

Client Alert
June 28, 2021

**OSHA's Issues New COVID-19 Emergency Temporary Standards for
Healthcare Industry and Additional COVID-19 Guidance for Other Industries**

I. New COVID-19 Emergency Temporary Standards

On June 10, 2021, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") unveiled its long-awaited emergency temporary standard ("ETS") for curbing health and safety risks associated with COVID-19. Significantly, the ETS has a limited reach as it is required for only the healthcare industry with some exceptions. Unlike previous OSHA guidance, the ETS is a mandatory rule for covered employers.

a) What is an *emergency temporary standard (ETS)*?

As opposed to a permanent standard, an ETS takes immediate effect. An ETS will expire after six months unless the normal rule-making process is followed to make the ETS permanent.

b) To which employers do the new emergency temporary standards regulations apply?

The ETS *only* covers workplaces providing patient care, health-care support services (i.e., patient intake/admission, patient food services, equipment and facility maintenance, housekeeping services, healthcare laundry services, medical waste handling services, and medical equipment cleaning/reprocessing services); nursing homes/assisted living facilities; emergency responders; home healthcare workers; and employees in ambulatory care facilities where patients may be infected with COVID-19.

The ETS *does not* apply to:

1. A non-licensed healthcare provider giving first aid;
2. Pharmacists in a retail setting;
3. Well-defined hospital ambulatory care settings or home healthcare settings when 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
4. Non-hospital ambulatory care settings that screens out non-employees who are suspected or confirmed as having COVID-19 from entering the setting;
5. Off-site healthcare support services (i.e., off-site laundry/medical billing) 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; or
6. Off-site telehealth services.

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Additionally, where a healthcare facility is within a non-healthcare facility (i.e., a walk-in clinic within a retail establishment), then the ETS applies only to the healthcare setting and not the remainder of the physical location. Further, even within the context of a covered employer's facility, when there is a well-defined area where there is "no reasonable expectation that any person with suspected or confirmed COVID-19 will be present," the ETS does not apply to employees who are fully vaccinated.

c) What does the rule require?

The ETS calls for a "multi-layered approach to controlling occupational exposures" to COVID-19 in healthcare workplaces. In summary only, the key requirements of the ETS are:

1. **COVID-19 Plan:** Employers must develop and implement a COVID-19 Plan ("Plan") to identify and control COVID-19 hazards in the workplace.
2. **Patient Screening and Management:** Employers must implement requirements for the screening and management of all clients, patients, residents, delivery people, visitors, and other non-employees entering the setting to reduce workplace-related transmission of COVID-19.
3. **Standard and Transmission-Based Precautions:** Employers must create policies for Standard and Transmission-Based Precautions in accordance with CDC's "Guidelines for Isolation Precautions."
4. **Personal Protective Equipment (PPE):** Employers must provide PPE including facemasks or respirators.
5. **Aerosol-Generating Procedures:** When aerosol-generating procedures are performed, employers must follow certain procedures like limiting the employees present for the procedure and follow post-procedure cleaning/disinfecting.
6. **Physical Distancing:** Employers must maintain physical distancing of at least six feet, when indoors and when feasible (excluding momentary exposures when people are in movement, like passing in hallways), and if such distancing is not feasible, then employers are required to setting up physical barriers.
7. **Cleaning and Disinfection:** Employers must perform daily cleanings of high-touch areas and provide alcohol-based hand rub. Additionally, specific CDC guidelines must be followed for cleaning and disinfecting in-patient care areas and other areas that an individual, who is known to be COVID-19 positive, has touched within twenty-four hours.
8. **Ventilation:** Employers must follow requirements for existing HVAC and AIRs and consider improving workplace ventilation in accordance with CDC guidance.
9. **Health Screening & Medical Management:** Employers must screen employees daily for COVID-19, provide free tests if a COVID-19 test is required of its employees, and follow notification and medical removal requirements for COVID-19 exposures in the workplace. The ETS also requires paid leave in specified circumstances.



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10. **Vaccination:** Employers must provide reasonable time and paid leave to each employee for COVID-19 vaccinations and vaccine side effects.
11. **Training:** Employers must provide training about COVID-19 (i.e., how the illness spreads and the employer’s workplace procedures related to COVID-19).
12. **Anti-Retaliation:** Employers are prevented from discharging or discriminating against an employee for exercising rights under the ETS.
13. **Recordkeeping & Reporting:** Employers with more than ten employees must follow certain recordkeeping protocols. Additionally, employers are required to report to OSHA within specified time frames each work-related COVID-19 fatality and each work-related COVID-19 in-patient hospitalization.

The ETS is effective immediately upon publication in the Federal Register. Covered employers must comply with most provisions within 14 days and with the remaining provisions within 30 days. OSHA will use its enforcement discretion to avoid citing employers who miss a compliance deadline but are making a good faith effort to comply with the ETS. OSHA will continue to monitor trends in coronavirus transmission.

II. OSHA Guidance for Non-Covered Employers

Separate from the ETS, on June 10, 2021, OSHA also issued non-binding guidance, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace* (“Guidance”) which provides recommendations for all employers and workers not covered by the ETS to identify COVID-19 exposure risks to workers, who are unvaccinated or otherwise at-risk, and to help them take appropriate steps to prevent exposure and infection. It reiterates some of OSHA’s past recommendations on mitigating COVID-19, but also recommends that employers not covered by the ETS follow many of the ETS requirements. It also recommends that employers suggest that unvaccinated customers, visitors, or guests wear face coverings, especially in retail establishment workplaces, if there are unvaccinated or otherwise at-risk workers in the workplace who are likely to interact with these customers, visitors, or guests. Additionally, the Guidance recommends unvaccinated and at-risk employees take the opportunity to receive a COVID-19 vaccination, wear face coverings, remain diligent on distancing, and utilize and participate in their employer’s COVID-19 prevention program, and maintain good hygiene.

The Guidance also identifies higher-risk workplaces which include, manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing. For these locations, the Guidance recommends employers:

1. Stagger break times and arrival/departure times to avoid congregating;
2. Provide visual cues as a reminder for maintaining social distancing;
3. Implement CDC ventilation guidelines;



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4. Use appropriate distancing or barriers, if distancing is not possible, in workplaces with food processing, assembly lines, or retail establishments;
5. Suggest masks for unvaccinated (or unknown-status) customers and visitors in retail establishments;
6. Shift primary stocking activities of unvaccinated or otherwise at-risk workers to off-peak or after hours, when possible, to reduce contact between unvaccinated or otherwise at-risk workers and customers; and
7. Mitigate certain risks with unvaccinated and otherwise at-risk workers traveling to and from work in employer-provided buses and vans.

This Client Alert was prepared by Brendan Collins, Nan O'Neill, Kier Wachterhauser, and Sarah Spatafore. This Alert was reviewed with Andy Waugh. If you have any questions, please contact Brendan Collins, Nan O'Neill, Kier Wachterhauser, and Sarah Spatafore or the attorney responsible for your account, or call (617) 479-5000.

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