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OSHA Issues COVID-19 Emergency Temporary Standard for Employers in the Healthcare Industry and Updates Guidance for All Employers

On June 10, the Occupational Safety and Health Administration (OSHA) issued its long-awaited COVID-19 Emergency Temporary Standard (ETS), which applies only to *employers in the healthcare industry*, and updated guidance for *all employers* not governed by the ETS. Both are aligned with the Centers for Disease Control and Prevention (CDC) guidance.

Pursuant to the Occupational Safety and Health Act (OSH Act), employers must comply with safety and health standards and regulations issued and enforced either by OSHA or by an OSHA-approved state plan. Additionally, OSHA's General Duty Clause, Section 5(a)(1), requires employers to provide their workers with a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. During the pandemic, employers have grappled with what measures they must implement in order to satisfy the requirements of OSHA's General Duty Clause against an ever-changing backdrop of federal, state and local guidance. The ETS establishes the measures employers in the healthcare industry must implement, and the updated guidance provides insight regarding OSHA's expectations of all other employers.

Employers in the Healthcare Industry

The ETS is aimed at protecting workers in healthcare settings where suspected or confirmed novel coronavirus patients are treated, such as hospitals, nursing homes and assisted living facilities.

The ETS is a new standard added to the General Industry standards at 29 CFR § 1910.500 et seq. as a new Subpart U and is effective immediately upon publication in the Federal Register. Once it is effective, covered employers must comply with most of the provisions within 14 days, but they will have 30 days to comply with others, including the new requirements involving physical barriers, ventilation and training. However, covered employers would be well advised to begin working on implementation as soon as possible as the requirements of the ETS are burdensome.

The ETS will require, among other things, assignment of a designated safety coordinator with authority to ensure compliance, a workplace-specific hazard assessment, involvement of nonmanagerial employees in hazard assessment and plan development/implementation, and policies and procedures to minimize the risk of transmission of COVID-19 to employees. In addition, the ETS will require patient screening and management, including limiting and monitoring points of entry to settings where direct patient care is provided. Also, the ETS speaks to personal protective equipment (PPE) requirements, including providing and ensuring each employee wears a facemask when indoors and when occupying a vehicle with other people for work purposes and providing and ensuring employees use respirators and other PPE when exposed to people with suspected or confirmed cases of COVID-19. Further, the ETS requires keeping people physically distant, at least six feet apart, when indoors; installing cleanable or disposable solid barriers at each fixed work location in non-patient care areas where employees are not separated from other people by at least six feet; and following standard practices for cleaning and disinfecting surfaces and equipment in accordance with CDC guidelines in patient care areas and resident rooms, and for medical devices and equipment.

Significantly, employers must implement the requirements of the ETS at no cost to employees.

Notably, and consistent with recent CDC guidance, the ETS exempts fully vaccinated employees from wearing a mask, social distancing and adhering to barrier requirements in defined areas where there is no reasonable expectation another person with a suspected or confirmed case of COVID-19 would be present.

Healthcare Settings Excluded From the ETS

The ETS does not apply to:

- Provision of first aid by an employee who is not a licensed provider
- Dispensing of prescriptions by pharmacists in retail settings
- Nonhospital ambulatory care settings, well-defined hospital ambulatory care settings, and home healthcare settings where all nonemployees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter
- Telehealth services performed outside a setting where direct patient care occurs

Where a healthcare setting is embedded within a nonhealthcare setting (e.g., walk-in clinic in a retail setting), the ETS applies only to the embedded healthcare setting. Where an emergency responder or other licensed provider provides healthcare services in a nonhealthcare setting, the ETS applies only to the provision of healthcare services by that employee.

All Other Employers

In addition, OSHA updated its Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, which applies to all employers not covered by the ETS. OSHA's guidance, which has not been updated since January 29, provides recommendations to assist employers in protecting employees against COVID-19, as well as descriptions of mandatory safety and health standards that employers must comply with when implicated.

One notable difference from OSHA's prior guidance is that it distinguishes between vaccinated employees and unvaccinated or otherwise at-risk workers. The guidance focuses on protecting unvaccinated or otherwise at-risk workers in the workplace (or well-defined portions of workplaces). Under the guidance, "at-risk workers" include individuals who have had organ transplants, individuals who have used corticosteroids or other immune-weakening medications that may affect their ability to have a full immune response to vaccinations, and individuals who fall within the scope of the CDC's guidance on COVID-19 Vaccines for People with Underlying Medical Conditions and People with Certain Medical Conditions. Unless otherwise required by federal, state, local, tribal, or territorial laws, rules and regulations, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at risk from COVID-19 exposure.

Many of the recommended mitigation strategies in the updated guidance are measures with which employers already are very familiar as they were contained in OSHA's prior guidance as well as included in many state and local requirements. The guidance recommends that employers engage with employees (and any applicable employee representatives) to determine how to implement multilayered interventions to protect unvaccinated or otherwise at-risk workers and mitigate the spread of COVID-19 in the workplace, including but not limited to:

- Granting paid time off for employees to get vaccinated
- Instructing employees who are infected, unvaccinated employees who have had close contact with someone who tested positive for COVID-19, and employees with COVID-19 symptoms to stay home from work to prevent or reduce the risk of transmission of the virus that causes COVID-19
- Implementing physical distancing for unvaccinated or otherwise at-risk workers in all communal work areas
- Providing unvaccinated or otherwise at-risk workers with face coverings or surgical masks, unless their work task requires a respirator or other PPE
- Educating and training workers on COVID-19 policies and procedures using accessible formats and in language workers understand

- Suggesting that unvaccinated customers, visitors and guests wear face coverings
- Maintaining ventilation systems
- Performing routine cleaning and disinfection
- Recording and reporting COVID-19 infections and deaths as set forth under mandatory OSHA rules in 29 CFR 1904 (which we previously discussed here)
- Implementing protections from retaliation and setting up an anonymous process for workers to voice concerns about COVID-19-related hazards
- Following other applicable mandatory OSHA standards

The guidance also recommends that employers in certain industries where there is heightened risk of COVID-19 exposure, including the manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing industries, take additional steps to mitigate the spread of COVID-19 for unvaccinated and otherwise at-risk workers in the workplace. Examples of additional measures employers in those industries should consider implementing include staggering break times, staggering arrival and departure times to avoid congregations of unvaccinated or otherwise at-risk workers, social distancing among unvaccinated or other at-risk workers, providing visual cues (floor markings, signs) as a reminder to maintain physical distancing, and implementing strategies to improve ventilation.

Takeaways

Laws and regulations impacting the workplace in response to COVID-19 are legion, particularly in the healthcare industry. The recent ETS and guidance issued by OSHA pose significant obligations on *all* employers. It is crucial that employers continue to monitor, assess and reassess laws and regulations promulgated in response to COVID-19 and seek legal guidance as situations arise in the workplace.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

Authors



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



James M. Leva
Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com