LEGAL UPDATES

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OSHA Issues Federal COVID-19 Emergency Temporary Standard

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DONNA V. PRYOR
DENVER:
303.749.7283
DONNA.PRYOR@
HUSCHBLACKWELL.COM

JULIANNE P. STORY
KANSAS CITY:
816.983.8230
JULIANNE.STORY@
HUSCHBLACKWELL.COM

On June 9, 2021, the Occupational Safety and Health Administration (OSHA) released its long anticipated interim final rule and request for comments for the Occupational Exposure to COVID-19; Emergency Temporary Standard (ETS). OSHA released the ETS one day after the approval of the standard was received from the Office of Information and Regulatory Affairs, Office of Management and Budget. The ETS is limited to covered healthcare employers and excludes from coverage of the standard certain healthcare workplaces that have a fully vaccinated workforce and that exclude individuals with possible COVID-19 infections. The rule becomes effective on the date of publication in the Federal Register with deadlines for compliance that vary by section of the ETS. Written comments regarding whether the ETS should become a final rule must be submitted within 30 days of the publication date in the Federal Register. A brief overview of the ETS's requirements are provided below.

Rationale for ETS

OSHA issued the ETS based on a determination that COVID-19 poses a grave danger to workers in all healthcare settings in the United States and its territories where people with COVID-19 can reasonably be expected to be present. As additional support for its determination, OSHA stated that its existing standards, regulations and the General Duty Clause were inadequate to address the occupational hazards presented by COVID-19 and that a federal standard was necessary to create a uniform standard to protect healthcare workers throughout the United States. OSHA acknowledged that the effectiveness of the nationwide distribution of vaccines is "encouraging" and stated that it intends to update the ETS as more healthcare workers complete the vaccine regimen and if information either demonstrates that a grave danger no longer exists or indicates a change in measures necessary to address the grave danger.

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Key requirements of the ETS

The lengthy ETS imposes requirements on employers that must be provided to employees at no cost to the employees (except for expenses associated with self-monitoring under section l(1)(i)) to ensure a safe and healthful work environment. A brief summary of selected provisions of the standard are included below.

1. Limited to healthcare settings. The requirements of the ETS are limited to healthcare settings because data demonstrates that the elevated risk of exposure while caring for individuals with suspected or confirmed cases of COVID-19 continues to present a grave danger. Additionally, a grave danger continues to exist in healthcare settings with unvaccinated workers. Nonhealthcare settings are not covered by the ETS because insufficient evidence exists to support a finding of grave danger for employees who are not expected to care for individuals exposed to or infected with COVID-19.

2. Excludes certain healthcare settings**.** The ETS adopts a setting- versus task-based approach to define the scope of the ETS. The ETS applies to workplace settings in which any employee provides healthcare services or healthcare support services, with some exceptions. The following workplace settings are excluded from the standard's requirements:

First aid performed by an employee who is not a licensed healthcare provider;

Pharmacies in retail settings;

Nonhospital ambulatory care settings where all nonemployees are screened prior to entry and appropriately excluded due to a confirmed or suspected exposure;

Well-defined hospital ambulatory care settings and home healthcare settings where all employees are fully vaccinated and nonemployees are screened for COVID-19 and appropriately excluded;

Healthcare support services not performed in a healthcare setting; and

Telehealth services provided outside of a direct patient care setting.

3. Requires adoption of a COVID-19 plan. Employers must develop and implement a workplace COVID-19 plan for each workplace. For workplaces of more than 10 employees, the COVID-19 plan must be in writing. The plan must include a workplace-specific hazard assessment and implementation of policies and procedures to minimize the risk of transmission of COVID-19. Employees, former employees and their representatives must have access to all original and updated versions of the plan.

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4. Requires monitoring of points of entry. Employers must limit and monitor points of entry where direct patient care occurs and screen and triage individuals symptomatic for COVID-19.

5. Provides for use of personal protective equipment (PPE). The ETS requires employers to provide appropriate PPE including facemasks and respirators, and allow for voluntary use of respirators instead of facemasks.

6. Addresses aerosol-generating procedures. The ETS limits personnel present during the procedure to essential personnel and addresses additional concerns.

7. Requires engineering and administrative controls. The ETS requires employers to adopt appropriate physical distancing, use of barriers, and cleaning and disinfection procedures.

8. Ensures adoption of ventilation protocols. The ETS ensures that ventilation protocols are followed with respect to HVAC systems.

9. Requires health screening. The ETS requires employers to pay for the cost of employer-required testing as well as time spent obtaining the test and waiting for test results, but does not require employers to conduct screening testing.

10. Requires medical removal of employees from the workplace. The ETS requires removal of employees from the workplace under certain circumstances and provides different exclusion requirements depending on the reason for removal. Employees who have been removed from the workplace but who cannot work remotely must continue to be paid wages and benefits during the time they are excluded from the workplace. Payments to employees are subject to wage caps and are adjusted based on the size of the employer.

11. Addresses vaccination issues. Employers are required to support COVID-19 vaccination efforts by providing employees with reasonable time off and paid leave for the full vaccination series and for recovery from any side effects experienced following vaccination. The ETS does not require employees to be vaccinated for COVID-19. The standard refers employers who wish to more strongly encourage or mandate vaccinations beyond the requirements of the standard to Equal Employment Opportunity Commission guidance.

12. Requires training. The training requirements are an essential and extensive part of the ETS. Generally, employers are required to provide training to each employee on all workplace-specific policies and procedures that mitigate the risk of COVID-19 transmission in accordance with the employer's hazard assessment conducted pursuant to the employer's COVID-19 plan. Training must be provided in the language and at a literacy level understood by the employees.

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13. Imposes recordkeeping and recording obligations. Requires employers with more than 10 employees to maintain a COVID-19 log without regard to occupational exposure. Employers must report work-related fatalities within 8 hours of learning about the fatality and within 24 hours of each work-related COVID-19 in-patient hospitalization.

14. Imposes notification requirements. The ETS requires employers to inform employees about potential exposures to COVID-19 in the workplace as a result of "close contact with a COVID-19 positive person." The notification requirement is not limited to contact with patients but contemplates contact with any third party such as another employee, visitor, vendor, contractor, etc.) Employers must notify each employee who was not wearing a respirator or other required PPE and who was in close contact with the infected person within 24 hours of receiving information about the presence of a COVID-19 positive person in the workplace. OSHA continues to define the term close contact as being within 6 feet of a person for a cumulative total of 15 minutes over a 24-hour period during the transmission period. OSHA provides a sample notification letter on its website.

What this means to you

The ETS is effective immediately upon publication in the Federal Register. Most provisions require compliance within 14 days of publication. Provisions relating to physical barriers, training and ventilation require compliance within 30 days.

For states and territories with their own OSHA approved State Plans, states are required to either amend their standards to be identical to or "at least as effective as" the new standard, or "show that the existing standard covering this area is at least as effective as the new Federal standard." Adoption of the Federal standard by State Plans must occur within 30 days of the Federal standard's publication date in the Federal Register.

State or local government mandates or guidance that go beyond and are not inconsistent with the ETS are not preempted by the new Federal ETS.

It is anticipated that the federal ETS will be challenged in the future with the possibility of an injunction being imposed. The ETS limits its requirement to settings where employees provide healthcare and health care support services in an effort to protect employees at the highest risk of exposure. Given its limited scope, we are unable at this time to anticipate the probability of an injunction being successfully imposed.

For employers in non-healthcare related industries with a partially unvaccinated workforce, OSHA has issued updated guidance with a special emphasis on work settings that require workers to be in close contact with each other.

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Contact us

If you have questions about OSHA's new ETS and its obligations, contact Donna Pryor, Julianne Story or your Husch Blackwell attorney.

Your Comprehensive COVID-19 Legal Resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.

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