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LEGAL UPDATES

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Compliance Guidance for Healthcare: OSHA Directive for COVID-19 ETS

On June 28, 2021, the Occupational Health and Safety Administration (OSHA) issued a new directive that establishes a change in its inspection and enforcement procedures to facilitate the uniform enforcement of OSHA's Emergency Temporary Standard (ETS) with respect to workplace exposures to COVID-19 in the healthcare industry. The directive is effective for no more than 12 months from June 21, 2021, unless cancelled or extended by OSHA. State Plans must adopt enforcement policies that are identical to or at least as effective as the enforcement policies issued by federal OSHA by July 28, 2021.

The directive provides a roadmap for healthcare employers and illustrates OSHA's approach for assessing compliance with the ETS. The highest inspection priority will be given to fatality inspections, followed by unprogrammed inspections precipitated by complaints and referrals that allege employee exposure to COVID-19 and related hazards. If an employer relies on its fully vaccinated workforce to claim an exemption from providing controls (facemasks, physical distancing, and physical barriers), it can expect OSHA compliance officers to verify all aspects related to the employer's claimed exemption, including the vaccination status of its employees. Regarding ETS requirements for covered employers, the directive identifies: 1) the nature of the information subject to verification, including documents and non-managerial employee and representative interviews, as well as 2) acceptable employer approaches for compliance with the ETS.

OSHA inspectors are directed to issue citations for employer compliance deficiencies and to issue a citation classified as serious or to take other aggressive enforcement actions to enforce the ETS with respect to the following violations:

Failure to adopt and implement a written COVID-19 plan where the employer has 10 or more employees on the effective date of the ETS;

Failure to provide or ensure the use of respirators and/or other personal protective equipment;

Deficiencies with the HVAC system or Airborne Infection Isolation Rooms where employees have tested positive for COVID-19;

Failure to timely notify employees of workplace COVID-19 exposures, including the dates and locations of the exposure, that resulted in a serious condition, such as additional cases of COVID-19 infections;

Adverse employment actions or the threat of adverse employment actions taken against employees as a result of medical removal. The directive recommends that such violations be referred to the Whistleblower Protection Program and contemplates issuance of citations against employers that require payment of back pay to the employee and reinstatement;

Failure to pay employees at their regular rate of pay when working remotely or in isolation as a part of medical removal. The directive acknowledges that while punitive damages cannot be imposed under the ETS for failure to provide benefits during medical removal, punitive damages may be imposed on the employer under section 11(c) of the Whistleblower Protection Program. The OSHA compliance officer is authorized to refer the violation to the Whistleblower Protection Program; and

Failure to educate and train employees about the grave danger associated with COVID-19 as well as workplace measures that reduce risk and provide protection to employees under the employer's COVID-19 plan.

As OSHA's directive demonstrates, the agency intends to aggressively enforce the provisions of the ETS by issuing citations to covered employers for COVID-19 violations. Additionally, OSHA recommends that compliance officers consider citations under the ETS for well-known SARS-CoV-2 control measures that should have been implemented before the issuance of the ETS, such as physical distancing, barriers and hand hygiene, in ongoing investigations where the opening date precedes the ETS effective date of June 21, 2021. Compliance officers may exercise discretion to issue citations where either: 1) a technical detail of the standard is not satisfied, but the employer has complied with all other provisions of the standard and it is unlikely that the deficiency would result in a serious hazard, or 2) a violation is found while the investigation is still open and is related to a provision

unique to the ETS, such as maintaining a COVID-19 plan, maintaining a COVID-19 log, and notifications to employees.

What you need to know

Covered healthcare employers and onsite managers responsible for COVID-19 plans should use the directive as a checklist to aid in compliance with the COVID-19 ETS. Further, employers should avoid taking actions that may be characterized as adverse employment actions stemming from an employee's COVID-19 infection or exposure. Additionally, employers must take particular care to calculate the appropriate amount of compensation for medical removal to avoid the imposition of significant penalties under the Whistleblower Protection Program.

Contact us

If you have questions regarding your compliance obligations under the OSHA COVID-19 ETS, contact Tom O'Day 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.