



OSHA's Healthcare ETS in Limbo: What are Employers to do?

On December 27, 2021, OSHA issued a statement to address the confusion surrounding the status of the Healthcare Emergency Temporary Standard (the "Healthcare ETS") implemented on June 21, 2021. The confusion arose because the Healthcare ETS was a temporary standard that was intended to be effective until it was replaced by a permanent standard. However, the OSH Act provides that the permanent standard should be promulgated within six (6) months from the adoption of the temporary standard. This means that OSHA needed to implement a permanent standard to replace the Healthcare ETS by December 20, 2021. This did not occur.

The lack of a permanent standard left many wondering whether the Healthcare ETS was still effective. OSHA answered the question in its December 27, 2021 communication stating that while OSHA intends to implement a permanent standard, because it did not do so within six months, it has withdrawn the non-recordkeeping portions of the Healthcare ETS.

OSHA's statement went on to say that it "strongly encourages" healthcare employers to continue to implement all portions of the Healthcare ETS to protect their employees. OSHA also stated that it will "vigorously enforce the general duty clause and its general standards, including the Personal Protective Equipment (PPE) and Respiratory Protection Standards." OSHA stated that healthcare employers who continue to comply with the Healthcare ETS will have met their obligations under the general duty clause, Personal Protective Equipment standards, and Respiratory Protection Standards.

OSHA's statement signaled to healthcare employers that, while not necessarily required at this time, they should continue to comply with all portions of the Healthcare ETS. This also makes practical sense given that if healthcare employers remove such programs at this time, they will likely have to implement the programs again when OSHA's final rule is effective.

Healthcare Employers with 100 or More Employees

The withdrawal of the Healthcare ETS also created confusion for those healthcare employers with 100 or more employees. The ETS covering employers with 100 or more employees (the "Large Employer ETS") specifically excludes those employees covered by the Healthcare ETS from coverage. Accordingly, until now, many healthcare workers have not been thought to have to comply with the Large Employer ETS, which requires, among other things, that employees either be fully vaccinated or test weekly and wear face coverings in the workplace. Now that the Healthcare ETS has been withdrawn, it seems that the Large Employer ETS is applicable to many more employees in the healthcare industry.

To add to the confusion, the Large Employer ETS, while already effective, is in litigation and oral arguments are set to be heard by the Supreme Court on January 7, 2022.

Recommendations

Healthcare employers need to work with counsel to determine how to approach this overlap to ensure that they are best protecting their employees and complying with the applicable laws. For now, healthcare employers who are also subject to the Large Employer ETS should consider continuing the programs they implemented to comply with the Healthcare ETS as well as preparing to implement new programs to comply with the Large Employer ETS. While the Large Employer ETS is already effective, OSHA issued a statement that it will not issue citations for failure to comply with the non-testing portions of the Large Employer ETS prior to January 10, 2022, and will not issue citations for failure to comply with the testing portion of the Large Employer ETS prior to February 9, 2022. All employers with 100 or more employees should also monitor developments from the Supreme Court proceedings scheduled for January 7, 2022, as they determine how to implement programs to comply with

the Large Employer ETS.

OSHA's December 27, 2021 statement can be found [here](#).

This Client Alert was prepared by Elizabeth Wente, a partner in the Springfield, MO office of Spencer Fane. For more information, please visit www.spencerfane.com.