

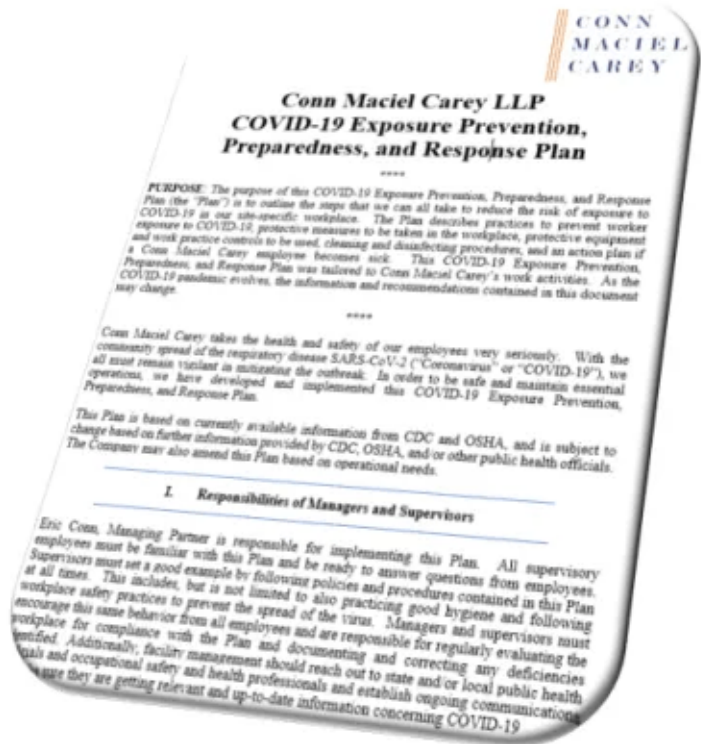
AUGUST 30, 2021 | OSHA RULEMAKINGS & STANDARDS

# Fed OSHA's COVID-19 ETS: Everything You Need to Know

By *Conn Maciel Carey's [COVID-19 Task Force](#)*

We know that many of our friends in the healthcare industry are knee-deep analyzing Fed OSHA's new COVID-19 Emergency Temporary Standard ("ETS") and making adjustments to COVID-19 protocols and programs to quickly come into compliance with this onerous new regulation. Conn Maciel Carey LLP's [COVID-19 Taskforce](#) has carefully reviewed all 1,000+ pages of the ETS, its Preamble, and the rest of the supporting documentation, and has participated in several discussions with senior leadership at OSHA about thorny provisions of the rule, so we have a good understanding of what is required. To help you understand precisely what is required of your covered facilities, and to assist with compliance implementation, we have prepared summaries of all the major requirements of the ETS below.

## Hazard Assessments and COVID-19 Plan



One of the first steps employers must take is to conduct a hazard assessment of your operations to determine those areas where risk of virus transmission exists, and to then develop a response plan for dealing with those risks. The hazard assessment findings and your plans for transmission mitigation must be incorporated into a written COVID-19 Plan. Here is a summary of the ETS requirements for conducting the hazard assessment and preparing a written plan.

29 C.F.R. Section 1910.502(c) requires all employers covered by the ETS to develop and implement a COVID-19 Plan for each workplace. If the employer has more than 10 employees, the Plan must be written. This summary describes the requirements associated with the COVID-19 Plan.

Before developing the Plan, employers must conduct a workplace specific hazard assessment for the purpose of identifying and understanding where potential COVID-19 hazards exist and what controls must be implemented to reduce those hazards. Employers must inspect the entire workplace and the hazard assessment should:

- Evaluate employees' potential workplace exposure to all people at the workplace including patients, coworkers, employees of other entities, members of the public, clients, independent contractors, visitors, and other non-employees;
- Identify and address places and times where people may congregate or come in contact with one another;
- Consider how employees and other people enter, travel through, and leave the workplace; and
- Consider the hazards employees are exposed to at fixed work locations.

The hazard assessment should document:

- The identification of “high-risk” area(s), tasks, and occupations;
- A plan to mitigate the identified hazards or risk factors, and set a date by which planned actions should be completed;
- Date(s) the assessment was performed;
- The names and titles of the individuals who participated in the evaluation and contributed to the written plan;
- Communications of the status of planned or completed actions to employees who may be affected by the identified hazards or risk factors;
- For completed mitigation actions:
  - what method(s) of control was/were decided upon;
  - area(s) where control(s) was/were implemented;
  - specific date(s) of completion; and
  - the names and titles of the individuals who authorized and managed implementation of control.

After completing the hazard assessment, the Plan must:

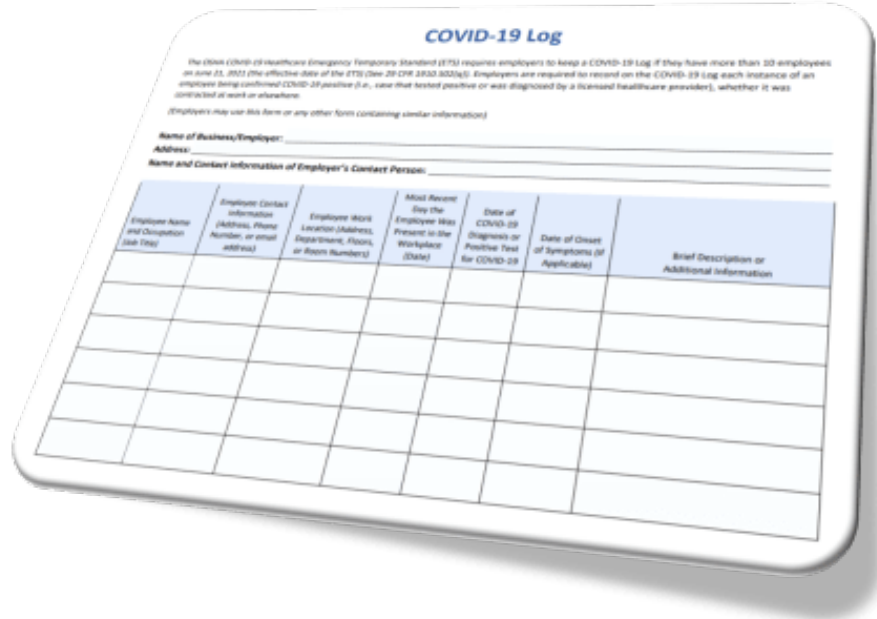
- Identify a workplace safety coordinator. The coordinator must be knowledgeable on the workplace infection control practices and have authority to ensure compliance with all aspects of the COVID-19 Plan.
- Outline the employer’s policies and procedures to determine employee’s vaccination status, if the employer chooses to exercise an exemption from providing PPE, physical distancing, and physical barriers (where there is a reasonable expectation that no person with suspected or confirmed COVID-19 will be present).
- Address the hazards identified in the hazard assessment by implementing policies and procedures to:
  - effectively communicate the COVID-19 Plan and coordinate with other employers to ensure the protection of all employees when employees of different employers share the same work location; and
  - protect employees who are required to enter private residences or physical locations controlled by a person who is not covered by the OSH Act, including the process for employee withdrawal from the residence in the event those protections are inadequate.

After the Plan is implemented, employers must monitor each of their workplaces to ensure the COVID-19 Plan is effective, and if the employer determines the plan is not effective, make updates as necessary.

## **Recordkeeping**

29 C.F.R. Section 1910.502(q) establishes a new recordkeeping obligation applicable to covered employers requiring the creation and maintenance of a dedicated COVID-19 Log, while leaving in place the existing requirements applicable to all employers (including employers covered by the ETS) to record workplace COVID-19 cases that meet the Section 1904 recordkeeping criteria threshold (days away from work, etc.) on the

employer’s OSHA 300 Log. It also establishes recordkeeping obligations for the COVID-19 Plan that is required by Section 1910.502(c) of the ETS. This summary describes the new requirements for COVID-19 recordkeeping.



The ETS requires covered employers — unless they have 10 or fewer employees in the entire company — to create, maintain, and make available to regulators COVID-19 records. Most notably, this requires covered employers to maintain a COVID-19 Log on which they must record *every instance* of a COVID-19-positive employee, *whether or not the illness is work-related*, with the limited exception of employees who exclusively telework. Unlike an OSHA 300 Log, for which employers have seven days to record an injury or illness, positive COVID-19 cases must be recorded on the COVID-19 Log within 24 hours of learning of the positive diagnosis. (Note that the 10 or fewer employee exemption applies to the new COVID-19 Log recordkeeping obligations only and *not* to a covered employer’s obligation to report work-related COVID-19 fatality or in-patient hospitalizations.)

Each entry on the COVID-19 Log must include:

- Employee name;
- One form of contact information;
- Occupation;
- Location where employee worked;
- Last day at the workplace;
- Date of the positive test or diagnosis; and
- Date first had symptoms (unless asymptomatic).

The only limitations on which positive employee cases should not be included on the COVID-19 Log are those employees who contract COVID-19 but work exclusively from home and could not expose other employees, and those cases that are not either confirmed by a positive test or through diagnosis by a licensed healthcare provider.

The COVID-19 Log must be retained as though it is a confidential medical record. This means that unlike the 300

Log, which an employer is required to share with employees, former employees, and their representatives upon request, the COVID-19 log is very limited in how it can be disclosed.

The Log must be made available upon request by OSHA, an employee or an employee's personal or authorized representative, by the next business day after the request, as follows:

- A copy of an individual entry to an employee listed on the Log or to such other individual who has the employee's written consent;
- A version of the Log that only includes location where the employee worked, last day worked, date of positive test or diagnosis, and the date the employee first had symptoms for each entry. All of the other information must be removed; or
- A copy of the full Log upon request from an OSHA representative.

The Log must be maintained and preserved for the period of time the ETS is in effect. The form in which the log is maintained, as well as how it is maintained and where (i.e., at the individual work site or in a central location) is left to the discretion of the employer.

In addition to the creation of this new COVID-19 Log, the ETS recordkeeping requirements mandate that employers maintain *all versions* of the COVID-19 Plan implemented at an employer's facility and provide access to all versions to employees as well as employees' personal representatives or authorized representatives, upon request, by the next business day after the request is made.

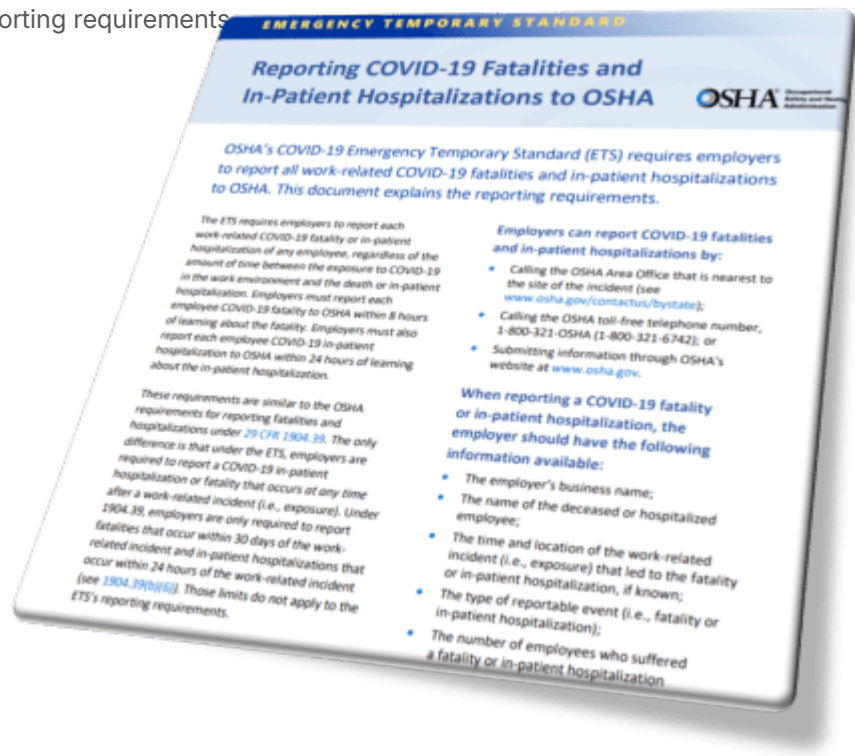
Although employers in certain low hazard industries including healthcare services have historically been exempt from the obligation to create and retain OSHA injury and illness records (i.e., 300 Logs, 301 Reports, and 300A Summaries), this exemption does *not* apply to the recordkeeping obligations established by the ETS.

As stated above, *these ETS recordkeeping obligations are in addition to the injury and illness recordkeeping obligations established by 29 C.F.R. 1904.* Thus, covered employers remain required to record cases of COVID-19 on their 300 Logs if these cases are work-related and result in one of the recording criteria (i.e., death, days away, work restriction, or medical treatment beyond first aid). This means that, in some instances, employers will be recording a single confirmed positive case twice – once on the OSHA 300 Log and once on the COVID-19 log.

## **Reporting**

29 C.F.R. Section 1910.502(r) revises the fatality and hospitalization reporting requirements for COVID-19 cases.

This summary describes the new reporting requirements



For fatalities, covered employers must report *all work-related* COVID-19 fatalities within 8 hours of learning of the reportable fatality. Unlike the requirement to report work-related fatalities under the existing injury and illness reporting standard (29 C.F.R. Section 1904.39), the reporting obligation is *not* limited to fatalities that occur within 30 days of exposure.

This means if these two factors are present, the case is reportable:

- The employee died from a confirmed case of COVID-19; and
- The cause of death was a work-related exposure to COVID-19.

For hospitalizations, covered employers must report *all work-related* COVID-19 in-patient hospitalization within 24 hours of learning of the reportable in-patient hospitalization. Similar to fatalities, OSHA did not include in the COVID-19 reporting standard the temporal boundary included in the existing Section 1904.39 reporting standard. Thus, the reporting obligation is *not* limited to in-patient hospitalizations that occur within 24 hours of exposure.

This means if the following factors are present, the case is reportable:

- The employee has been formally admitted to an in-patient unit of a hospital or clinic;
- For care or treatment;
- Due to a confirmed case of COVID-19; and
- The reason for the hospitalization is a work-related exposure to COVID-19.

In determining whether a case is work-related, the ETS does not appear to require anything new or different from the May 19, 2021 guidance, [Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 \(COVID-19\)](#) (archived) regarding how to evaluate work-relatedness. The May 19 guidance, in pertinent part, provides the following instruction:

- COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
- An employee's COVID-19 illness is likely not work-related if she is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- An employee's COVID-19 illness is likely not work-related if he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.
- CSHOs should give due weight to any evidence of causation, pertaining to the employee illness, at issue provided by medical providers, public health authorities, or the employee herself.
- **If, after the reasonable and good faith inquiry described above, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness.**


Employers should apply this guidance and the criteria established in 29 C.F.R. 1904.5 to make good faith determinations based on reasonable efforts to obtain information available at the time.

Finally, in accordance with the recent [Letter of Interpretation](#) issued at the request of Conn Maciel Carey LLP, an employer is required to make only one report of a single case of COVID-19 even if it results in a hospitalization and then becomes a fatality. If an employer makes a report of a COVID-19 in-patient hospitalization, it does not need to make an additional report if the employee subsequently dies from the illness.

## **Face Masks, Respiratory Protection and Other PPE**

29 C.F.R. Section 1910.502(f) of the ETS establishes the personal protective equipment ("PPE"), including respiratory protection, requirements that must be implemented at covered facilities. This summary describes these requirements.

### **Face Masks**

The standard *does not* mandate that all employees wear N95 or other higher-level respiratory protection at all times. Rather, it allows employees who work at covered facilities but do not have exposures to suspected or 

confirmed COVID-19 persons to wear face masks, defined as “surgical, medical procedure, dental, or isolation mask[s] that [are] FDA-cleared, authorized by an FDA EUA, or offered or distributed as described in an FDA enforcement policy.” Face masks must be worn on all employees **indoors** or when **in a vehicle with another person** (for work purposes). The face masks must be provided at no cost to the employee, and the employer must ensure that employees change their masks at least once per day (or when they are soiled, damaged or for other patient-care related reasons).

Certain exceptions to the requirement to wear face masks are allowed under the ETS, including when employees:

- Are alone in a room
- Are eating or drinking (**and** remain 6 feet from others or are separated by a physical barrier)
- Have a medical condition, disability or religious beliefs that prevents use
- Would risk serious injury or death by their use (in other words, where mask use poses a greater hazard)
- Need to see another’s mouth when communicating (e.g., deaf employees)

In the above situations (except when alone or eating/drinking), the employer must ensure that employees are provided with and use other protection, such as a face shield, if feasible and where it will not pose the same concerns as use of a face mask. The standard establishes specific requirements for shields, such as the requirement to ensure that they are cleaned at least daily and are not damaged.

### **Respirators**

Whenever an employee has exposure to or will perform an aerosol-generating procedure on a person with suspected or confirmed COVID-19, the ETS reverts to OSHA’s respiratory protection standard, requiring employers to provide and require use of respiratory protection pursuant under 29. C.F.R. Section 1910.134 (with all the attendant requirements of Section 1910.134, such as fit-testing, a written program document, and medical evaluations).

Apparently recognizing that this requirement may spur additional N95 shortages, under the section of the standard related to exposures to persons with suspected or confirmed COVID-19, the ETS builds in the guidance CDC issued last year for situations where the country faces supply shortages of this PPE. The standard expressly identifies and allows employers to follow the CDC’s “Strategies for Optimizing the Supply of N95 Respirators” guidance, but encourages employers to choose PAPRs or elastomeric respirators rather than N95s to avoid future shortages. PAPRs and elastomeric respirators also are encouraged over N95s (but not required) for all employees performing aerosol-generating procedures on a patient.

### **Voluntary Use Respirators**

The ETS also establishes a new “mini-respiratory program” that must be followed under voluntary use conditions. Specifically, under either of these following scenarios, the ETS requires implementation of its new “mini-respiratory program”:

- employers voluntarily provide N95s or other respirators to employees who are required only to wear face masks under the standard; or

- employees bring in their own respirators to use in the workplace. (Per the ETS, employers are required to allow employees to bring in and use their own respirators when those employees otherwise would be required simply to wear face masks.)

The new mini-respiratory program establishes a higher standard for voluntary use respirators than OSHA's existing respiratory protection program. For employees bringing in their own respirator, a specific notice to the employee regarding respirator use is required to be given by the employer to the employee.

For employers who voluntarily provided respirators to employees in lieu of face masks, the employer must ensure that the employee is trained in: how to inspect the respirator; limits and capabilities of the respirator; proper storage and maintenance techniques; how to conduct a proper seal check; and the medical signs and symptoms limiting effectiveness. Additionally, employers of employees wearing voluntary use respirators must ensure that these employees: perform a seal check before use and correct any problems identified during the seal check; and reuse only their own respirator and only when the respirator is appropriate for reuse (not soiled/damaged, etc.). Employers are also responsible for ensuring that employees discontinue use of these voluntarily used respirators if the employer is made aware of signs and symptoms indicating a risk with the use of the respirator. The mini-respiratory program is found at 29 C.F.R. Section 1910.504.

### Other PPE

When respirators – as opposed to face masks – are required, additional PPE is also required. Specifically, when employees are exposed to suspected or confirmed COVID-19 persons and/or where an aerosol-generating procedure is performed on a suspected or confirmed COVID-19 person, in addition to respirators regulated under Section 1910.134, employees must be provided with gloves, an isolation gown or protective clothing, and eye protection.

### Aerosol-Generating Procedures on COVID-19 Persons

Note that the ETS establishes specific limitations on the performance of aerosol-generating procedures on people who are suspected or COVID-19 patients. Specifically, the employer must:

- Limit the number of employees present during the procedure to only those essential for patient care and procedure support;
- Ensure that the procedure is performed in an existing airborne infection isolation room (AIIR), **if available**; and
- Ensure that the surfaces and equipment where the procedure is performed are cleaned and disinfected after it is conducted.

### **Cleaning and Disinfecting**

29 C.F.R. Section 502(j) of the ETS establishes the cleaning and disinfecting requirements that must be implemented at covered facilities. This summary describes these requirements.



*In patient care areas, resident rooms, and for medical devices and equipment, the employer must follow standard practices for cleaning and disinfection of surfaces and equipment in accordance with CDC's "COVID-19*

Infection Prevention and Control Recommendations” and CDC’s “Guidelines for Environmental Infection Control,” both of which the ETS incorporates by reference. Under the ETS and CDC Guidance, cleaning refers to removal of dirt and germs using soap and water or other cleaning agents while disinfecting means using an EPA-registered, hospital-grade disinfectant included on EPA’s “List N” in accordance with manufacturers’ instructions.

Most healthcare settings have been following this CDC Guidance throughout the pandemic, so OSHA’s incorporation of these requirements into the ETS likely requires nothing new to be done when cleaning and disinfecting. Some of the more fundamental requirements in CDC’s Guidance include:

- Dedicated medical equipment should be used when caring for patients with suspected or confirmed SARS-CoV-2 infection;
- All non-dedicated, non-disposable medical equipment used for patient care should be cleaned and disinfected according to manufacturer’s instructions and facility policies;
- Environmental cleaning and disinfection procedures should be followed consistently and correctly;
- Routine cleaning and disinfection procedures (e.g., using cleaners and water to pre-clean surfaces prior to applying an EPA-registered, hospital-grade disinfectant to frequently touched surfaces or objects for appropriate contact times as indicated on the product’s label) are appropriate for SARS-CoV-2 in healthcare settings, including those patient-care areas in which aerosol generating procedures are performed;
- Management of laundry, food service utensils, and medical waste should also be performed in accordance with routine procedures.

*In all other areas of the facility not covered above, the employer must:*

- clean high-touch surfaces and equipment at least once a day, following manufacturers’ instructions for application of cleaners; and
- when the employer is aware that a person who is COVID-19 positive has been in the workplace within the last 24 hours, clean and disinfect any areas, materials, and equipment under the employer’s control that have likely been contaminated by the person who is COVID-19 positive (e.g., rooms they occupied, items they touched).

As part of the hazard assessment required by the ETS, employers should identify high-touch surfaces and equipment in their workplaces to which the daily cleaning requirement will apply. The standard defines high-touch surfaces and equipment to mean any surface or piece of equipment that is repeatedly touched by more than one person. Examples include doorknobs, light switches, countertops, handles, desks, tables, phones, keyboards, tools, toilets, faucets, sinks, credit card terminals, and touchscreen enabled devices (e.g., tablets).

As to the cleaning and disinfecting requirement triggered when an employer becomes aware that a COVID-19 positive individual has been in the workplace within the last 24 hours, employers must clean and disinfect any areas, materials, and equipment under the employer’s control that have likely been contaminated by the person who is COVID-19 positive (e.g., rooms they occupied, items they touched). In making determinations about which areas, materials, and equipment have likely been contaminated, OSHA expects employers will be informed by relevant CDC guidance, the specifics of any notice received about the COVID-19 positive person in the workplace, such as when and where they were present, the person’s job duties (if the COVID-19 positive is an


employee), and any additional relevant information included on the COVID-19 logs.

This cleaning and disinfecting must be done in accordance with the CDC's "Cleaning and Disinfecting Guidance," which includes closing off areas used by the sick person and waiting at least several hours before cleaning and disinfecting. This also includes opening outside doors and windows or using other methods to increase air circulation when feasible, using products from EPA's "List N," and wearing a facemask and gloves when conducting the cleaning. If a person who is COVID-19 positive has occupied the space, all potentially-contaminated surfaces, regardless of touch frequency, need to be cleaned and disinfected. Only after the space has been cleaned and disinfected can it be reopened for use.

With respect to who should conduct cleaning and disinfection duties, OSHA's ETS FAQs state that employers can satisfy their cleaning and disinfection obligations through a variety of means. This may include contracting with a cleaning service or requiring employees to perform cleaning and disinfection duties. Employers should note that if they are relying on employees to clean and disinfect, the employer must provide the necessary supplies to employees at no cost and must ensure employees have sufficient time during their work shift to perform these cleaning and disinfection duties.

Additionally, the ETS requires employers to provide alcohol-based hand rub that is at least 60% alcohol or provide readily accessible hand washing facilities.

## Physical Distancing

29 C.F.R. Section 1910.502(h) establishes the requirements employers covered by the ETS must follow regarding physical distancing. Employers must ensure that each employee is separated from all other people by at least 6 feet when indoors, unless the employer can demonstrate that it is not feasible to remain distant to accomplish a specific activity (e.g., hands-on medical care). This summary describes the physical distancing requirements of the ETS. 

To determine when and where physical distancing is necessary in the workplace, employers must rely on the results of their hazard assessments. Places and times where people may congregate or come in contact with one another must be identified and addressed, regardless of whether employees are performing an assigned work task or not. For instance, it is typical that employees congregate during meetings or training sessions, as well as in and around entrances, bathrooms, hallways, aisles, walkways, elevators, breakrooms or eating areas, and waiting areas. All of these areas must be identified and addressed as part of the hazard assessment.

After identifying potential areas where employees may congregate and therefore where concern regarding workplace exposure is heightened, employers must develop and implement policies and procedures to comply with the 6 feet physical distancing requirements.

The ETS establishes several exceptions to the physical distancing requirements of the standard. Physical distancing is not required for employees who are fully vaccinated when those employees are in well-defined areas where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present. (Face masking and physical barriers also are not required in this situation.)

The physical distancing requirement also does not apply to momentary exposure while people are in movement

(e.g., passing in hallways or aisles). OSHA's ETS FAQs note that the exception applies where momentary exposures happen on an infrequent or occasional basis. If an employee quickly passes another person in a hallway or aisle a few times a day, the distancing requirement would not apply. On the other hand, physical distancing would be required for short conversations in a hallway or at a cubicle, as well as in other situations involving frequent, albeit brief contact. Similarly, physical distancing (from employees and non-employees alike) is required where employees are repeatedly passing by each other to perform their tasks (e.g., where employees are regularly moving around to check on patients). Physical distancing is also required (meaning the exception for momentary exposures does not apply) for food service employees in a cafeteria setting (e.g., taking customer orders at a food service counter or waiting on tables).

Additionally, when an employer can establish that it is not feasible for an employee to maintain a distance of at least 6 feet from all other people, the 6 feet requirement does not apply, but the employer must ensure that the employee is as far apart from all other people as feasible. OSHA's ETS FAQs provide guidance regarding the circumstances in which physical distancing may not be feasible. For example, there may be situations where a room or other workspace is less than 6 feet in length and width and two employees, or an employee and a patient, must be in it at the same time.

The burden is on the employer to demonstrate that it is infeasible to comply with the required physical distancing for a specific activity or workspace. If the employer can demonstrate that the space cannot be expanded, and that multiple employees must be in that space at the same time to conduct the job task (i.e., that there are no other feasible alternatives that would permit 6 feet of physical distancing), the employer satisfies its infeasibility burden.

The preamble to the ETS sheds more light on infeasibility. It acknowledges that maintaining physical distance between a healthcare provider and patient is not always feasible when conducting an in-person exam or providing medical treatment, particularly within a small exam room; however, it is more likely that physical distance of 6 feet can be maintained when healthcare providers are asking patients questions about their medical history or problems they are experiencing. OSHA reiterates that it requires employers to ensure 6 feet whenever possible, and reminds that employees who provide medical care will also be protected by other aspects of the ETS, including the use of facemasks or respirators and other PPE, depending on the circumstances, and cleaning and disinfection requirements.


The preamble goes on to describe other job duties that may require employees to be within 6 feet of others, including patient transport, operations security, multi-person maintenance tasks, and confined space work. Here, OSHA states that physical distancing of 6 feet may be difficult to maintain at all times in constricted areas, even after the employer has reallocated work tasks or redesigned workflow to maximize distancing. It provides that, in all cases, the burden is on the employer to demonstrate that it is infeasible to comply with the required physical distancing for a specific activity, and in such cases, employers must ensure that employees maintain as much physical distance as feasible and that physical distancing is layered with the other means of protection required by this standard (e.g., facemask use, cleaning and disinfection, installation of physical barriers).

OSHA's ETS Compliance Directive informs that, if an employer claims it is infeasible to separate employees, CSHOs should interview the employer to determine why physical distancing is not feasible and what alternative measures were implemented. CSHOs are also directed to request any relevant documentation, which supports

the employer's position regarding infeasibility and document this in their casefiles. The Compliance Directive further states that, when an employer establishes it is not feasible for an employee to maintain a distance of at least 6 feet from all other people, the employer must ensure that the employee is as far apart as feasible and implement the remaining layers of overlapping controls, including physical barriers, source control, hand hygiene, and ventilation, required by the ETS to reduce the risk of COVID19 transmission. CSHOs are directed to obtain photos and measurements during the walkaround of the affected area as necessary to document the workspace layout, and the physical distance between people.

OSHA notes that physical distancing can include (but does not mandate) methods such as: telehealth; telework or other remote work arrangements; reducing the number of people, including non-employees, in an area at one time; visual cues such as signs and floor markings to indicate where employees and others should be located or their direction and path of travel; staggered arrival, departure, work, and break times; and adjusted work processes or procedures to allow greater distance between employees.

## Physical Barriers

29 C.F.R. Section 1910.502(i) of the ETS establishes a requirement for physical barriers to be installed under certain circumstances. Solid barriers must be installed at *each fixed work location outside of direct patient care areas where an employee is not separated from all other people by at least 6 feet of distance*, except where the employer can demonstrate it is not feasible to do so or where the exception for vaccinated employees applies. This summary describes the standard's requirements for physical barriers. 

Where barriers are required, they must be of sufficient height and width and situated in a manner to block face-to-face pathways between individuals based on where each person would normally stand or sit. They must either be easily cleanable or disposable. While the ETS does not specify the type of material that must be used for physical barriers, OSHA explains in the preamble that the material must be impermeable to infectious droplets that are transmitted when an infected individual is sneezing, coughing, breathing, talking, or yelling – such as plastic or acrylic partitions. The barriers must be designed, constructed, and installed to prevent droplets from reaching employees when they are *in their normal sitting or standing location relative to the workstation*. OSHA recognizes that effective design and installation of physical barriers will differ among workplaces based on job tasks, work processes, potential users, and the physical layout of the work area.

In terms of where barriers need to be installed and where they don't, the ETS exempts direct patient care areas as well as resident rooms from the requirement for physical barriers. Direct patient care is specifically defined as "hands-on, face-to-face contact with patients for the purpose of diagnosis, treatment, and monitoring." Physical barriers also are not required when an employer can demonstrate that such barriers would be *infeasible* (in a location they otherwise would be required). In the preamble to the ETS, OSHA elaborates on areas where physical barriers are essentially deemed to be feasible and infeasible. OSHA states that it is feasible to install physical barriers at hospital security checkpoints; reception desks; patient/visitor information counters; triage stations; hospital pharmacy windows; and bill payment stations. On the other hand, OSHA expressly recognizes areas where physical barriers (and physical distancing) likely would be infeasible – areas where direct patient care or EMS services are performed on a patient, or in locations where barriers would obstruct emergency egress paths or interfere with a facility's fire safety systems (e.g. fire alarm notification devices, fire sprinklers, fire pull stations).

## Vaccination, and Patient Screening & Management

29 C.F.R. Section 1910.502(m) requires that all employers covered by the ETS support COVID-19 vaccination for each employee. This summary describes the vaccination requirements of the ETS.

To support COVID-19 vaccination, employers must provide to their employees:



- reasonable time during work hours for employees to receive COVID-19 vaccinations, and
- paid leave for employees to receive vaccinations and any side effects experienced following vaccination (to the extent these occur during regular work hours).

“Reasonable time” may include, but is not limited to:

- registering for vaccination appointments
- completing paperwork required before receiving the vaccination
- receiving the shot
- waiting during the post-vaccination monitoring period
- traveling to and from the place of vaccination administration.

“Paid leave” includes paid sick leave already accrued by the employee if available, any additional paid leave provided by the employer for this purpose and/or administrative leave. The details of paid leave may vary depending on the circumstances. Employers may set a “reasonable cap” on the amount of time and paid leave available to employees to receive each dose of the vaccine and to recover from any side effects. Generally, OSHA presumes that, if an employer makes available to its employees four hours of paid leave for each dose of the vaccine, as well as up to 16 additional hours of leave for any side effects of the dose(s) (or 8 hours per dose), the employer would be in compliance with this requirement.

Recall that, with regard to the COVID-19 Plan requirements set forth in 29 C.F.R. §1910.502(c), in the event that all employees are “fully vaccinated,” and the employer’s COVID-19 Plan includes policies and procedures to determine employees’ vaccination status, the employer may be exempt from providing controls in a well-defined area under paragraph (a)(4).

### Patient Screening & Management

29 C.F.R. Section 1910.502(d) establishes patient screening and management requirements that must be implemented at covered facilities. This summary identifies these requirements.

In settings where direct patient care is provided, the employer must:


- Limit and monitor points of entry to the settings (except where emergency responders or other licensed healthcare providers enter a non-healthcare setting to provide healthcare services);
- Screen and triage all clients, patients, residents, delivery people and other visitors, and other non-employees entering the setting;
- Implement other applicable patient management strategies in accordance with CDC’s “COVID-19 Infection Prevention and Control Recommendations.”

OSHA informs that screening may take different forms depending on the design and size of the facility; however, at a minimum, employers must ask questions about COVID-19 symptoms and illness. 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.

The ETS also includes a note that employers are encouraged to use telehealth services where available and appropriate in order to limit the number of people entering the workplace.

## Ventilation

29 C.F.R. Section 1910.502(k) establishes ventilation requirements for covered facilities. This summary describes the standard's requirements for ventilation.

The ventilation provisions of the ETS do not require employers to purchase new HVAC systems or to reconfigure existing duct work to comply with the standard. Rather, employers are required simply to increase indoor ventilation to the maximum extent possible on existing systems. New filtration equipment may be required, however, depending on the existing air filters in an HVAC system. 

OSHA ventilation requirements are based on the concern that, without adequate ventilation, continued exhalation can cause the amount of infectious smaller droplets and particles produced by people with COVID-19 to become concentrated enough in the air to spread the virus to other people. OSHA explained in the preamble that the more outdoor air the HVAC system is capable of drawing into the building, the greater the impact may be on limiting the potential for the virus to accumulate.

Accordingly, the ETS establishes five main requirements that employers who own or control buildings or structures with an existing heating, ventilation, and air conditioning (HVAC) system(s) must follow to comply with the ETS:


- Verify that the HVAC systems are used in accordance with manufacturer instruction and design specifications and functioning as designed;
- Maximize to the extent appropriate the amount of the outside air circulated throughout the HVAC system and number of air changes per hour;
- *Install MERV-13 or higher air filters if compatible with the existing HVAC system (\*if the HVAC system is not compatible with such filters, filters with the highest compatible filtering efficiency for the existing system must be used);*
- Air filters must be maintained and replaced as necessary to ensure the proper function and performance of the HVAC system(s); and
- All intake ports that provide outside air to the HVAC system(s) must be cleaned, maintained, and cleared of any debris that may affect the function and performance of the HVAC system(s).

The ETS does not require covered employers who do not own or control the buildings in which their services are provided to comply with the ventilation requirements of the standard. Thus, employers that lease space in

another employer's building and have no authority over or responsibility for the HVAC system under the lease are not required to comply with these requirements.

The ETS states, however, that *all employers* should consider implementation of measures to increase and improve ventilation identified in CDC's [Ventilation in Buildings Guidance](#). This Guidance includes multiple tools to improve ventilation, such as opening doors and windows as often as possible; using strategically placed fans to increase the effectiveness of open windows; setting the fan to "on" rather than "auto" on HVAC systems; using portable HEPA filtration systems to enhance air cleaning, etc. As stated, though, implementation of the measures identified by the CDC is not mandated by the ETS; the CDC guidance is described as a recommendation to consider.

## Training

29 C.F.R. Section 1910.502(n) requires that all employers covered by the ETS provide training to their employees. To the extent that the employer has already provided training and that training is compliant with the standard, the employer does not need to re-train employees. This summary describes the training requirements of the ETS. 

If the employer has already provided training related to COVID-19, but the previous training did not cover all the elements required by the ETS, the employer must offer training on the elements it had not previously addressed.

As with other OSHA standards, the training required by the ETS must be administered at a literacy level and in a language employees understand. The trainer must be a person knowledgeable in the topics covered by the training and how they apply to the employee's specific job tasks. Additionally, the training should be interactive, providing an opportunity for interactive questions and answers. An employer may satisfy the interactive requirement even if the employer offers a virtual training if the employer makes available a qualified trainer to address questions after the training or offers a telephone hotline where employees may ask questions.

The training must be designed to allow employees to understand the following:

- What COVID-19 is, how it is transmitted (including pre-symptom and asymptomatic transmission)
- Ways to reduce the transmission of COVID-19 including:
  - the importance of hand hygiene;
  - the proper covering of the nose and mouth;
  - the signs and symptoms of disease;
  - the risk factors for severe illness; and
  - when to seek medical attention.
- The employer's policies and procedures on patient screening and management
- Tasks in the workplace that could result in COVID-19 infection
- Workplace policies and procedures to prevent the spread of COVID-19 applicable to employees' duties
- If there are multiple employers at the worksite, multi-employer workplace agreements related to infection control policies and procedures, the use of common areas, and the use of shared equipment
- The employer's policies and procedures for all PPE worn in compliance with the ETS including:

- when PPE is required to protect against COVID-19;
- how to properly put on, wear, and take off PPE;
- how to properly care, store, clean, maintain, and dispose of PPE; and
- any modifications to donning, doffing, cleaning, storage, maintenance, and disposal procedures needed to address COVID-19 when the PPE is worn to address workplace hazards other than COVID-19.
- Workplace policies and procedures for cleaning and disinfection
- Available sick leave policies and any COVID-19 benefits employees may be entitled to under federal, state, or local laws
- The identity of the safety coordinator specified in the COVID-19 Plan
- How the employee can obtain copies of the training materials and any of the employer's COVID-19 policies and procedures

The ETS also mandates re-training of employees when:

- Changes occur that affect the employee's risk of contracting COVID-19 at work, such as new job tasks;
- The employer's policies or procedures are changed; or
- There is an indication that the employee has not retained the necessary understanding or skill.

## **Health Screening and Medical Management**

29 C.F.R. Section 1910.502(l) sets forth employee screening, employer/employee notification, medical removal, medical removal protection benefits, and return-to-work requirements. This summary describes those requirements of the ETS.

### **A. Employee Screening**

Employers have discretion in choosing whether to implement self-monitoring and/or in-person screening. 

Employers who choose to have employees self-monitor for COVID-19 symptoms can assist employees in that effort by providing them with a short fact sheet to remind them of the symptoms of concern. Employers may also consider posting a sign stating that any employee entering the workplace certifies that they do not have symptoms of COVID-19, to reinforce the obligation to self-screen before entering the workplace.

Employers who choose to conduct in-person employee screening for COVID-19 symptoms may use methods such as temperature checks and asking the employee if they are experiencing symptoms consistent with COVID-19. Employers should conduct this screening before employees come into contact with others in the workplace, such as co-workers, patients, or visitors.

To the extent employers choose to conduct onsite screening, there are important safety considerations to take into account. Specifically, to ensure screeners and employees waiting to be screened are protected, employers must continue to maintain compliance with all requirements of the ETS for physical distancing, physical barriers, and facemask use; thus, employers may need to provide physical barriers to separate employees and screeners and ensure that employees waiting to be screened can maintain adequate physical distancing between each other. Employers should also ensure screenings are conducted in a timely manner to minimize potential

exposure to other employees waiting to be screened and to the screener.

## **B. Notifications**

**Employees** must promptly notify their employers when:

- they learn they are COVID-19 positive, as confirmed by a positive test for COVID-19 or when diagnosed with COVID-19 by a licensed health care provider;
- told by a licensed health care provider that they are suspected to have COVID-19;
- they are experiencing recent loss of taste and/or smell with no other explanation; or
- when they are experiencing both a fever ( $\geq 100.4^{\circ}$  F) with a new unexplained cough associated with shortness of breath.

OSHA informs that “promptly” takes on two meanings. First, for employees who are not at the workplace when they meet a notification criterion, “promptly” notifying the employer would mean notifying the employer before the employee is scheduled to start their shift or return to work. Second, in the event that the employee is in the workplace when meeting a notification criterion, “promptly” notifying the employer means notifying the employer as soon as safely possible.

**Employers** also have notification requirements. Once an employer is notified of a COVID-19 positive person who has been in the workplace, such as employees, vendors, contractors, delivery people, visitors, or other non-employees, the employer has three separate notification obligations that must be completed within 24 hours, if applicable. The employer must notify:

1. Each employee who was not wearing a respirator and any other required PPE and has been in close contact with the COVID-19 positive person in the workplace. The notification must state that the employee was in close contact with a COVID-19-positive person and the date(s) that the close contact occurred.
2. All other employees who were not wearing a respirator and any other required PPE and worked in a well-defined portion of the workplace (e.g., a particular floor) in which the COVID-19 positive person was present during the potential transmission period. The notification must specify the date(s) the COVID-19 positive person was present in that portion of the workplace during the potential transmission period.
3. Other employees whose employees were not wearing respirators and any other required PPE and have been in close contact with the COVID-19 positive person, or worked in a well-defined portion of the workplace (e.g., a particular floor) in which that person was present, during the potential transmission period. The notification must specify the date(s) and the location(s) of the COVID-19 positive person within the workplace during the potential transmission period.

Note that the notification provisions are **not** triggered by the presence of a patient with confirmed COVID-19 in a workplace where services are normally provided to suspected or confirmed COVID-19 patients (e.g., emergency rooms, urgent care facilities, COVID-19 testing sites, COVID-19 wards in hospitals). Additionally, any required notifications under the ETS must not include any employee’s name, contact information (e.g., phone number, email address), or occupation.

“Close contact” and “potential transmission period” are defined as follows:

- “Close contact” is defined as being within 6 feet of another person for a cumulative total of 15 minutes or more over a 24-hour period during that person’s potential period of transmission. Examples of cumulative exposures for 15 minutes could be 3 exposures for 5 minutes each or 1 exposure for 5 minutes and a second exposure for 10 minutes, over a 24-hour period.
- The potential transmission period runs from 2 days before the person felt sick (or, for asymptomatic people, 2 days prior to test specimen collection) until the time the person is isolated.

OSHA informs that, when making required notifications, employers should notify each individual in a language and manner they understand via a phone call, text message, e-mail, or in person (if using protections such as physical distancing and face coverings); however, in some cases, such as when close contact did not occur and all persons who could have been potentially exposed in a general area may not be known (e.g., restroom, building floor), the employer may satisfy notification requirements by posting notices in common areas (e.g., break rooms, time clock areas, or restrooms) as well as using alternative modes of communication needed to reach employees with disabilities.

### **C. Medical Removal From the Workplace**

Employer must remove an employee from the workplace when the employer knows that the employee:

1.  is COVID-19 positive (confirmed positive for or was diagnosed by a licensed healthcare provider with COVID-19);
2. has been told by a healthcare provider that they are suspected to have COVID-19;
3. is experiencing recent loss of taste and/or smell, with no other explanation;
4. is experiencing both fever ( $\geq 100.4^{\circ}$  F) and new unexplained cough associated with shortness of breath;
5. is required to be notified by the employer of a close contact in the workplace to a person who is COVID-19 positive (unless the employee has been fully vaccinated against COVID-19, or recovered from COVID-19 within the past 3 months, and does not experience: recent loss of taste and/or smell, with no other explanation; or both fever ( $\geq 100.4^{\circ}$  F) and new unexplained cough associated with shortness of breath).

Employers must remove the employee from the workplace and keep the employee removed until the employee meets return to work criteria based on guidance from a licensed healthcare provider or applicable guidance from the CDC, unless state or local public health authorities specify a longer period of removal. More details provided in the “Return to Work” section below.

After removing an employee who is suspected to have COVID-19, is experiencing recent loss of taste and/or smell, with no other explanation, or is experiencing both fever ( $\geq 100.4^{\circ}$  F) and new unexplained cough associated with shortness of breath, the employer must either:

1. Keep the employee removed until the employee meets the return to work criteria; or
2. Remove the employee, provide a polymerase chain reaction (PCR) COVID-19 test at no cost to the employee, and keep the employee removed until the employer is notified by the employee of the test results.
  - If the test results are negative, the employee may return to work immediately.
  - If the test results are positive, the employer must keep the employee removed until the employee

meets return to work criteria.

- If the employee refuses to take the test, the employer must continue to keep the employee removed until the employee meets return to work criteria, but the employer is not obligated to provide medical removal protection benefits. Note: Absent undue hardship, employers must make reasonable accommodations for employees who cannot take the test for religious or disability-related medical reasons.

After removing an employee who is required to be notified of close contact with a COVID-19 positive person in the workplace, the employer must either:

1. Keep the employee removed from the workplace for 14 days.
2. Keep the employee removed and provide a PCR COVID-19 test, at no cost to the employee, at least 5 days after the exposure that triggered the notification requirement.
  - If the test results are negative, the employee may return to work after 7 days have passed following the exposure.
  - If the test results are positive, the employer must keep the employee removed until the employee meets return to work criteria.
  - If the employee refuses to take the test, the employer must continue to keep the employee removed until the employee meets return to work criteria, but the employer is not obligated to provide medical removal protection benefits. Note: Absent undue hardship, employers must make reasonable accommodations for employees who cannot take the test for religious or disability-related medical reasons.

As a reminder, employees required to be notified by the employer of a close contact in the workplace to a person who is COVID-19 positive need not be removed if they have been fully vaccinated against COVID-19, or recovered from COVID-19 within the past 3 months, unless they experience: recent loss of taste and/or smell, with no other explanation; or both fever ( $\geq 100.4^{\circ}$  F) and new unexplained cough associated with shortness of breath.

Additionally, employers may (but are not required to) remove employees who:

- are experiencing symptoms other than recent loss of taste and/or smell or fever coupled with new unexplained cough and shortness of breath;
- were exposed to a COVID-19 positive person outside of the workplace; or
- were notified by a state or local public health authority to quarantine or isolate.

Note that, although OSHA's ETS does not require removal in these situations, the state or local public health authority may impose separate obligations or the employer might choose to remove employees in those circumstances, above and beyond what is required by the ETS.

When employee must be removed from the workplace pursuant to the ETS, the employer may require the employee to work remotely (e.g., telework) or in isolation if suitable work is available. When an employee's regular duties cannot be performed remotely, employers should consider flexible and creative solutions (e.g., temporary reassignment to a position that can be performed by telework). If an employee is too ill to work due to

COVID-19, however, remote work should not be required; sick leave or other leave should be made available as consistent with the employer's general policies and any applicable laws.

#### D. Medical Removal Protection Benefits

Like other OSHA standards, such as OSHA's lead standard, the ETS provides medical removal protection ("MRP"). This is in part to ensure continuity of benefits during an employee's removal period. Importantly, the ETS MRP benefits provisions only apply if the employer is required to remove an employee under the ETS – that is, the ETS does not require the employer to provide paid medical removal protection benefits when removal is not required under the ETS.

If an employer is required to remove an employee under the ETS, obligations to pay the removed employee depend on the size of the employer:

1. Employers with **10 or fewer employees** on the date that the ETS became effective (i.e., June 21, 2021) are not required to maintain pay for removed employees.
2. Employers **with fewer than 500 employees**, must pay the employee's regular pay, up to \$1400 per week, for the first two weeks that the employee is removed. Beginning in the third week, if the employee's removal continues that long, the employer must pay two thirds of the same regular pay the employee would have received if working, up to \$200 a day (equivalent to \$1000 per week in most cases). Employers must also continue to provide the benefits to which the employee is normally entitled (e.g., employer-sponsored health insurance) during the removal period.
3. Employers with **500 or more employees** must pay the employee's salary up to \$1400 per week during the entire period of removal, until the employee meets applicable return to work criteria. Employers must also continue to provide the benefits to which the employee is normally entitled (e.g., employer-sponsored health insurance) during the removal period.

Note that, if the employee receives compensation for lost earnings from any other source, such as employer-paid sick leave, administrative leave, or a publicly funded compensation program, then the employer may reduce the amount paid to the removed employee by however much the employee receives from the outside source.

Additionally, employers are not required to provide overtime pay, even if the employee had regularly worked overtime hours in recent weeks. The employer's obligation to pay medical removal benefits ceases when the employee meets the return to work criteria described in the ETS, even if the employer chooses to require a longer removal period.

Whenever an employee returns to the workplace after a COVID-19-related workplace removal, that employee must not suffer any adverse action as a result of that removal from the workplace and must maintain all employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed.

#### E. Return to Work

Employer's decision to return an employee to work must be made in accordance with guidance from a licensed healthcare provider or applicable guidance from the CDC, unless state or local public health authorities specify a

longer period of removal.

For example, as of the date of this writing, the CDC's Isolation Guidance states that a COVID-19 positive person **with symptoms** can stop isolation when three criteria are met:

1. at least ten days have passed since the first appearance of the person's symptoms;
2. the person has gone at least 24 hours without a fever (without the use of fever-reducing medication); and
3. the person's other symptoms of COVID-19 are improving (excluding loss of taste and smell).

If a person has tested positive but **never experiences symptoms**, then the person can stop isolating after ten days from the date of their positive test.

Importantly, to the extent that removal is causing critical staffing shortages, the ETS also includes a note stating, "OSHA recognizes that CDC's "Strategies to Mitigate Healthcare Personnel Staffing Shortages" [] allows elimination of quarantine for certain healthcare workers, but only as a last resort, if the workers' absence would mean there are no longer enough staff to provide safe patient care, specific other amelioration strategies have already been tried, patients have been notified, and workers are utilizing additional PPE at all times."

Please contact any of the OSHA attorneys in [Conn Maciel Carey's national OSHA Practice](#) if you need help determining any of the COVID-19 ETS requirements.

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For resources on issues related to COVID-19, please visit Conn Maciel Carey's [COVID-19 Resource Page](#) for a comprehensive database of resources regarding HR, employment law, and OSHA regulatory developments and guidance, as well as COVID-19 recordkeeping and reporting flow charts. Likewise, subscribe to our [Employer Defense Report](#) blog and [OSHA Defense Report](#) blog for regular updates about the Labor and Employment Law or OSHA implications of COVID-19 in the workplace. Conn Maciel Carey's COVID-19 Task Force is monitoring federal, state, and local developments closely and is continuously updating these blogs and the [COVID-19 Task Force](#) page with the latest news and resources for employers.