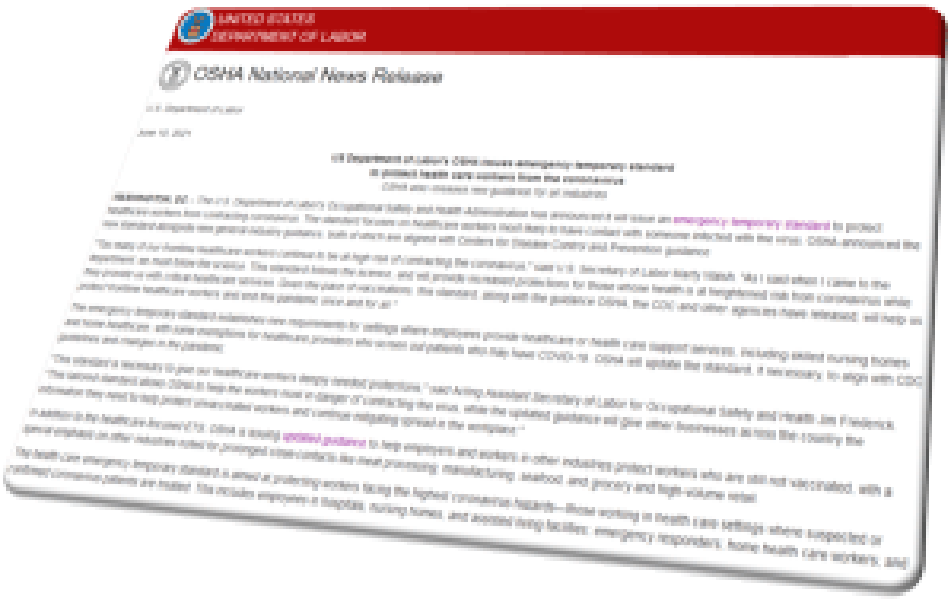
JUNE 14, 2021 | OSHA RULEMAKINGS & STANDARDS

Is Your Workplace Covered by Fed OSHA's New COVID-19 ETS for Healthcare?

By Conn Maciel Carey's COVID-19 Task Force

Nearly 16 months after the pandemic began, federal OSHA revealed its COVID-19 Emergency Temporary Standard (the ETS) that imposes a series of requirements on healthcare employers. While OSHA's issuance of an ETS comes as no surprise to many who have been tracking the agency since Pres. Biden's inauguration, the fact that it applies only to the healthcare sector and not to all industries is not what we expected. Looking back, the promulgation of an ETS *applicable to all workplaces* seemed a foregone conclusion when President Biden took office in January and issued an Executive Order that same day directing OSHA to update its COVID-19 guidance, adopt a COVID-19 National Emphasis Program, evaluate whether an ETS was necessary and, if so, issue the ETS on or before March 15, 2021.


OSHA National News Release

On April 27, 2021, OSHA delivered to the White House Office of Management and Budget (OMB) an ETS, which, by all accounts, was a broad rule applicable to all industries, but because this was an emergency rulemaking, the proposed regulatory text was not available to the public. In the weeks that followed, the Office of Information and Regulatory Affairs (OIRA), within OMB, hosted a series of meetings to hear from stakeholders regarding a proposed rule they had not seen. On behalf of the Employers COVID-19 Prevention Coalition, Conn Maciel Carey organized and led two OIRA meetings at which we and our coalition members provided input and recommendations to OSHA and OMB. As the meetings continued, the success of the vaccine rollout became

clearer, with a corresponding drop in COVID-19 cases, hospitalizations, and deaths, and then came the Centers for Disease Control ("CDC") game-changing guidance on May 13, 2021 relaxing protocols for vaccinated individuals. All of this caused many to question whether an OSHA ETS was still necessary. With conditions on the ground improving rapidly, we continued to help stakeholder schedule and participate in OIRA meetings to argue that a general industry ETS was no longer needed.

On June 10, 2011, after more than 50 OIRA meetings, a final ETS applicable only to the healthcare industry was sent to the Office of the Federal Register for publication. The standard appears at 29 C.F.R. Section 1910.502, and will appear in the Federal Register within a couple of weeks.

Explaining the purpose of the ETS for Healthcare, U.S. Secretary of Labor Marty Walsh offered this statement:

"Too many of our frontline healthcare workers continue to be at high risk of contracting the coronavirus. As I said when I came to the department, we must follow the science. 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. Given the pace of vaccinations, this standard, along with the guidance OSHA, the CDC and other agencies have released, will help us protect frontline healthcare workers and end this pandemic once and for all."

At the same time, OSHA released its updated workplace guidance for all other industries.

The healthcare ETS imposes a series of requirements, many of which are likely already in place in most healthcare settings, such as the implementation of a written infection-control plan, mandatory use of face covers and respirators, distancing, screening, ventilation, training, cleaning and disinfecting, and providing paid time off for vaccinations.

What Healthcare Settings and Services Are Covered?

The ETS applies to all settings where any employee provides healthcare services or healthcare support services *unless* one of several exceptions applies.

For purposes of the ETS, OSHA defines healthcare services as services that are provided to individuals by professional healthcare practitioners (e.g., doctors, nurses, emergency medical personnel, oral health professionals) for the purpose of promoting, maintaining, monitoring, or restoring health. Healthcare services are delivered through various means including hospitalization, long-term care, ambulatory care, home health and hospice care, emergency medical response, and patient transport. Healthcare services include autopsies as well.

Meanwhile, healthcare support services include services associated with the provision of healthcare services, such as patient intake/admission, patient food services, equipment and facility maintenance, housekeeping services, healthcare laundry services, medical waste handling services, and medical equipment cleaning/reprocessing services.

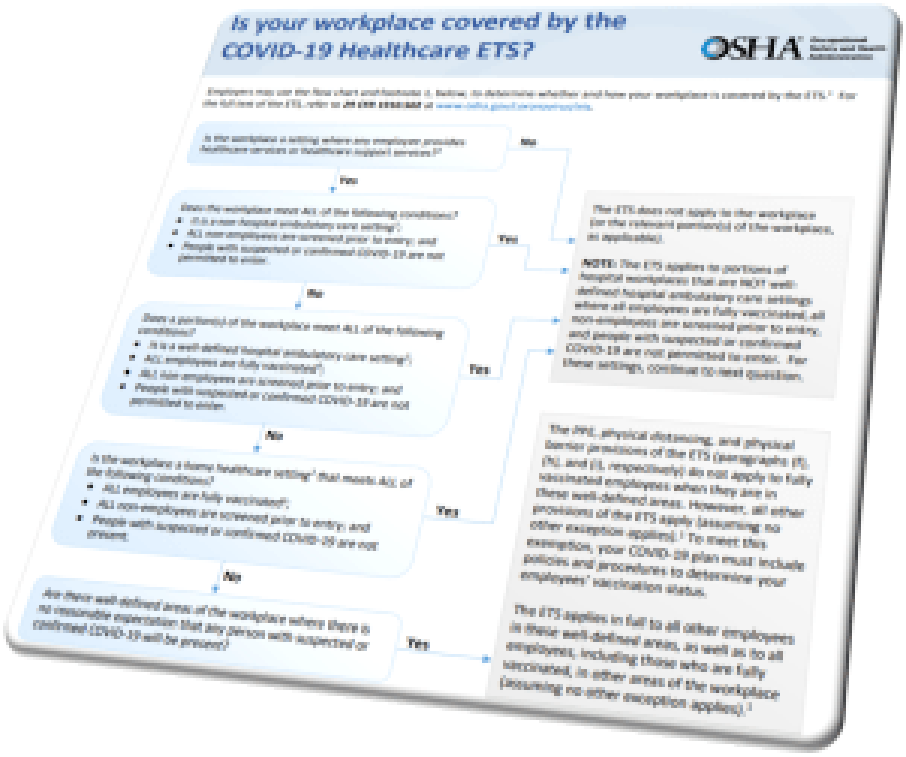
Affected workplace settings include:

- Hospitals
- Specialty Hospitals (e.g., Psychiatric and Substance Abuse)
- Nursing Homes
- Long Term Care (e.g., Residential Intellectual and Developmental Disability Facilities)
- Other Patient Care (e.g., Chiropractors, Dentists, Optometrists, Podiatrists, Family Planning Centers)
- Home Health Providers
- Temporary Labor (e.g., Employment Placement Agencies for Healthcare Services)
- First Aid and Emergency Care (e.g., Urgent Care, Clinic Services in Retail Establishments, Ambulance Service)
- Sports Medicine Clinics (e.g., Medical Staff at Sports Club)
- Industry Clinics (e.g., Health Clinics in Manufacturing Workplaces)
- Correctional Facility Clinics (e.g., Medical Clinic in Prison)

Are There Healthcare Settings or Services That Are Not Covered By The ETS?

There are a number of settings in which healthcare is provided that are nonetheless exempt from the ETS. Specifically, the ETS does not apply to:

- *Non-hospital ambulatory care settings* where healthcare services are performed on an outpatient basis, so long as all non-employees are screened for COVID-19 symptoms (simply with questions or even self-screening) prior to entry, and suspected or confirmed COVID-19 cases are not permitted to enter. For example, a dental office in its own office building or suite where all patients and any contractors entering are screened for COVID-19 and not allowed in if they are experiencing COVID-19 symptoms.
- *Well-defined ambulatory care settings within hospitals* where: (i) healthcare services are performed on an outpatient basis; (ii) all employees are fully-vaccinated; and (iii) all non-employees are screened prior to entry and suspected or confirmed COVID-19 cases are not permitted to enter. OSHA views a well-defined area to be distinct from the rest of the hospital in that it has a separate entrance and operates such that there is no reasonable expectation that a suspected or confirmed COVID-19 case will be present. For example, a dialysis center located in a hospital complex with a separate entrance. But regardless how isolated the department is, to benefit from this exemption, all employees assigned there must be fully vaccinated, and all other entrants must be screened so as to exclude suspected or confirmed COVID-19 cases.
- *Home healthcare settings* where: (i) all employees are fully-vaccinated; (ii) all non-employees are screened prior to entry; and (iii) suspected or confirmed COVID-19 cases are not present. Employers will need to screen patients and any other non-employees who will be present *before* the employee enters that setting in order to meet this exemption. Moreover, the employer must specify a clear contingency for situations where an employee arrives at the home healthcare setting and finds an unexpected non-employee in the setting; i.e., that non-employee can be screened, the employee can leave the home, or the employer must comply with all requirements of the ETS.
- *Healthcare support services not performed in a healthcare setting*. For example, a standalone laundry service disconnected from the hospital complex that launders linens for the hospital would be exempt from



the ETS.

- *Telehealth services* performed outside of a setting where direct patient care occurs.

What About Healthcare Settings Found Within a Non-Healthcare Setting?

Where healthcare settings are embedded within a non-healthcare setting (e.g., medical clinic in a manufacturing facility or a walk-in clinic in a retail setting), the ETS applies only to the embedded healthcare setting and not to the remainder of the physical location. Note that these types of settings are also eligible for the exemption for *non-hospital ambulatory care settings*, so the manufacturer's medical clinic can be excluded from the ETS's requirements if all entrants to the clinic are screened before entering the clinic (or all employees at the facility are screened before coming to work), and anyone with COVID-19 symptoms is barred from entry.

What about Retail Pharmacies?

The scope and application section of the ETS provides a good, clear exception for certain pharmacy operations: *"Except as otherwise provided in this paragraph, this section applies to all settings where any employee provides healthcare services or healthcare support services… [except] to the following: … the dispensing of prescriptions by pharmacists in retail settings."* However, the preamble for the ETS includes the following section which clarifies the limits of that exception: *"It is important to note that the 'retail pharmacist' exception applies only to the dispensing of prescriptions and not to other healthcare services that a pharmacist might provide (e.g., vaccination, testing). Moreover, OSHA will not consider the setting in which prescriptions are dispensed to be a retail setting if other healthcare services are performed in the same setting as the dispensing of prescriptions. Thus, for example, if a pharmacist performs COVID-19 testing in the same setting where they dispense prescriptions, OSHA will consider that setting to be a healthcare setting and not a retail."* To the extent that a pharmacy also administers vaccinations or COVID-19 tests, it appears that such tasks fall within the scope

of the ETS.

What Happens When Emergency Responders or Other Licensed Healthcare Providers Enter a Non-Healthcare Setting to Provide Care?

When emergency responders or other licensed providers enter a non-healthcare setting to provide emergency care, the ETS applies only to the provision of the healthcare services by that employee. This provision would apply, for example, where a physician assigned to work in an embedded clinic enters the production area of a manufacturing plant to provide healthcare services to a sick or injured employee. In such circumstances, the ETS would apply to the provision of healthcare services by the physician or emergency responder, but not apply to all other employees in the setting. Note the ETS does not apply at all whenever and wherever a non-licensed healthcare provider employee performs first aid for a co-worker.

What Type of Screening Is Required to Satisfy These Exceptions?

Note that required COVID-19 symptom screening to satisfy the exemptions must, at a minimum, assess whether any of the following symptoms are occurring: fever or chills; cough; shortness of breath or difficulty breathing; fatigue; muscle or body aches; headaches; new loss of taste or smell; sore throat; congestion or running nose; nausea or vomiting; diarrhea. However, the level of screening required is probably lighter than screening protocols most of you have implemented to date. There is no requirement to take body temperatures. Rather, all that is required is asking questions (even in advance by electronic means) to determine whether a person is COVID-19 positive or has any of the COVID-19 symptoms on the above list. It appears OSHA may also find "self-monitoring" to be acceptable.

Are There Certain Provisions That Do Not Apply to Fully Vaccinated Employees in Healthcare Settings If No COVID Patients Are Reasonably Expected to Be Present?

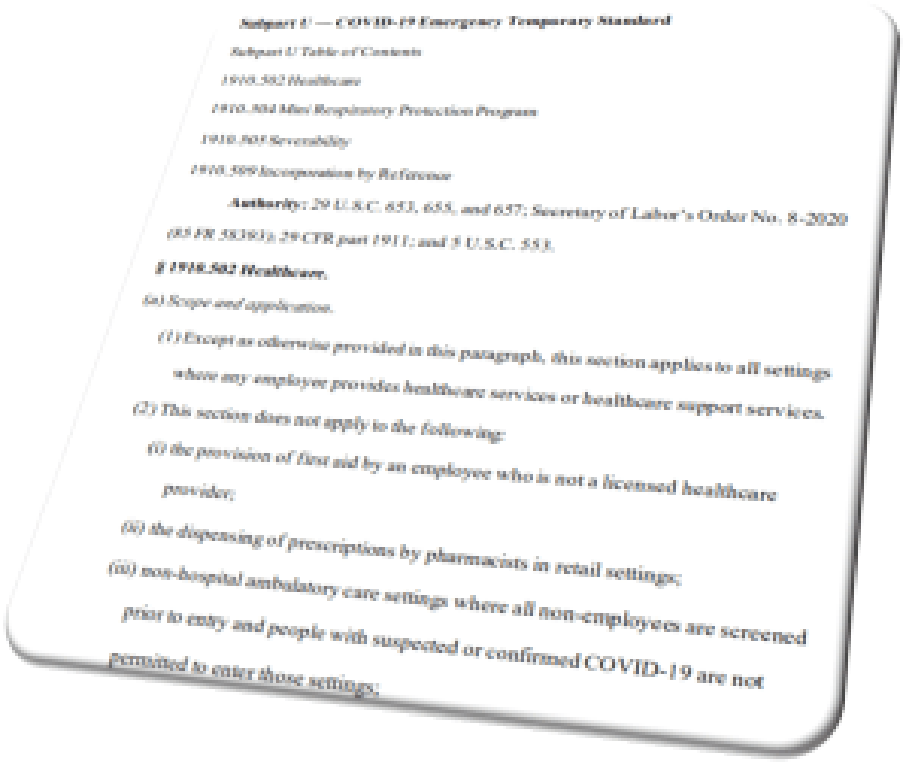
OSHA recognizes an exception for the PPE, physical distancing, and physical barrier requirements for fully vaccinated employees in well-defined areas of a workplace where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present. Examples of such areas are billing or other administrative offices, employee break rooms, or employee meeting areas. To trigger this exception for vaccinated-employees, employers must assess their workplaces to identify the applicable well-defined areas and implement a process to verify employees' vaccination status. This exemption will never apply to areas of healthcare facilities (well-defined or not) where there is a reasonable expectation that suspected or confirmed COVID-19 cases may be present, such as in emergency rooms, patient waiting areas, or hospital wards open to treating COVID-19 patients. In such areas, the PPE, physical distancing, and physical barrier requirements will apply to all employees, including those who are fully vaccinated.

What Are the Key Elements of the ETS?

Although more comprehensive than what we have seen in general industry, the essential elements of the healthcare ETS will be familiar to most employers:

1. Workplace-specific COVID-19 Hazard Assessment
2. Written COVID-19 Prevention Plan

3. Designate workplace COVID-19 safety coordinator(s)
4. Patient Screening and Management
5. CDC-recommended Standard and Transmission-Based Precautions
6. PPE
7. Unique new requirement for Mini-Respiratory Protection Program for voluntary-use respirators
8. Special requirements for aerosol-generating procedures on suspected or confirmed COVID-19 cases
9. Physical Distancing
10. Physical Barriers
11. Cleaning and Disinfection



Subpart U — COVID-19 Emergency Temporary Standard

Subpart U Table of Contents

1910.502 Healthcare

1910.504 Mini Respiratory Protection Program

1910.505 Severability

1910.509 Incorporation by Reference

Authority: 29 U.S.C. 653, 655, and 657; Secretary of Labor's Order No. 8-2020 (85 FR 58393); 29 CFR part 1911; and 5 U.S.C. 553.

§ 1910.502 Healthcare.

(a) Scope and application.

(1) Except as otherwise provided in this paragraph, this section applies to all settings where any employer provides healthcare services or healthcare support services.

(2) This section does not apply to the following:

(i) the provision of first aid by an employee who is not a licensed healthcare provider;

(ii) the dispensing of prescriptions by pharmacists in retail settings;

(iii) non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings;

12. Ventilation
13. Health screening and medical management
14. Vaccination
15. Training
16. Recordkeeping –new COVID-19 Tracking Log to include all employee cases, regardless of work-relatedness
17. Reporting COVID-19 fatalities and hospitalizations to OSHA (regardless how long after the exposure they occur)
18. Anti-retaliation

We are working on separate summaries of these major substantive elements of the ETS.

When Do These Requirements Become Effective?

OSHA advises that it is essential that employers ensure that the provisions of the ETS are implemented as quickly as possible, and that all provisions except those regarding physical barriers, ventilation and training must

be in place no later than 14 days after the ETS is published in the Federal Register. The requirements regarding physical barriers, ventilation and training must be implemented within 30 days of publication. OSHA standards are typically published in the Federal Register 10-14 days after release. Here, however, it is quite possible the Administration will fast-track publication given the emergency nature of the rule.

What Happens Where an Employer Tries, But Cannot Comply in Time?

OSHA maintains that compliance with the requirements of the ETS within the above timeframes is achievable under most circumstances. Indeed, the agency notes that many employers are likely already in compliance with at least some of the provisions of the ETS, such as the provisions for patient screening and management, PPE, standard and transmission-based precautions, physical distancing, physical barriers, and cleaning and disinfection. However, recognizing that some employers will, despite their best efforts, be unable to comply with all requirements by the specified compliance dates, OSHA expressed a willingness to exercise its enforcement discretion in situations where an employer can show it has made good faith efforts to comply with the requirements of the ETS but has been unable to do so. To trigger this safe harbor, an employer should be prepared to provide documented proof of its efforts to comply.

What Other Resources Available to better understand the new ETS?

OSHA has already developed a Fact Sheet, an application flow chart, a set of FAQs, and other information. Here are some useful links:

- **ETS Regulatory Text**
- **Preamble**
- **Fact Sheet – COVID-19 Healthcare ETS**
- **Is Your Workplace Covered by the ETS?**
- **FAQs**

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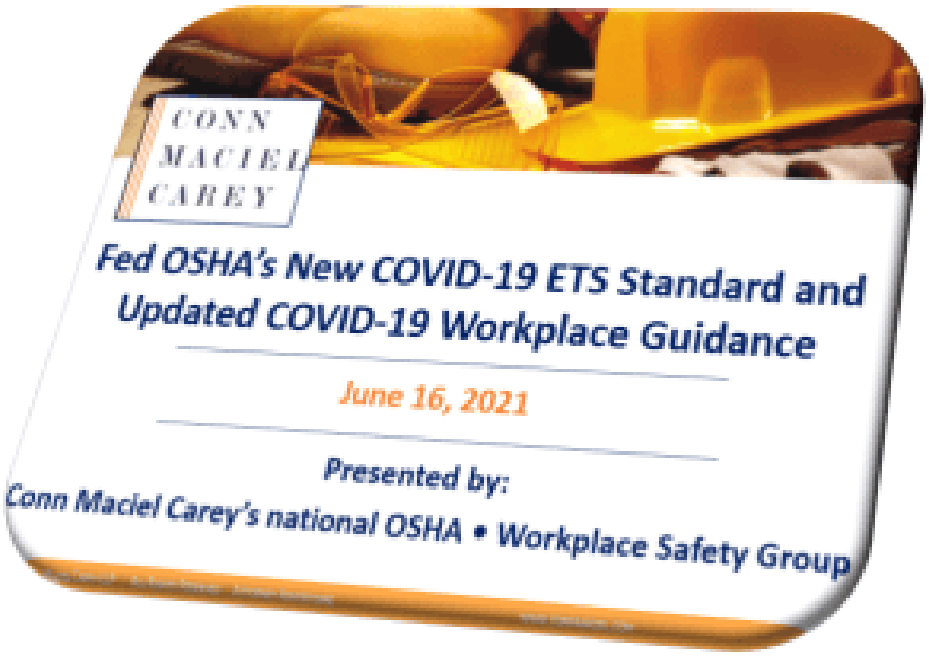
For more information about these developments, join Conn Maciel Carey's national OSHA Practice for a complimentary webinar on Wednesday, June 16, 2021 at 1:00 p.m. ET — Federal OSHA's New COVID-19 ETS for Healthcare and Updated COVID-19 Workplace Guidance.



Likewise, please contact any of the attorneys in Conn Maciel Carey's national OSHA Practice if you have questions about whether the ETS applies to any of your facilities or operations, or whether your current programs and policies meet the new requirements. We can help with:

- Gap assessments of existing written COVID-19 prevention plans and policies
- Required COVID-19 hazard assessments
- Developing protocols for screening non-employees for COVID-19 symptoms
- Written Vaccine Policies and processes for verifying employee vaccination status
- Developing a new "mini-respiratory protection program"
- Helping to obtain or advocate for certain answers from OSHA about any aspect of the ETS