CLIENT ALERTS & INSIGHTS

OSHA Issues Emergency Temporary Standards for Healthcare Workers

JUNE 15, 2021

Authors: Joseph N. Gross, Johanna Fabrizio Parker, Bradley Wenclewicz

On June 10, 2021, the Occupational Safety and Health Administration ("OSHA") issued an Emergency Temporary Standard ("ETS"), a mandatory workplace safety rule aimed at protecting healthcare workers from COVID-19. OSHA also updated its non-mandatory guidance regarding COVID-19 safety practices applicable to non-healthcare industries.

What Employers Are Covered by the Mandatory ETS?

The ETS applies, with limited exceptions, to employers providing patient care, such as hospitals and their healthcare support services, as well as skilled service nursing homes and home healthcare providers. The limited exceptions to the ETS are: (1) first aid performed by an employee who is not a licensed healthcare provider; (2) the dispensing of prescriptions by pharmacists in a retail setting; (3) 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; (4) well-defined hospital ambulatory care settings and home healthcare settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not present or permitted to enter; (5) healthcare support services performed outside of healthcare settings; and (6) telehealth services performed without direct patient care.

Key Requirements of the ETS.

The ETS includes numerous requirements for covered healthcare employers, several of which embody best practices developed as the pandemic progressed. There are too many requirements to list here, but they include the following:

- **COVID-19 Plan**: Covered employers must develop and implement a COVID-19 plan (in writing for employers with more than 10 employees) for each workplace. Each plan must designate a safety coordinator with authority to ensure compliance, be based on a workplace-specific hazard assessment involving some of the employer's non-managerial employees and include policies and procedures to minimize the risk of COVID-19 transmission.
- **Patient Screening and Management**: Covered employers must limit and monitor points of entry to settings where direct patient care is provided, and must screen patients, clients, visitors, and others. Employers are encouraged to use telehealth services where available and appropriate and other patient management strategies to limit the number of people entering their workplaces.

- **Personal Protective Equipment**: Covered employers must provide and ensure that employees wear facemasks when indoors and when occupying a vehicle with others for work purposes. When employees have exposure to a person with suspected or confirmed COVID-19, their employer must provide them with respirators, gloves, isolation gowns or other protective clothing, and eye protection, and ensure that they are properly used.
- **Aerosol-Generating Procedures**: When an aerosol-generating procedure, like an intubation, is performed on a person with suspected or confirmed COVID-19, the employer must limit the number of employees present during the procedure and ensure that the procedure is performed in an existing airborne infection isolation room, if available.
- **Physical Distances and Barriers**: Covered employers must ensure at least 6 feet social distancing when employees are indoors, if feasible. Where that is not feasible, employers must install cleanable or disposable solid barriers or demonstrate that it is not feasible to do so.
- **Cleaning and Disinfection**: In patient care areas, resident rooms, and for medical devices and equipment, covered employers must clean and disinfect surfaces and equipment in accordance with the CDC's "COVID-19 Infection Prevention and Control Recommendation" and CDC's "Guidelines for Environmental Infection Control."
- **Ventilation**: Covered employers who own or control buildings or structures with an existing heating, ventilation, and air conditioning system must ensure that they are used in accordance with manufacturer's instructions and design specifications and that air filters are rated Minimum Efficiency Reporting Value 13 or higher if the system allows.
- **Health Screening and Medical Management**: Covered employers must (1) screen employees before each workday and shift by asking them to self-monitor before reporting to work or conduct in-person screens, (2) require their employees to notify them if they contract COVID-19, have been told by a licensed healthcare provider that they are suspected to have COVID-19, or are experiencing recent loss of taste or smell with no other explanation or a temperature of 100.4 degrees or higher, and (3) notify employers of any COVID-19 exposure in the workplace.
- **Vaccination**: Covered employers must support COVID-19 vaccinations for their employees by providing them with reasonable time off and paid leave (e.g., paid sick leave, administrative leave) to get vaccinated and deal with any side effects. Employers are not required to provide vaccines to their employees.
- **Training**: Covered employers must ensure that their employees receive training about: COVID-19 transmission, symptoms, and risk reduction; their policies and procedures on patient screening and management; and tasks and situations in the workplace that could spread COVID-19.
- **Anti-Retaliation and Recordkeeping**: Covered employers must inform employees of their rights to the protections required by the ETS. Employers with more than 10 employees must retain all versions of each COVID-19 plan implemented, as well as logs recording each employee COVID-19 case.

- **Fatality and Hospitalization Reporting:** Covered employers must report each work-related COVID-19 fatality and hospitalization to OSHA. Fatalities must be reported within 8 hours of their learning of the fatality, and hospitalizations must be reported within 24 hours of their learning of the hospitalization.

When Is the ETS Effective?

Healthcare employers must comply with the ETS' key requirements within 14 days of its appearance in the Federal Register. As of the date of this alert, the ETS has not been published in the Federal Register and no publication date has been announced. Other mandates which require physical changes to the workplace and buildings, and work training provide for a 30-day compliance deadline.

Updated Guidance for Employers Not Covered by the ETS

In conjunction with its announcement of the ETS, OSHA updated its non-mandatory Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace. While "most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at risk from COVID-19 exposure," OSHA is not suggesting employers take a hands-off approach. Rather, the general themes are to encourage and support that (1) all non-vaccinated employees get vaccinated; and (2) employers continue to take protective measures for the non-vaccinated. Specifically, OSHA recommends that employers:

(a) instruct non-vaccinated employees to stay home if they have been exposed to someone who has COVID-19;

(b) instruct the non-vaccinated to wear facemasks (and provide them for these individuals);

(c) implement or continue social distancing requirements, and suggesting that non-vaccinated workers in any one place be limited; and

(d) should grant paid time off to employees to get vaccinated.

OSHA's revised guidance also recommends additional precautions to protect unvaccinated and other at-risk workers at "higher-risk workplaces," which includes manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing workplaces. Those precautions include staggering arrival, departure, and break times; providing visual cues as reminders to maintain social distancing; and improving ventilation.

Although OSHA characterizes its revised guidance as creating "no new legal obligations," it warns employers not covered by the ETS that they are still required under the General Duty Clause to provide safe and healthful workplaces free from recognized hazards that are likely to cause death or serious physical harm.

If you have any questions, we encourage you to reach out to your Benesch contact or one of the attorneys below to discuss.

Joseph N. Gross at jgross@beneschlaw.com or 216.363.4163.

Johanna Fabrizio Parker at jparker@beneschlaw.com or 216.363.4585.

Corey Clay at cclay@beneschlaw.com or 216.363.4158.

Brad Wenclewicz at bwenclewicz@beneschlaw.com or 216.363.6191.

Eric M. Flagg at eflagg@beneschlaw.com or 216.363.6196.