



## OSHA Implements COVID-19 Emergency Temporary Standard for Healthcare and Updates COVID-19 Guidance for all Employers

On June 10, 2021, the Occupational Safety and Health Administration (“OSHA”) [announced](#) an action OSHA has not taken in 38 years: issuing an Emergency Temporary Standard (“ETS”). This ETS aims to protect “healthcare and healthcare support service workers from occupational exposure to COVID-19 in settings where people with COVID-19 are reasonably expected to be present.” The ETS does not go into effect until publication in the Federal Register, which has not yet occurred but appears imminent (OSHA has submitted the ETS to the Office of the Federal Register for publication and codification in 29 CFR 1910 Subpart U). The text of the ETS, as submitted to the Office of the Federal Register, is available [here](#). OSHA also launched a [website](#) with resources regarding the ETS.

The ETS will require covered healthcare employers to develop and implement a COVID-19 plan to identify and control COVID-19 hazards in the workplace. Covered employers must also implement other measures to reduce transmission of COVID-19 in their workplaces, related to:

- Patient screening and management
- Standard and Transmission-Based Precautions
- Personal protective equipment (PPE), including facemasks or respirators
- Controls for aerosol-generating procedures
- Physical distancing of at least six feet, when feasible
- Physical barriers
- Cleaning and disinfection
- Ventilation
- Health screening and medical management

- Training
- Anti-retaliation
- Recordkeeping
- Reporting

The ETS encourages vaccination by requiring employers to provide reasonable time and paid leave for employee vaccinations and any side effects. It also encourages use of respirators, where respirators are used in lieu of required facemasks, by including a mini respiratory protection program that applies to such use. Finally, the ETS exempts from coverage certain workplaces where all employees are fully vaccinated and individuals with possible COVID-19 are prohibited from entry; and it exempts from some of the requirements of the ETS fully vaccinated employees in well-defined areas where there is no reasonable expectation that individuals with COVID-19 will be present.

Employers must comply with most of the above provisions within 14 days of publication in the Federal Register, and with provisions involving physical barriers, ventilation, and training within 30 days. OSHA states that it will use its enforcement discretion for employers who are making a good faith effort to comply with the ETS, but employers should not plan to receive such discretion.

OSHA is directed by federal law to issue Emergency Temporary Standards, without undergoing the public notice and comment process normally required for OSHA regulatory promulgation, when OSHA determines that workers are exposed to a grave danger from new hazards or toxic substances or agents determined to be physically harmful and that an ETS is needed to protect such workers. Once published in the Federal Register, an ETS takes effect immediately and remains in effect until replaced by a permanent standard. The ETS also serves as a proposal for a permanent regulation and is subject to the usual notice and comment rulemaking procedure, except that it must be finalized within six months. State occupational safety and health plans are required to have an ETS that is at least as effective as an ETS issued by federal OSHA 30 days following publication.

This ETS follows through on a January 21, 2021, Biden Administration [Executive Order](#) directing OSHA to consider the need for an ETS to address COVID-19.

It is unknown at this time if, and how quickly, the ETS will be challenged in court, but it is quite likely that legal challenges will ensue.

Also on June 10, 2021, OSHA simultaneously issued updated guidance applicable to all employers and all industries for protection of COVID-19. The updated guidance is available [here](#), and supplements previous OSHA guidance from January 2021 with new additional focus on: (1) protections on unvaccinated and otherwise at-risk workers; and (2) COVID-19 vaccination for employees in the workplace.

## **Key Takeaways**

- Healthcare employers will soon be required to follow a significant body of new rules for preventing transmission of COVID-19, and OSHA will take steps to enforce the rules, including assessing regulatory fines for noncompliance.
- The new rules will likely be the subject of legal challenges, but the impact of such anticipated challenges on the implementation of the new rules is not yet clear, so healthcare employers ought to swiftly plan for compliance with the new rules.
- All employers should review the new OSHA guidance regarding protection of unvaccinated and otherwise at-risk workers, and COVID-19 vaccination.

This blog post was drafted by [Paul Jacobson](#), an attorney in the Kansas City, Missouri office of Spencer Fane. For more information please visit [www.spencerfane.com](http://www.spencerfane.com).