

# Employee Benefit ■ Plan Review

## OSHA Issues COVID-19 Standard for Healthcare Employers

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OSHA has issued a 916-page COVID-19 Healthcare Emergency Temporary Standard (“ETS”) setting forth a myriad of requirements for covered healthcare entities, including implementation of a comprehensive COVID-19 plan identifying and addressing hazards, patient screening and management protocols and transmission-based precautions, protocols for providing and requiring use of personal protective equipment (“PPE”), aerosol-generating procedure controls, requirements for physical distancing, physical barriers, cleaning and disinfection, ventilation, health screening and medical management, training, anti-retaliation, recordkeeping, and reporting.

The ETS also requires covered employers to provide reasonable time off and paid leave for employee vaccinations and any side effects.

Further, it includes a respiratory protection program that applies when respirators are used in lieu of required facemasks.

### WHY IS THE ETS BEING ISSUED NOW, WELL OVER A YEAR INTO THE PANDEMIC?

The ETS is in response to President Biden’s January 21, 2021 Executive Order<sup>1</sup> on Protecting Worker Health and Safety, which had set forth a March 15, 2021 deadline for

OSHA to “consider whether any emergency temporary standards on COVID-19, including with respect to masks in the workplace, are necessary, and if such standards are determined to be necessary, [to] issue them. . . .”

At the start of the pandemic, OSHA contended that other regulations and the “General Duty Clause” under the Occupational Safety and Health Act provided sufficient protections. That clause imposes on employers a general duty to maintain a safe workplace free from recognized hazards likely to do serious harm.

Now, more than a year into the pandemic, OSHA has concluded otherwise – at least for healthcare workers. Indeed, the lengthy preamble to the ETS specifically provides that “[t]hrough its enforcement efforts to date, OSHA has encountered significant obstacles, revealing that existing standards, regulations, and the OSH Act’s General Duty Clause are inadequate to address the COVID-19 ETS hazard for employees covered by this ETS. The agency has determined that a COVID-19 ETS is necessary to address these inadequacies.”

Moreover, OSHA recognizes that while nationwide distribution of vaccines is encouraging, “vaccination has not eliminated the grave danger presented by the SARS-CoV-2 virus to the entire healthcare workforce.”

### WHO IS REQUIRED TO COMPLY WITH THE ETS?

Covered employers are broadly defined to include those who have employees in a covered setting. The ETS applies to all settings where an employee provides healthcare services, including services provided by professional healthcare practitioners, such as doctors, nurses, emergency medical personnel, and oral health professionals.

Additionally, the ETS applies to settings where healthcare support services, such as hospitalization, long-term care, ambulatory care, home health and hospice care, emergency medical response, patient transport, and autopsies, are provided. Employees in a covered setting include but are not limited to, those in hospitals, nursing homes, assisted living facilities, surgical centers, doctor's offices and dental offices, as well as emergency responders, home healthcare workers, and employees in ambulatory care facilities where suspected or confirmed COVID-19 patients are treated.

Where a healthcare setting is embedded within a non-healthcare setting (for example, a medical clinic in a manufacturing facility or a walk-in clinic in a retail setting), the ETS applies only to the healthcare setting and not the remainder of the physical location.

### ARE ANY HEALTHCARE SETTINGS EXEMPT?

The ETS does not apply in the following settings:

- (1) The provision of first aid by an employee who is not a licensed healthcare provider;
- (2) The dispensing of prescriptions by pharmacists in retail settings;
- (3) Non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings;
- (4) Well-defined hospital ambulatory care settings where all employees 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;
- (5) Home healthcare settings where all employees are fully vaccinated, and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not present;
- (6) Healthcare support services not performed in a healthcare setting (such as off-site laundry or off-site medical billing); or
- (7) Telehealth services performed outside of a setting where direct patient care occurs.

Additionally, the ETS sections requiring PPE, physical distancing, and physical barriers do not apply in well-defined areas where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present.

### WHEN IS THE DEADLINE TO COMPLY?

OSHA has submitted the ETS to the Office of the Federal Register for public inspection and publication in the Federal Register. Healthcare employers are required to comply with all provisions of the ETS (except those regarding physical barriers, ventilation, and training), within 14 days after publication of the ETS in the Federal Register. ETS provisions regarding physical barriers, ventilation and training are effective and should be complied with, within 30 days after publication of the ETS in the Federal Register. The compliance deadline for the mini respiratory protection program is the Federal Register publication date.

### WHAT ARE THE MAIN REQUIREMENTS OF THE ETS?

Covered employers are required to use a multi-layered approach

to preventing and responding to COVID-19 exposures and infections, including the following.

### COVID-19 Plan

Covered employers must develop and implement a COVID-19 plan for each workplace. While all employers are required to develop and implement a COVID-19 plan, employers with more than 10 employees must put the plan in writing. The plan should:

- Designate one or more designated workplace COVID-19 safety coordinators to implement and monitor the COVID-19 Plan;
- Include conducting a workplace-specific hazard assessment to identify workplace hazards related to COVID-19. Input should be sought from non-managerial employees and their representatives in the hazard assessment, development and implementation of the COVID-19 Plan;
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- Address the hazards identified by the hazard assessment and include policies and procedures to:
  - Minimize the risk of COVID-19 transmission for each employee;
  - Effectively communicate and coordinate with other employers who have employees in the same physical workspace;
  - Protect employees who, in the course of their employment enter into private residences or other physical

locations controlled by a person who is not subject to the Occupational Safety and Health Act, and include procedures for withdrawal if the protections are inadequate;

- Any other policies, procedures, or information necessary to comply with other applicable law; and
- Methods for monitoring each workplace to ensure the ongoing effectiveness of the COVID-19 Plan and to update it as needed.

**Patient Screening and Management**

In direct patient care settings, covered employers must utilize patient screening and management that:

- Limits and monitors points of entry into the setting;
- Screens and triages all clients, patients, residents, delivery people and other visitors, and other non-employees entering the setting; and
- Implements other applicable patient management strategies in accordance with the CDC’s “COVID-19 Infection Prevention and Control Recommendations.”

**Standard and Transmission-Based Precautions**

Covered employers must develop and implement policies and procedures to adhere to standard and transmission-based precautions in accordance with the CDC’s “Guidelines for Isolation Precaution.”

**Personal Protective Equipment**

Covered employers must provide and require use of PPE, including:

- Facemasks or respirators (with some limited exceptions);
- Respirators, gloves, isolation gowns or protective clothing, and eye Protection for workers exposed to suspected or confirmed cases of COVID-19;

- Respirators and other PPE during aerosol-generating procedures; and
- Respirators and other PPE based on Standard and Transmission Based Precautions.

**Control Methods for Aerosol-Generating Procedures**

Covered employers must implement control methods for aerosol-generating procedures, including:

- Limiting the number of employees present during the procedure to only essential employees needed for patient care and procedure support;
- Ensuring the procedure is performed in an existing airborne infection isolation room, if available; and
- After the procedure has been completed, cleaning and disinfecting the surfaces and equipment in the room where the procedure was performed.

**Physical Distancing**

Covered employers must implement physical distancing protocols. When indoors, employees must be separated from all other people by at least six feet unless the employer can demonstrate that such distancing is not feasible for a specific activity. When the employer has established it is not feasible, it must ensure that the employee is as far apart from other people as is feasible. The distancing requirement does not apply to momentary exposure while people are in motion, such as passing in the hallways.

**Physical Barriers**

Covered employers must use physical barriers – cleanable or disposable solid barriers that block face-to-face pathways between individuals – at fixed work locations outside of direct patient care areas where each employee is not separated by six feet from other people.

**Cleaning and Disinfection**

Employers must comply with the CDC’s “COVID-19 Infection Prevention and Control Recommendations” and CDC’s “Guidelines for Environmental Infection Control,” when cleaning and disinfecting patient care areas, patient rooms, and medical devices and equipment.

In all other areas, employers must clean high-touch surfaces and equipment at least once per day, and provide alcohol-based hand sanitizer or easily accessible washing facilities. When aware that a person who is COVID-19 positive has been in the workplace within the previous 24 hours, the employer must clean and disinfect in accordance with CDC’s “Cleaning and Disinfecting Guidance.”

**Ventilation**

Employers who own or control buildings must ensure, among other things, that the heating, ventilation, and air conditioning (“HVAC”) system air filters are rated Minimum Efficiency Reporting Value (“MERV”) 13 or higher. If such filters are not compatible with the HVAC system, employers must use filters with the highest compatible filter efficiency for their specific system. The air filters must be maintained and replaced to ensure proper functioning and performance of the HVAC system. All intake ports that provide outside air to the HVAC system must be cleaned, maintained, and clear of debris.

**Health Screening and Medical Management**

Employers are required to institute employee screening each workday and before each shift. Screening can be done by self-monitoring before employees report to work. Employers must also require employees to promptly report if they are experiencing COVID-19 symptoms, are told by a healthcare professional that they are suspected of or have tested positive for COVID-19,

have a sudden loss of taste or smell with no other explanation, or have a fever accompanied with a new unexplained cough with shortness of breath.

Additionally, once an employer is notified that an employee has tested positive for COVID-19, the employer must take enumerated steps to notify employees who were not wearing a respirator and other PPE and were in close contact with the positive employee; notify other employees within a well-defined area in which the positive employee was present during the potential transmission period; and notify other employers with employees in the same circumstances as the employer's employees.

The employer must also remove employees from the workplace who have met any of the requirements for prompt reporting.

Further, for employers with 10 or more employees, the ETS provides a continuation of pay and benefits for remote or isolation work and removal from the workplace.

### Vaccination

Employers are required to support employee COVID-19 vaccination by providing time off and pay for employees to be vaccinated and for any vaccination side effects.

### Training

The ETS requires employers to conduct training in a language and literacy level at which the employee understands. The ETS specifies the topics to be covered during the training, including among other things:

- COVID-19 transmission and infection reduction;
- Employer-specific policies and procedures regarding patient screening and management;
- Workplace-specific policies and procedures to prevent the spread of COVID-19;
- PPE policies and procedures to comply with the ETS requirements;

- Workplace-specific policies and procedures for cleaning and disinfecting;
- Available sick leave policies;
- Anti-retaliation policy; and
- The identity of the safety coordinator(s) specified in the COVID-19 Plan.

### Anti-Retaliation

Employers are prohibited from discharging or discriminating against an employee on the basis of the employee's exercise of rights or protections required by the ETS or for engaging in actions that are required by the ETS.

### Recordkeeping

Employers with 10 or more employees must:

- Retain all versions of the COVID-19 plan;
- Establish and maintain a COVID-19 log recording each instance of employees with COVID-19 positive test results, regardless of whether the exposure occurred at work; and
- Provide for examination and copying of records.

### Reporting

Employers are required to report to OSHA all work-related COVID-19 fatalities and in-patient hospitalizations.

### DOES THE ETS IMPOSE ANY NEW REQUIREMENTS ON HEALTHCARE EMPLOYERS?

Most likely yes, depending upon the setting and the precautions that an employer has already put in place. For example, an employer may not have previously conducted the required hazard assessment with non-management input or addressed the hazards in the required manner. Covered employers should review the ETS to determine what additional requirements they will need to meet by the compliance deadline. OSHA contends that because healthcare-specific infection control practices

have already been implemented by employers in covered settings, employers should be able to comply with the ETS within the applicable short time frame of 14 or 30 days from the publication date.

### WHAT IF MY STATE ALREADY HAS AN ETS IN PLACE PURSUANT TO AN OSHA STATE-PLAN?

When OSHA promulgates an ETS, states must ensure that their plans are "at least as effective" as the ETS. State plans must adopt the ETS and amend their plans "within 30 days of the promulgation date of the final Federal rule, and State Plans must notify Federal OSHA of the action they will take within 15 days. The State Plan standard must remain in effect for the duration of the Federal ETS."<sup>2</sup>

### WHERE MAY I OBTAIN A COPY OF THE ETS?

The ETS has been released on the OSHA website<sup>3</sup> and once published in the Federal Register, will become part of the General Industry standards as 29 CFR 1910, Subpart U.

Additionally, the OSHA website contains FAQs, fact sheets, and reporting information.<sup>4</sup> 🌐

### NOTES

1. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/>.
2. See FAQ, available at <https://www.osha.gov/coronavirus/ets/faqs>.
3. <https://www.osha.gov/coronavirus>.
4. On September 9, 2021, the Biden Administration unveiled its COVID-19 Action Plan ("Plan"), which requires OSHA to issue an Emergency Temporary Standard requiring all employers with 100 or more employees to either ensure their employees are "fully vaccinated" or provide proof of a negative COVID-19 test at least once a week. Further, the Plan calls on the Centers for Medicare & Medicaid Services to require COVID-19 vaccinations for workers in healthcare settings that receive Medicare or Medicaid reimbursement. The precise impact of the Plan's resulting regulations on the ETS is unknown at this time. But, healthcare employers should keep abreast of the regulations once issued to determine whether the encouragement for vaccination under the ETS will become a vaccine or weekly testing mandate for their employee population.

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