

## MDS Alert

### COVID-19: Don't Miss These New OSHA Obligations for Facilities

#### Some healthcare entities may fight back through litigation.

The Occupational Safety and Health Administration has released emergency temporary standards (ETS) that saddle healthcare entities, including nursing homes, with additional responsibilities to protect employees.

Even though we're 17 months into the pandemic, the rules and requirements continue to evolve.

**Context:** On Jan. 29, the Occupational Safety and Health Administration issued a guidance document, "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace." The guidance aimed to help employers and workers "identify risks of being exposed to and/or contracting COVID-19 at work and to help them determine appropriate control measures to implement," OSHA said. The agency issued the guidance in response to the "Executive Order on Protecting Worker Health and Safety" signed by President **Biden** on Jan. 21, the day after his inauguration.

The executive order also required OSHA to "consider whether any emergency temporary standards (ETS) on COVID-19, including with respect to masks in the workplace, are necessary, and if such standards are determined to be necessary, issue them by March 15, 2021."

The March deadline passed without an ETS issuance. OSHA "experienced major delays due in large part to a changing landscape as vaccinations became common and the Centers for Disease Control and Prevention (CDC) loosened face covering and physical distancing requirements for fully vaccinated individuals," note attorneys **Courtney Malveaux**, **Patricia Anderson Pryor**, **Mary Bradley**, and **Juliana Gaige** with law firm Jackson Lewis.

But now OSHA has followed through and released the rule. The ETS final rule has been "long awaited," note attorneys **Bradford Hammock**, **Yvette Gatling**, and **Sarah Martin** with law firm Littler Mendelson in Tysons Corner, Virginia, in online analysis.



#### Healthcare Workers Singled Out

Observers expected the guidance to apply to all employers - but that didn't happen. Instead, "the standard focuses on healthcare workers most likely to have contact with someone infected with the virus," OSHA says in a release. "The emergency temporary standard establishes new requirements for settings where employees provide healthcare or health care support services, including skilled nursing homes and home healthcare, with some exemptions for healthcare providers who screen out patients who may have COVID-19," according to the release.

"Too many of our frontline healthcare workers continue to be at high risk of contracting the coronavirus," U.S. Secretary of Labor **Marty Walsh** says in the release. "This standard follows the science and will provide increased protections for those whose health is at heightened risk from coronavirus while they provide us with critical healthcare services," Walsh says.

"This standard is necessary to give our healthcare workers deeply needed protections," Acting Assistant Secretary of Labor for Occupational Safety and Health **Jim Frederick** says in the release. "This tailored standard allows OSHA to help the workers most in danger of contracting the virus." OSHA also issued updated guidance - but not an ETS - for other, nonhealthcare industries.

#### Hop To Fulfilling These Requirements

Don't assume you are set because you are already following CDC, CMS, and other COVID guidelines. "While most health care employers subject to [the new] ETS are already complying with many of the ETS' mandates, there are also many new employer obligations," warns attorney **Aaron McCann** with law firm Godfrey & Kahn in Green Bay, Wisconsin. Those include "new notice, recordkeeping and training requirements," among others, McCann emphasizes in online analysis.

"Many healthcare employers already have in place policies and procedures that meet or exceed CDC guidelines and thus meet or exceed most of OSHA's new ETS," agree attorneys **Dean Kelley** and **John Martin** with law firm Ogletree, Deakins, Nash, Smoak & Stewart in online analysis. "Healthcare employers should focus compliance efforts on new or revised requirements, including training requirements ... new recordkeeping obligations, the changes to healthcare employer's reporting obligations to OSHA and, last but not least, OSHA's paid leave requirement," Kelley and Martin say.

**Beware:** The ETS will require providers to report more COVID-19 information, Kelley and Martin point out. "OSHA's new deadlines for reporting COVID-19 fatalities and in-patient hospitalizations, coupled with the removal of the regular reporting exceptions, will result in more reports to OSHA for employers covered by the ETS. This, in turn, invites more OSHA inspections for healthcare employers," Kelley and Martin caution.



This rule is effective June 21, 2021, and healthcare employers must comply with some regulations by July 6, 2021, and others by July 21, 2021.

#### **Note These Potential Caveats**

"OSHA will use its enforcement discretion to avoid citing employers who miss a compliance deadline but are making a good faith effort to comply with the ETS," the agency says in the release.

Of course, the feds' definition of "good faith" and yours may differ significantly, attorneys caution.

"Healthcare employers should be cognizant of OSHA's National Emphasis Program, effective 12 March 2021, that targets for enforcement, industries with the highest risk of exposure to COVID-19 and prioritizes hospitals, assisted living facilities, nursing homes, and other healthcare providers treating COVID-19 patients," stress attorneys **Sarah Carlins**, **David Lindsay**, and **Erinn Rigney** with law firm K&L Gates. "Though OSHA has noted that it will use discretion in its enforcement for employers that are making a good faith effort ... covered employers will need to adhere to these new regulations to minimize the risk of an OSHA violation," Carlins, Lindsay, and Rigney advise.

Providers should also keep an eye out for how legal challenges may affect implementation dates and/or enforcement. "It is anticipated that the federal ETS will be challenged in the future with the possibility of an injunction being imposed," say attorneys **Donna Pryor** and **Julianne Story** with law firm Husch Blackwell.

Kelley and Martin expect the leave portion, in particular, to draw legal action. "OSHA's new medical removal benefits provision will generate controversy and, quite possibly, litigation," they predict. "The agency plays off the paid leave provision as insignificant, citing to paid medical leave provisions in its lead and formaldehyde standards, among others. But no provision in the OSHA Act of 1970 gives OSHA the power to order employers to pay employees when they are not at work. The subject is beyond OSHA's authority and jurisdiction," they conclude.

**Read more:** Links to many ETS resources including the new 44-page rule, fact sheets in English and Spanish, a Frequently Asked Question document with 98 FAQs, and more are at [www.osha.gov/coronavirus/ets](http://www.osha.gov/coronavirus/ets). The ETS is at [www.federalregister.gov/documents/2021/06/21/2021-12428/occupational-exposure-to-covid-19-emergency-temporary-standard](http://www.federalregister.gov/documents/2021/06/21/2021-12428/occupational-exposure-to-covid-19-emergency-temporary-standard).