

Labor and Employment Alert: OSHA Imposes New COVID-19 Requirements on Healthcare Employers

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If your organization operates a setting “where any employee provides healthcare services or healthcare support services”, you will have until July 6, 2021, to comply with most of OSHA’s newly promulgated COVID-19 Emergency Temporary Standard (“ETS”) and until July 21, 2021, to comply with the ETS’s training, ventilation, and physical barrier provisions. As addressed below, some healthcare employers may be exempt from these new requirements if they satisfy certain criteria.

Exemptions from the ETS

Non-hospital ambulatory care settings will be exempt from coverage of the ETS if all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter. Other types of healthcare organizations may be exempt from coverage as well (e.g., a hospital ambulatory care setting and a home healthcare setting); however, these additional exemptions are very narrowly defined and in some cases require that all employees be fully vaccinated. An organization looking to be exempt from coverage of the ETS will need to adopt and implement certain protocols and practices and will need to keep careful records about those practices.

Even if a healthcare employer is exempt from the ETS issued by OSHA, such employers must remember that they will remain governed by any applicable COVID-related directives and orders issued by the New Jersey Department of Health and the Department of Consumer Affairs. By way of example, all physicians licensed by the State of New Jersey who operate their own offices must continue to require clinical staff to wear PPE and administrative staff to wear a cloth face-covering within the office, regardless of vaccination status. Generally speaking, these directives and orders currently are scheduled to remain in place until January 11, 2022.

Coverage

If your workplace is covered by the requirements of the ETS, it is extremely broad and in some respects goes beyond what states like New Jersey are requiring of healthcare organizations. The ETS, for example, requires a number of disease control management protocols that healthcare organizations most likely already have in place on topics such as patient screening, PPE, mask-wearing, cleaning and disinfection, and ventilation. On the other hand, the ETS also requires the following:

- The development and maintenance of a written COVID-19 management plan that is based, in part, on “the input and involvement of non-managerial employees and their representatives”;
- Maintaining an employee’s compensation while quarantined from work if remote work is permitted or paying the quarantined employee “the same regular pay the employee would have received had the employee not been absent from work, up to \$1,400 per week” (subject to certain reductions for employers with less than 500 employees) if remote work is not permitted;
- Paid leave to employees for time out of work to obtain a vaccination or due to the vaccination’s side effects; and
- Training to all employees on all aspects of the ETS and the company’s COVID-19 management policy.

The ETS also requires continued daily screening of employees and reporting of COVID cases to employees at a time when many states, like New Jersey, are eliminating these types of obligations for certain types of employers.

Certain provisions of the ETS are not required of employees who have been fully vaccinated, and therefore it is important for

covered employers to identify such employees. Employers may rely upon employee self-certification, among other methods, according to the ETS's regulatory Preamble.

Beware of Potential OSHA Investigations

The ETS will be subject to enforcement by OSHA. As such, healthcare employers covered by the ETS are subject to being audited by OSHA and, if a violation is found, are subject to the full array of OSHA sanctioned penalties. Recordkeeping will be of paramount importance and will likely be among the first things an OSHA inspector requests if conducting a site audit. The ETS also protects employees from retaliation for engaging in ETS-related activity, a provision likely to add complexity to the employee termination process.

It is recommended that every healthcare organization take immediate action to assess whether it is covered by the ETS and, if so, what steps it must take to ensure timely compliance.

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