



## News & Trending

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### OSHA ISSUES NEW COVID-19 RULES, BUT LIMITS THEM TO HEALTH CARE

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Last week the Occupational Safety and Health Administration (“OSHA”) issued its long-expected **new rules** relating to COVID-19 in the workplace. Although some welcomed formal rules on COVID-19, many were surprised to see the agency limit its new Emergency Temporary Standard (“ETS”) to just the health care industry.

Under the Trump administration, OSHA generally addressed the risks stemming from COVID-19 in the workplace by directing employers to guidance from both OSHA itself and the United States Centers for Disease Control and Prevention (“CDC”). In the absence of specific OSHA rules relating to COVID-19, the agency has mostly based enforcement actions on the “General Duty Clause.” This clause, found in Section 5(a)(1) of the federal Occupational Safety and Health Act (also known as “OSHA”), requires employers to provide their employees with “a workplace free from recognized hazards.”

The incoming Biden administration directed OSHA to issue updated guidance on worker protections and to consider whether any new formal rules were warranted to better protect American workers. On January 29, 2021, OSHA issued **updated guidance** for employers. This guidance largely standardized existing OSHA and CDC guidance on safety measures, such as stressing the need for formal COVID-19 Prevention Plans, physical distancing and barriers in the workplace, and separating infected and potentially infected staff from others.

On May 13, 2021, the CDC **updated its guidance** on masks and distancing for fully vaccinated individuals, advising that fully vaccinated individuals no longer needed to wear masks or physically distance while in most indoor settings. (Notable exceptions include health care facilities and areas involving public transport). OSHA responded shortly thereafter by updating its website to point employers to the updated CDC guidance and stating that it would be updating its own guidance following a review of the CDC guidance.

On June 10, 2021, OSHA issued its ETS addressing COVID-19 in the workplace. In a surprise to many observers, the ETS is limited in scope and nature, applicable only to the health care industry. In announcing the new rules, OSHA noted that science shows the workers most vulnerable to COVID-19 are those in front line health care positions. For this reason, the agency said, it was directing its new rules at the health care industry, to make the most impact in the ongoing efforts to combat the pandemic.

With certain limited exceptions, the new standard (a grouping of OSHA rules) applies to all settings in which employees provide health care services or health care support services. This includes hospitals, nursing homes and assisted living facilities; emergency responders; home health care workers; and ambulatory care settings where suspected or confirmed coronavirus patients are treated.

The new ETS incorporates previously existing guidance from both OSHA and the CDC pertaining to health care, as well as other high-risk industries. This includes performance of formal hazard assessments, written COVID-19 Prevention Plans, masks, distancing and barrier requirements. The ETS also requires covered employers to provide employees with paid time off to get vaccinations, as well as to recover from any adverse reactions. If infected or potentially infected employees cannot work remotely or otherwise be separated from other employees, they must be given paid time off of up to \$1,400 per week. Employees must also be advised of their rights under the new ETS, and employers are prohibited from retaliating against any employees exercising such rights.

In a reflection of the updated CDC guidance, the ETS also exempts fully vaccinated employees from masking, distancing and barrier requirements when in well-defined areas where there is no reasonable expectation of COVID-19 exposure.

One example of the exemptions includes well-defined non-hospital ambulatory care settings, where all employees are vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 infections are not permitted entry. Another is some health care settings where all employees are fully vaccinated and all non-employees are screened prior to entry, and people with suspected or confirmed COVID-19 infections are not present.

The ETS is less clear on the issue of precisely which health care support service personnel are covered by its requirements. As a threshold matter, the new rules generally apply in all settings where any employee provides health care services or health care support services. But the ETS contains various exclusions for certain health care support services, including a potentially vague exemption for “health care support services not actually performed in a health care setting.” Specific examples offered in the new rules include:

- Offsite medical billing;
- Offsite laundry services;
- Telehealth where no direct patient care occurs;
- Dispensing of prescriptions by pharmacists in retail settings; and
- The provision of first aid by an employee who is not a licensed health care provider.

It seems clear that OSHA anticipated that health care support service staff other than the specific examples listed above could be excluded from ETS coverage. But employers opting to exclude other health care support service personnel, i.e., staff other than the specific examples listed above, will need to document carefully in their COVID-19 Prevention Plans how they came to this conclusion and the specific measures taken to protect such employees. It should also be noted that any employees unable to take, or reasonably objecting to, COVID-19 vaccines must continue to be protected in accordance with the ETS. In addition, the ETS states that even where certain services and staff may be exempted from coverage, OSHA expects employers to follow applicable CDC guidance.

Finally, although the ETS must be followed and enforced by all states and jurisdictions that are authorized to administer the OSHA program locally, all states and jurisdictions are permitted to enforce more rigorous employee protections. Accordingly, employers in the health care and health care support industries should carefully review state and local requirements applicable to worker safety.

For additional information concerning this Alert, please contact the Smith Anderson lawyer with whom you normally work.

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