

DECEMBER 12, 2022 | OSHA RULEMAKINGS & STANDARDS

OSHA's Proposed Permanent COVID-19 Standard for Healthcare Nears the Finish Line

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Thankfully, it has been quite a while since our [last COVID-19 rulemaking update](#).

As you will recall, OSHA [reopened its rulemaking record for the COVID-19 Rule for Healthcare](#) on March 22, 2022, and then on April 22nd, we submitted three sets of written comments on behalf of the Employers COVID-19 Prevention Coalition regarding issues facing: (1) [retailers and retail pharmacies](#); (2) addressing embedded [medical clinics and emergency response teams](#) for manufacturers and other industrial worksites; and (3) addressing [construction issues at healthcare workplaces](#). We participated in OSHA's Public Hearing for the rulemaking, held on April 27th – May 2nd, and then submitted two additional sets of [post-hearing comments](#) on May 23rd. Then basically nothing happened. 

We were beginning to think that OSHA had abandoned the rulemaking for a permanent COVID-19 Standard for Healthcare. But we now have some significant news to share. Last week, on December 8th, the Office of Management and Budget (OMB) **updated its website to reflect that it officially has OSHA's "Occupational Exposure to COVID-19 in Healthcare Settings" Standard "under review."**

The website reflects that OMB received the proposed final rule from OSHA on December 7th. [Here is a link](#) to the page for this rulemaking and below is all the relevant information reflected on OMB's website:



Our first reaction when we saw that the rule had been delivered to OMB was surprise. The CDC has been "watering down" its COVID-19 recommendations since OSHA began this rulemaking, even [loosening recommendations for masking in healthcare settings](#) on September 23, 2022, and President Biden even went so far as to publicly declare that the pandemic was over ahead of the mid-term elections. We thought all of that made the environment too politically murky for OSHA to follow-through with this rulemaking.

However, OSHA's timing for delivery of the rule to OMB may be quite clever by the agency. Had OSHA issued a final rule earlier in the Fall, it would have been met with a pretty reasonable "you can't be serious" response from the public. But now, in the last few days, we have been hearing about so many more COVID-19 cases than we have heard about for months. Approximately 5% of the U.S. population now lives in counties where the CDC is

officially recommending masks due to high rates of community spread. As we head into winter the darkest part of winter, it would be no surprise if we see another really significant upswing in cases, and a shift from the CDC back to more onerous recommendations (i.e., resuming masking, distancing, and quarantine recommendations in certain environments). The Biden Administration is not tone deaf. It appears OSHA is timing this rulemaking carefully so that it could finalize the rule at the top of a COVID-19 wave, or at least right as CDC resumes emphasizing mask and other recommendations.

Substance and Timing of Final Rule

The big questions remaining are what does the final regulatory text look like, and when will the final rule be issued. Unfortunately, there's not a lot of information available on the first question. The text of the regulation sent late Wednesday has not been released, but if the standard follows the outline of the Healthcare ETS, without any changes, it will require covered employers to have comprehensive, top to bottom, infection protection programs, covering, among other things, hazard assessments, screening requirements, standard and transmission-based precautions, PPE, physical distancing, physical barriers, cleaning and disinfection, ventilation, notification of COVID-19 cases, medical removal and associated protection benefits, return to work, training, etc. We do not think OSHA included all of these elements in the final rule, as the state of the pandemic is very different from what it was back in June 2021 when the Healthcare ETS took effect. Plus, OSHA did signal when it reopened the rulemaking record that it was at least considering softening the rule in certain areas.

The other significant questions for which we do not have solid answers is the scope of covered employers. Our Coalition dedicated most of our advocacy to discouraging OSHA from expanding the healthcare standard to cover non-traditional workplace settings. Or, said another way, to keep the standard focused on in-patient hospital settings.

In terms of timing, typically, this OMB review is likely the last step before the rule is issued. As background, proposed regulations go to OMB for a meaningful review by the Administration's economists and policy experts. One element of that review process is that OMB's Office of Information and Regulatory Affairs (OIRA) takes stakeholder input in some form, pursuant to Executive Order 12866. Most often, that input is in the form of stakeholder meetings with representatives from OMB and from the agency promulgating the rule – OSHA for our purposes. Likewise, stakeholders may submit any form of written advocacy, exhibits, data, etc. in connection with their EO 12866 meetings. During the first COVID-19 emergency rulemaking, OIRA took more than 50 stakeholder meetings over eight weeks, and the end result was a final rule that was dramatically different than what OSHA had delivered to OMB. Our coalition for that rulemaking participated in five stakeholder meetings, and got additional written comments into the hands of OMB and OSHA through that process.

Although OMB technically has 90 days to review and approve the rule, or to return it to OSHA for more work, given the number of opportunities to comment (first, back in August 2021 as an ETS, and again when the rulemaking record was reopened in March 2022), and the Administration's urgency to get this done (at least in part we think due to the strong push by unions, including National Nurses United, who came out and stated that they "strongly urge [OMB] to complete its review of the permanent standard as quickly as possible"), we do not expect OMB will take the full 90 days. Indeed, it is technically possible that OMB takes no stakeholder input, rubber stamps what was submitted, and moves to publish this rule in the Federal Register this week. That is not our expectation, but it is possible.

Next Steps

All of that is to say, this rulemaking is close to the finish line, but not at it. There should still be one last opportunity to help shape the final rule before it is issued.

Now that we have a Regulation Identifier Number (RIN) for this rule, we will be able to formally request EO 12866 stakeholder meetings with OIRA. On behalf of our Coalition, we plan to pursue at least three different stakeholder meetings – one for retail pharmacies, another for manufacturing and industrial facilities with on-site medical clinics, and one for construction contractors that engage in construction, renovation, or maintenance work at hospitals.

[Let us know](#) if you have any questions about the status of the rulemaking or the next steps.