

# OSHA's COVID-19 Emergency Temporary Standard Contains Anti-Retaliation Provision

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On June 21, 2021, OSHA's much-anticipated [Emergency Temporary Standard \("ETS"\)](#) on COVID-19 protections went into effect. While Proskauer's Law and the Workplace blog covered the ETS in detail [here](#), this post focuses on the anti-retaliation provision in the ETS.

## **Anti-Retaliation Provision**

The ETS, which applies only to the health-care sector, contains an anti-retaliation provision prohibiting employers from discharging or discriminating against employees for exercising their rights and obligations relating to the COVID-19 pandemic. This includes disclosing a positive test and/or COVID-19 symptoms, quarantining after testing positive for COVID-19, or notifying an employer of hazardous COVID-19 related conditions at the workplace (such as insufficient PPE or failure to implement enhanced cleaning and ventilation procedures). Employers must also inform employees of the requirements of the ETS and that they are protected against retaliation. Employers have discretion in how to provide the information, and may do so verbally, in writing, or by incorporating it into COVID-related trainings.

OSHA explained that the anti-retaliation provision was critical due to the "central role employee participation plays in effectuating the ETS's purpose." For example, employees who test positive for COVID-19 must not hesitate to inform their employers of their condition out of fear of retaliation, so that they can be removed from the workplace and close contacts can be identified. Similarly, employees must feel free to notify employers of COVID-related violations, such as co-workers refusing PPE or wearing PPE improperly, so that employers become aware of such conditions and can promptly address them.

OSHA noted that the anti-retaliation provision in the ETS partially overlaps with the statutory bar on retaliation found in Section 11(c) of the OSH Act (which we discussed [here](#)). However, in addition to improving employee awareness of its protections, the ETS anti-retaliation provision also provides additional remedies. Under Section 11(c), employees have only 30 days to report retaliation to OSHA, after which the agency may file a complaint against the employer in U.S. District Court on the employee's behalf. In contrast, under the ETS, OSHA has up to six months from the date of the alleged retaliation to issue a citation, which may include remedies such as back-pay and reinstatement. In addition, OSHA can address retaliation directly and relatively quickly by issuing a citation, whereas litigation in court under Section 11(c) is a much slower process. That said, the ETS does not limit an employee's options—they may file a complaint under Section 11(c) regardless of whether OSHA is investigating a violation of the ETS for the same underlying conduct.

## Implications

As significant steps toward reopening are already underway, many employers may welcome OSHA's decision to limit application of the ETS to healthcare settings. Even there, healthcare employers will likely find that many of the ETS's requirements overlap with the protocols and preventative measures they have already taken under prior CDC, state, or local guidelines. However, particularly given the substantial increase in retaliation complaints observed during the pandemic, *all* employers are reminded that they remain subject to the requirements of the OSH Act, including its General Duty Clause and Section 11(c)'s anti-retaliation provision.

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