirator or the employer chooses to provide a respirator to employees for use in lieu of a

facemask to offer enhanced worker protection. The mini respiratory protection program is intended to supplement – rather than obviate – the full respiratory protection program. Therefore, all employers must still implement a full respiratory protection program – including medical evaluation and fit testing – when employees are exposed to suspected or confirmed sources of COVID-19 or exposed to other hazards that may require the use of respiratory protection.

One significant difference between the two is that, under the ETS, an employer is **required** to allow employees to use a respirator if they so choose. Furthermore, an employer that provides respirators for an employee's use in lieu of facemasks must implement a training program, require employees using a tight-fitting respirator to perform seal checks, implement specific requirements for reuse of respirators, and discontinue the use of respirators in specific circumstances.

New OSHA Guidance for All Other Settings

OSHA's June 10, 2021 announcement also includes [updated guidance](#) aimed at helping employers protect unvaccinated or otherwise at-risk workers in settings that are not covered by the ETS.

Of note, OSHA prefaced its guidance by emphasizing that "most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure," provided that no other applicable law requires otherwise.

As to protecting unvaccinated and otherwise at-risk workers, OSHA sets forth a number of steps employers should consider, including:

- Granting paid time off for vaccinations;
- Instructing infected workers, unvaccinated workers in close contact with a COVID-19 positive individual, and those with COVID-19 symptoms to stay home;
- Implementing physical distancing for unvaccinated and at-risk workers in communal work areas;

- Providing face coverings or surgical masks to workers, at no cost, unless respirators or other PPE is required;
- Educating and training workers on the employer's COVID-19 policies and procedures;
- Suggesting that unvaccinated customers, visitors, and guests wear face coverings if there are unvaccinated or at-risk workers in the workplace;
- Maintaining ventilation systems;
- Performing routine cleaning and disinfection;
- Recording and reporting COVID-19 infections and deaths that are work-related, as required by OSHA;
- Implementing protection from retaliation and setting up an anonymous process to report COVID-19 health hazards;
- Complying with other applicable OSHA Standards, including PPE, respiratory protection, sanitation, protection from bloodborne pathogens, and access to medical and exposure records.

OSHA also encourages employers to take additional steps to mitigate the spread of COVID-19 in industries where there is a heightened risk of exposure and infection, such as manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing. For those employers, OSHA suggests staggering arrival, departure, and break times to minimize interaction, and providing visual cues for social distancing (e.g., floor markers).

For retail workplaces, OSHA suggests proposing masks for unvaccinated customers and visitors, ensuring social distancing or the use of barriers, moving payment readers further away from the worker, and shifting primary stocking activities of unvaccinated or at-risk workers to off-peak or after hours, when possible.

While OSHA's recommendations do not create any new legal obligations for employers, OSHA's announcement provides a good opportunity for employers in all industries to evaluate their COVID-19 policies to determine whether any changes are needed to comply with industry best practices, especially in light of OSHA's previous announcement that it will increase enforcement activities

related to COVID-19.

The ETS may be subject to legal challenges. We will monitor the situation for developments that may impact the healthcare sector and will provide updates as appropriate.

For more information, please contact [Kyle D. Johnson](#), [Souhila EL Moussaoui](#), [Steve Tolbert](#), or any attorney in Frost Brown Todd's [Labor and Employment](#) practice group.

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