

OSHA Issues Emergency Temporary Standard for Health Care Employers and Updated Guidance for All Other Employers

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Who Needs to Know

All health care employers covered by the Emergency Temporary Standard and all employers in other industries, including a workforce with both vaccinated and unvaccinated employees.

Why It Matters

Health care employers now are subject to the first binding COVID-19 guidance issued by OSHA since the pandemic began. Further, other employers now have clarity from OSHA regarding its recommendations on the CDC's May 13 guidance, which loosened social distancing and mask requirements for fully vaccinated individuals.

While the Occupational Safety and Health Administration (OSHA) released informal guidance during the COVID-19 pandemic on workplace safety^[1], it had not released anything binding on employers until last week. On June 10, OSHA released its first set of binding guidance on COVID-19 in the form of a Emergency Temporary Standard (ETS) applicable to certain health care employers. The ETS becomes effective upon publication in the *Federal Register* and requires health care employers to comply within 14 days of its publication. Because it is a temporary standard, the ETS requirements have a six-month duration limit, during which time OSHA must finalize permanent standards.

Health Care Employers Guidance

Which Health Care Employers Are Covered by the ETS?

The ETS applies to any setting, where employees provide health care services or health care support services. For purposes of the standard, "health care services" mean services provided to individuals by professional health care practitioners for the purpose of promoting, maintaining, monitoring, or restoring health. "Health care support services" means services that facilitate the provision of health care services, such as patient intake/admission, patient food services, equipment and facility maintenance, housekeeping services, health care laundry services, medical waste handling services, and medical equipment cleaning/reprocessing services. OSHA has indicated that the ETS is intended to protect workers facing the highest COVID-19 hazards — those working in health care settings, where suspected or confirmed COVID-19 patients are treated. This includes employees in hospitals, nursing homes, and assisted living facilities; emergency responders; home health care workers; and employees in

ambulatory care facilities, where suspected or confirmed COVID-19 patients are treated.

Which Health Care Employers Are Not Covered by the ETS?

Some health care employers are exempt from the ETS. Specifically, OSHA excluded, for example, telehealth settings; first aid performed by unlicensed health care provider employees; pharmacists dispensing prescriptions in retail settings; and health care support services not performed in a health care setting (like off-site laundry or medical billing). [OSHA has released a flowchart](#) to assist employers in determining coverage.

The ETS also does not apply (1) to a nonhospital ambulatory care setting, where all nonemployees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter; (2) to well-defined hospital ambulatory care settings, where all employees are fully vaccinated, all nonemployees are screened prior to entry, and people with suspected or confirmed COVID-19 are not permitted to enter; or (3) to home health care settings, where all employees are fully vaccinated and all nonemployees are screened prior to entry, and people with suspected or confirmed COVID-19 are not present.

Fully Vaccinated Workforce. Regarding exemptions that require a fully vaccinated workforce, OSHA has indicated that employers of employees, who are unable to be vaccinated due to a medical condition or sincerely held religious belief, may fall under the exemptions to the extent the employer “reasonably accommodates an employee who is unable to be vaccinated in a manner that does not expose the employee to COVID-19 hazards (e.g., telework, working in isolation).” Employers wishing to implement a vaccine mandate for their workforce should consult counsel to ensure that such a program complies with applicable federal, state, and local requirements, including [the EEOC’s latest guidance](#).

COVID-19 Screening. Regarding screening, the [FAQs released with the ETS](#) provide some guidance on the type of virus screening OSHA would approve. OSHA indicates that questionnaires asking patients and other visitors about COVID-19-related symptoms and illness is the minimum screening requirement, but providers should consider additional measures to the extent their facility or patient population warrants it.

“Screening may take different forms depending on the design and size of the facility. However, OSHA notes that it views asking questions about COVID-19 symptoms and illness as the minimum requirement for screening. Screening may also include confirming that individuals are abiding by any policies and procedures for wearing face coverings, as well as assessing individuals’ recent exposures to COVID-19. To comply with the screening requirement, an employer could assign an employee to each entrance to perform a health screening on each individual entering the facility. Employers could also contact patients, clients, residents, or other visitors by phone or video, prior to their arrival at the facility, to conduct the screening.”

Also, OSHA has published [a model employee COVID-19 Health Screening Questionnaire](#) for employers to review.

What Does the ETS Require of Covered Health Care Provider Employers?

The ETS sets forth a variety of requirements, outlined below.

COVID-19 Plan Development. The ETS requires that each covered employer develop a COVID-19 plan.

Employers with 10 or more employees must put their plan in writing. In any case, the COVID-19 plan must include the designation of a COVID-19 workplace safety coordinator, who is knowledgeable about infectious disease; documentation of a completed workplace-specific hazard assessment and how the employer plans to address those identified hazards; and policies and procedures that minimize the risk of COVID-19 transmission and protects employees when they must enter residences or other locations not covered by OSHA's ETS.

Additionally, OSHA requires health care providers to seek and incorporate input from nonmanagerial employees and their representatives when conducting the hazard assessment and when implementing their COVID-19 plan. Finally, health care employers must continuously monitor each workplace to ensure its COVID-19 plan is sufficiently effective for its workforce. OSHA maintains compliance assistance materials, including a model COVID-19 plan, for employers to refer to in preparing a plan.

Ventilation Systems Assessment. While the ETS does not require any employer to install new HVAC systems or equipment, it does require that employers use and maintain existing HVAC systems according to the manufacturer's instructions; that outside air circulation is maximized; and that air filters meet certain minimum requirements. The ETS also refers employers to the recommendations contained in the [CDC's Ventilation Guidance](#).

Standard and Transmission-Based Precautions. The ETS requires development and use of standard and transmission-based precautions — standard precautions are infection control measures intended to minimize the risk of infectious disease transmission in health care settings that include precautions, such as hand washing, cough etiquette, and safe management of contaminated equipment. These infection control practices are used in conjunction with transmission-based precautions, implemented only if the presence of an infectious agent, such as COVID-19, is suspected or confirmed.

Cleaning and Disinfection Protocols. In patient care areas, the ETS requires cleaning and disinfection consistent with the CDC's "[COVID-19 Infection Prevention and Control Recommendations](#)" and "[Guidelines for Environmental Infection Control](#)." In all other areas, the ETS requires that employers clean high-touch surfaces and equipment (defined as any surface or piece of equipment repeatedly touched by more than one person, such as doorknobs, light switches, keyboards, or countertops) at least once a day and provide alcohol-based hand rub (minimum 60% alcohol) or provide readily accessible handwashing facilities.

Managing Infected Employees. Additionally, the ETS requires employers to exclude from the workplace any employee, who tests positive for COVID-19; is suspected of being infected; or is symptomatic for defined periods of time. Health care employers with more than 10 employees must continue paying workers who are unable to telework their normal salary up to \$1,400 a week for the first two weeks they are absent (or for employers with 500 or more employees, for the duration of the removal period), although the exact amount may vary if workers are sick for a longer time period. The ETS also requires that once informed that a COVID-19 positive person (including employees, vendors, contractors, delivery people, visitors, or others) has been in the workplace, employers must provide notice to employees who have been in close contact with and worked in a well-defined portion of the workplace (e.g., a particular floor) in which that person has been present within 24 hours, and they must also notify other employers whose employees were in close contact or worked in a well-defined portion of the workplace with the infected individual.

COVID-19 Policy Changes. New obligations on employee training, the provision of COVID-19 vaccine-related

leave, and anti-retaliation protections are also required. Further, covered employers must maintain and comply with new recordkeeping obligations, such as maintaining a [COVID-19 log](#) of all employee infections for employers with more than 10 employees.

COVID-19 Safety Protocols. The ETS includes specific requirements for a variety of COVID-19-related safety protocols. For instance, it outlines requirements for patient and employee screening and management, personal protective equipment (PPE), physical distancing, and physical barriers.

Exceptions for Fully Vaccinated Employees. The ETS provides an exception to certain requirements related to PPE, physical distancing, and physical barriers (ETS Sections (f),(h), and (i)) in “well-defined areas where all employees are fully vaccinated” and where people who have or could potentially have the virus are not reasonably expected to be present. As such, employers must have a reliable method of tracking employee vaccination status to avail themselves of such exemptions (or to confirm they fall under an ETS exemption). The EEOC further clarifies that vaccination status [constitutes protected medical information under the Americans with Disabilities Act](#). Thus, such information must be kept in a confidential manner and stored separately from the employee’s personnel file. Employers also should verify that no applicable state law places any limitations in collecting and verifying vaccination status.

[All Other Employers Guidance](#)

OSHA also updated its [recommended guidance](#) for workplace safety for all employers, including those not covered under the health care ETS, revising its guidance to expressly encourage COVID-19 vaccination (and employer-provided paid time off for employees to get vaccinated). The revised guidance takes into account the [CDC’s May 13 announcement](#) that relaxes social distancing and mask-wearing requirements for fully vaccinated individuals. Specifically, “[u]nless 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.” (emphasis added).

While OSHA has confirmed that most employers no longer need to take steps to protect their workers from COVID-19 exposure, “where all employees are fully vaccinated,” employers must “still take steps to protect unvaccinated or otherwise at-risk workers in their workplaces, or well-defined portions of workplaces,” following an 11-item list of recommended safety and health measure to reduce the risk of COVID-19 infection in the workplace. These recommended measures include providing unvaccinated or at-risk workers with masks, implementing social distancing, maintaining ventilation systems, and performing routine cleaning and disinfection.

OSHA also provides additional guidance [in the form of an appendix](#), outlining measures appropriate for higher-risk workplaces with mixed-vaccination status workers. “Higher-risk” workplaces may include manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing workplaces. However, a “higher-risk” workplace also could include any other workplace, where unvaccinated or at-risk employees (1) work in close proximity to one another, such as on production lines; (2) have prolonged closeness to co-workers (e.g., for eight to 12 hours per shift); (3) may be exposed to COVID-19 through respiratory droplets in the air (e.g., if they share tools or workstations); or (4) share transportation or living quarters. This guidance includes suggestions like recommending masks for customers and considering distancing or barriers in high-volume retail settings. OSHA has declared that it does not intend to preempt state or local COVID-19 testing requirements, which may be in

place for certain workplaces designated under states' OSHA plans.

While OSHA's informal guidance, unlike the ETS, does not carry the force of law, it is recommended that all employers review and comply with its recommendations (consistent with applicable state or local law) since OSHA's recommendations will likely represent the standard of care in any later claim for COVID-19 infection in the workplace.

OSHA has indicated that it is in the process of updating its [COVID-19 workplace safety FAQs](#) to reflect the new recommended guidance and ETS.

If you have questions about how OSHA's latest announcements impact your business, please feel free to [contact us](#) or visit the [Troutman Pepper COVID-19 Resource Center](#).

[1] This guidance includes OSHA's initial [Guidance on Preparing Workplaces for COVID-19](#), issued at the beginning of the pandemic in March 2020 and its later [January 2021 updated guidance](#), "Protecting Workers: Guidance on Mitigating and preventing the Spread of COVID-19 in the Workplace."

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