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OSHA Releases First Coronavirus Emergency Temporary Standard and Updates Non-Mandatory Guidance

Law and the Workplace Blog on **June 21, 2021**

On June 21, 2021, OSHA's first emergency temporary standard ("ETS") aimed at limiting the spread of COVID-19 in the workplace went into effect. The mandatory standards apply only to the health-care sector. OSHA also released several Fact Sheets and almost 100 FAQs regarding the ETS.

In addition, OSHA released updated non-mandatory guidance for industries outside the healthcare sector. This guidance focuses on protections for unvaccinated and at-risk workers and encouraging vaccination. Reflecting recent CDC guidance, it states that most non-healthcare employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at risk from COVID-19 exposure. For unvaccinated or otherwise at-risk workers, OSHA recommends providing paid time off for vaccination, implementing physical distancing, providing face coverings or surgical masks, suggesting unvaccinated customers or visitors wear face coverings, maintaining ventilation systems, performing routine cleaning and disinfection, and instructing unvaccinated workers who had close contact with someone with COVID-19 to stay home.

Employers in healthcare settings, however, will be required to comply with the ETS that includes a number of mandatory practices and procedures.

Workplaces Subject to the ETS

The ETS applies to "settings where any employee provides healthcare services or healthcare support services." The ETS expressly exempts from the rule "the dispensing of prescriptions by pharmacists in retail settings," "healthcare support services not performed in a healthcare setting" (i.e. off-site laundry, off-site medical building, telehealth services), and certain non-hospital ambulatory care operations, "well-defined" hospital ambulatory care operations, and home healthcare settings that meet certain vaccination and screening parameters. OSHA released a diagram to help employers determine if their workplace is covered by the ETS.

Effective Date of the ETS

The ETS took effect on June 21, 2021 when it was published in the Federal Register. Under the ETS, covered employers will be required to comply with all the ETS's requirements within 14 days, apart from standards relating to physical barriers, ventilation, and training, which require compliance within 30 days of the rule's effective date. OSHA's FAQs indicate that OSHA is "willing to use its enforcement discretion" where an employer has "made good faith efforts to comply with" these requirements, but has been unable to do so.

The ETS Requirements

The ETS requires covered healthcare employers to comply with a host of requirements, including:

- Conduct a "workplace-specific hazard assessment to identify potential workplace hazards related to COVID-19" and "develop and implement a COVID-19 Plan for each workplace."
- Implement patient screening and management procedures "where direct patient care is provided."
- Provide, and ensure that employees properly wear, appropriate facemasks when indoors or when occupying a vehicle with other people for work purposes, with certain exceptions.
- Provide, and ensure that employees properly wear, a respirator, gloves, isolation gown or protective clothing, and eye protection where the employees have exposure to or perform aerosol-generating procedures on a person with suspected or confirmed COVID-19.

- Implement precautions for aerosol-generating procedures conducted on a person with suspected or confirmed COVID-19.
- “[E]nsure that each employee is separated from all other people by at least 6 feet when indoors unless the employer can demonstrate that such physical distancing is not feasible for a specific activity.”
- Install cleanable or disposable solid barriers in entryways, lobbies, check-in desks, bill payment areas, and other similar locations where physical distancing by 6 feet is not possible.
- Follow the CDC’s “COVID-19 Infection Prevention and Control Recommendations” and “Guidelines for Environmental Infection Control” for patient care areas, resident rooms, and medical devices and equipment. For all other areas, employers “must clean high-touch surfaces and equipment at least once a day,” and follow the CDC’s “Cleaning and Disinfecting Guidance” if “the employer is aware that a person who is COVID-19 positive has been in the workplace within the last 24 hours.” Employers must also provide alcohol-based hand sanitizer or readily-accessible hand washing facilities.
- For employers who “own or control buildings or structures with an existing heating, ventilation, and air conditioning (HVAC) system(s),” ensure HVAC systems are used in accordance with manufacturer instructions and design specifications, that certain functions are “maximized to the extent possible,” that air filters are maintained and replaced as necessary, and that intake ports are cleaned, maintained and cleared of any debris that may affect the function and performance of the HVAC system. The ETS does not require employers to install new HVAC systems or airborne infection isolation rooms.
- Screen each employee before each work day and each shift. This can include self-monitoring or in-person screening. If COVID-19 testing is required for screening purposes, the employer must provide the test at no cost to the employee.
- Require employees to inform the employer if they test positive for COVID-19, have been told by a licensed healthcare provider that they are suspected to have COVID-19, or if they are experiencing a recent loss of taste and/or smell, or a fever and new unexplained cough associated with shortness of breath.
    - If an employer is notified that a person who has been in the workplace is COVID-19 positive, the employer must make certain notifications within 24 hours, including notifying all employees who were not wearing a respirator and any other required PPE and had been in close contact with that person, or who worked within a particular portion of the workplace in which that person was present (i.e. a particular floor) during the potential transmittal period. This period is defined as 2 days before the person felt sick or 2 days before

the test specimen was collected for asymptomatic cases. The notification cannot include the employee's name, contact information, or occupation.

- Follow certain workplace removal or testing parameters for employees who are confirmed or suspected to be COVID-19 positive. Employees that have been removed from the workplace for this reason may be required to work remotely or in isolation if suitable work is available.
- Continue to provide benefits and pay to employees mandated to leave the workplace due to being confirmed or suspected of having COVID-19.
    - For employers with 500 or more employees, the employer must pay the employee "the same regular pay the employee would have received had the employee not been absent from work, up to $1,400 per week, until the employee meets the return to work criteria specified in" the ETS.
    - For employers with fewer than 500 employees, the employer "must pay the employee up to the $1,400 per week cap but, beginning in the third week of an employee's removal, the amount can be reduced to two-thirds of the regular pay the employee would have received," with a maximum of $200 per day.
    - This payment obligation can be "reduced by the amount of compensation that the employee receives from any other source, such as a publicly or employer-funded compensation program (e.g., paid sick leave, administrative leave)."
- Provide "reasonable time and paid leave (e.g., paid sick leave, administrative leave) to each employee for vaccination and any side effects experienced following vaccination."
- "[E]nsure each employee receives training, in a language and at a literacy level the employee understands," on COVID-19 and how it is transmitted, ways to reduce the risk of spreading COVID-19, tasks and situations that could result in COVID-19 infection, the identity of the safety coordinator(s) specified in the COVID-19 plan, and any employer- and workplace-specific policies and procedures on preventing the spread of COVID-19 applicable to the employee's job duties, proper wearing of PPE, cleaning and disinfection, health screening and medical management, and available sick benefits.
- Inform each employee of the rights established under the ETS. Employers "must not discharge or in any manner discriminate 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]."
- "[R]etain all versions of the COVID-19 plan implemented to comply with [the ETS] while [the ETS] remains in effect" and "establish and maintain a COVID-19 log to

record each instance identified by the employer in which an employee is COVID-19 positive, regardless of whether the instance is connected to exposure to COVID-19 at work." The log must be updated "within 24 hours of the employer learning that the employee is COVID-19 positive".
    - Employers with 10 or fewer employees on the effective date of the ETS are exempt from this requirement.

- Report each "work-related COVID-19 fatality" to OSHA within 8 hours of learning of the fatality and report each "work-related COVID-19 in-patient hospitalization" to OSHA within 24 hours of the employer learning about the in-patient hospitalization.

The implementation of these requirements, apart from any employee self-monitoring, must be at no cost to employees.

Mini Respiratory Protection Program

The ETS also requires employers that provide respirators to employees follow certain training, use, and maintenance standards. In workplaces that allow employees to provide their own respirators, employers must provide employees with a specific notice regarding the respirator use and maintenance.

Conclusion

OSHA had previously only issued non-mandatory guidance on COVID-19 workplace safety practices and procedures, relying instead on existing PPE and general safety standards to address workplace safety issues raised by the coronavirus pandemic. With this ETS, covered employers in the healthcare setting may need to adjust their policies and practices to comply with these new nationwide standards.

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