

OSHA Issues COVID-19 Emergency Temporary Standard

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On June 10, 2021, the Occupational Safety and Health Administration (“OSHA”) issued a long-awaited [Emergency Temporary Standard](#) (“ETS”) to protect health care workers from COVID-19. This new temporary standard applies to workplace settings where employees provide health care or health care support services. Notably, the ETS *does not* apply to non-health care employers. The ETS takes effect as soon as it is published in the *Federal Register*, and can remain in place for up to six months without extension.

The ETS is aimed at protecting workers facing the greatest COVID-19 hazards—those working in health care settings where suspected or confirmed COVID-19 patients are treated. The ETS exempts fully vaccinated workers from masking, distancing, and barrier requirements when in “well-defined areas” where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present.¹

Which workplaces are covered by the ETS?

The ETS applies to all settings where any employee provides health care services or health care support services. The ETS defines “health care services” as services provided by professional health care practitioners, such as doctors and nurses, for the purpose of promoting, monitoring, or restoring health. Health care services settings include hospitals, ambulatory care and medical clinics, long-term care facilities, home health and hospice care, emergency medical response, and patient transport companies.

“Health care support services” are those that facilitate the provision of health care services, such as patient intake and admission, patient food services, equipment and facility maintenance, housekeeping services, health care laundry services, medical waste handling services, and medical equipment cleaning services.

Which health care workplaces are exempt from the ETS?

The ETS exempts certain health care workplaces from the standard. Key exemptions include:

¹ OSHA Fact Sheet “Subpart U—COVID-19 Healthcare ETS,” available at <https://www.osha.gov/sites/default/files/publications/OSHA4122.pdf>.

1. 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;
2. well-defined hospital ambulatory care settings where all employees are fully vaccinated, all non-employees are screened prior to entry, and people with suspected or confirmed COVID-19 are not permitted to enter those settings;²
3. home health care settings where all employees are fully vaccinated, all non-employees are screened prior to entry, and people with suspected or confirmed COVID-19 are not present; and
4. medical support services performed in buildings separate from patient treatment facilities.

Employers may still take advantage of these exemptions even if all employees cannot be vaccinated, so long as employees who cannot be vaccinated for disability-related or religious reasons are provided reasonable accommodations that do not expose the employee to COVID-19 hazards.

What are the primary requirements of the ETS?

The ETS requires each covered workplace to implement a COVID-19 plan to mitigate the spread of the virus. Workplaces with more than 10 employees must have a written plan.

As part of its COVID-19 plan, a covered employer must:

- conduct a workplace-specific hazard assessment, and address the identified hazards in the plan;
- involve non-managerial employees in both the hazard assessment and the development and rollout of the plan;
- designate a safety coordinator to oversee implementation of the plan;
- in direct patient care settings, screen patients and any other non-employees before they enter the workplace, and follow the Centers for Disease Control and Prevention's ("CDC's") "COVID-19 Infection Prevention and Control Recommendations";
- screen employees for COVID-19 before they enter the workplace, restrict entry, or remove from the workplace any employee with suspected or confirmed COVID-19, and follow specific notification procedures within 24 hours of being notified that a COVID-19-positive case entered the workplace;

² 29 C.F.R. § 1910.502(a)(2)(iv).

- require unvaccinated employees to wear face masks in most cases, and provide respirators for workers when exposed to people with suspected or confirmed COVID-19 infection;
- require six feet of separation between people when indoors, unless the employer can demonstrate that such distancing is not feasible;
- install physical barriers at work locations outside of direct patient care areas in which employees are not separated by others with six feet of distance;
- take specific precautions when performing an aerosol-generating procedure on a person with suspected or confirmed COVID-19;
- ensure ventilation systems operate at their designed specifications;
- follow standard practices for cleaning and disinfection of surfaces and equipment in accordance with CDC guidelines in patient care areas and resident rooms, and for medical devices and equipment;
- support COVID-19 vaccination by providing reasonable paid time off to get vaccinated, and deal with any resulting side effects;
- train employees on COVID-19, prevention measures, the employer’s safety policies and procedures, available sick leave entitlements, and related information.

In addition to developing a COVID-19 plan, a covered employer must maintain a COVID-19 log to record each instance in which an employee is COVID-19 positive, *regardless of whether the positive test is connected to exposure to COVID-19 at work*. An employer must record each COVID-19-positive instance within 24 hours of learning of it, and treat the COVID-19 log and the information contained therein as a confidential medical record. This is similar to the position the Equal Employment Opportunity Commission (“EEOC”) has taken with respect to an employee’s proof of vaccination.

The employer must make the COVID-19 plan and the COVID-19 log available to employees upon request, taking care to redact certain confidential information.

Do vaccinated employers have to continue to wear masks and social distance?

Under the ETS, “fully vaccinated” means two weeks or more following the final dose of a COVID-19 vaccine.³ The ETS largely follows recent CDC guidance with respect to vaccinated individuals. A fully vaccinated employee does not have to wear a face mask, maintain six feet of distance from others, or be subject to physical barriers when working in “well-defined areas” where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present.

To be able to relax protocols for fully vaccinated employees, a covered employer’s COVID-19 plan must include policies and procedures to determine vaccination status.

³ The definition of “fully vaccinated,” however, is silent as to booster shots, whether they will be necessary, and how they may impact vaccination status.

The ETS, however, does not give examples of acceptable methods of determining vaccination status. Employers should give careful consideration as to how this data will be collected and stored, as the EEOC has stated that proof of vaccination constitutes confidential medical information.

Does the ETS require covered employers to provide any additional benefits to employees?

The ETS provides covered employees with “medical removal protection benefits” in the event they must be removed from work and required to isolate or quarantine due to suspected or confirmed COVID-19, or exposure to COVID-19. In such cases, employers must provide the following benefits:

- All employees who are allowed to work remotely or in isolation during a period of self-isolation or quarantine must continue to receive their regular pay and benefits.
- Employees who cannot work remotely and who are employed by a company with at least 10 employees must continue to be paid their regular pay, up to \$1,400 per week, until the employee meets the return-to-work criteria of the ETS.
- Employees of companies with 10-499 employees will continue to be paid their regular pay but, beginning in the third week of removal, will receive only two-thirds of their regular pay, up to a cap of \$200 per day.

The employer’s payment obligation, however, is reduced by the amount of compensation that the employee receives from any other source, including a publicly or employer-funded compensation program.

The ETS also provides job-protection status to the employee while isolating or quarantining due to COVID-19, and the employer may not retaliate or otherwise adversely affect the employment status of an employee who isolated or quarantined due to COVID-19.

Additionally, employers must provide “reasonable time and paid leave” to any employee who receives a COVID-19 vaccine and/or experiences side effects following vaccination. The ETS does not define or give examples of “reasonable time or paid leave.”

What COVID-19 information must be reported to OSHA?

An employer must report to OSHA:

- each work-related COVID-19 fatality within eight hours of the employer learning of the fatality, and
- each work-related in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization.

In addition, although the COVID-19 log does not have to be provided to OSHA as a matter of course, an employer must provide to OSHA upon request the log and any other records maintained under the ETS.

When do the ETS compliance obligations go into effect?

Once the ETS goes into effect, covered employers will have to comply with the majority of the new rules within 14 days, but will have 30 days to comply with the rules relating to physical barriers, ventilation, and development of employee training. OSHA has stated that it 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.

What Health Care Employers Should Do Now

Employers in the health care industry should immediately determine whether they are covered by the ETS, or whether an exemption applies. If covered by the ETS, employers should do the following:

- Identify the key stakeholders, including appropriate non-managerial employees, to develop a COVID-19 plan.
- Consult with counsel on how to best design and implement an ETS-compliant COVID-19 plan.
- Decide whether to allow vaccinated workers to cease wearing masks and physically distancing in “well-defined areas,” and, if so, determine how those areas will be defined and formulate a protocol for obtaining vaccination status.
- Conduct a workplace hazard assessment.
- Prepare a COVID-19 training program for employees, or, if training has already been given, review the prior training to ensure it meets all ETS requirements.
- Obtain and maintain a supply of respirators for those employees who remain unvaccinated.
- Monitor [OSHA's website](#) for more updated guidance.
- Visit Epstein Becker Green's [Coronavirus Resource Center](#) for additional information and links.

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