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Update on OSHA's COVID Emergency Rule for Healthcare – And How It Affects the Vaccinate-or-Test ETS

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Last week, on December 27th, OSHA announced the withdrawal of most of its COVID-19 ETS for Healthcare, which was the first of the two COVID-19 emergency temporary standards OSHA issued in the first year of the Biden Administration.

This Healthcare ETS was issued back in June 2021 in response to President Biden's Day 1 OSHA Executive Order. Recall that this was the ETS that had been crafted by OSHA to apply to all employers in all industries, but as it was being finalized in late Spring, when it looked like we might just be approaching the end of the pandemic, the Administration decided to narrow the scope to just the healthcare industry. That ETS was what we call a "programmatic" standard; requiring the development of a comprehensive COVID-19 prevention program, complete with an array of required engineering and administrative controls. When the Healthcare ETS was issued, OSHA noted on its webpage for the ETS that it expected the ETS to be in effect for six months from the date of publication — until December 21, 2021.

December 21st came and went without any word from OSHA. But on Monday of last week, , six days after the Healthcare ETS's six-month anniversary, OSHA issued a statement that:

> ***"[while OSHA] intends to continue to work expeditiously to issue a final standard that will protect healthcare workers from COVID-19 hazards, and will do so as it also considers its broader infectious disease rulemaking[,]" it is "withdrawing the non-recordkeeping portions of the healthcare ETS. The COVID-19 log and reporting provisions ... remain in effect."***

Here is the full statement posted on OSHA's Healthcare ETS webpage:

Why Did OSHA Withdraw Portions of the Healthcare ETS?

That's the million-dollar question. While some (including me) assert that the standard automatically expired after

six months, others disagree, including, apparently, OSHA. Even though OSHA did withdraw the Healthcare ETS essentially at the six-month mark, the language OSHA used in that withdrawal announcement (and other rumblings we have heard out of OSHA) indicates that OSHA believes it has the legal authority to leave emergency temporary standards in place beyond six months, even if the agency is not prepared at the six-month mark to replace the ETS with a proper regulation that has gone through APA-compliant notice-and-comment rulemaking. Below is a quick summary of the controversy around the lawful duration of emergency OSHA standards.

For background, emergency temporary standards promulgated pursuant to the OSH Act are, by design, intended to have a short, temporary lifespan. Under Sec. 6(c)(2) of the OSH Act, an ETS is "**effective until superseded by a standard promulgated in accordance with the procedures prescribed in [Sec. 6(c)(3)**]." Pursuant to Sec. 6(c)(3), the ETS serves as a proposed permanent standard, and the Act calls for that replacement permanent standard to be finalized within six months of publication of the ETS. Specifically, Sec. 6(c)(3) states that "[t]he Secretary ***shall*** **promulgate a [permanent] standard under [Sec. 6(c)(3)]** ***no later than six months*** after publication of the emergency standard, as provided in [Sec. 6(c)(2)]."

On the one hand, we would argue that the grant of emergency rulemaking authority; i.e., to regulate without meeting the requirements of the APA, was an extraordinary power, and Congress purposefully paired that extraordinary power with a very short lifespan of six months. In other words, while OSHA is permitted, in emergency circumstances, to issue a rule without following the APA, that rule only gets to last for a short time before it must be replaced by an APA-compliant rule or go in the wastebin.

There is a big difference between OSHA missing the six-month deadline to replace an ETS with an APA-compliant regulation, and OSHA missing other statutory deadlines in the regular rulemaking process to promulgate a new regulation where there has been none before. The most important difference is that in the context of an ETS, while OSHA is derelict in meeting its deadline, employers are subject to enforcement of a rule that OSHA had been permitted to promulgate without following APA or OSH Act rulemaking requirements. An ETS is supposed to be a bridge to a permanent rule, and if an agency does not promulgate a replacement permanent rule in six months, or in the case of the Healthcare ETS, does not even work on a replacement permanent rule in any meaningful way, it would be a serious abuse of agency power to allow the non-APA compliant rule to remain in place. That cannot be what Congress intended.

On the other hand, labor advocates and some former OSHA officials have publicly argued that Sec. 6(c)(2) speaks to the duration an ETS may remain effective – that is, there is no automatic expiration date on an ETS. Rather, ETSs remain effective until superseded by a permanent replacement standards, no matter how long it takes OSHA to promulgate the permanent replacement. Here is an article written by Jordan Barab, former Deputy Assistant Sec'y of Labor for OSHA during the Obama Administration, laying out this argument in more detail. Mr. Barab and others assert that the language in Sec. 6(c)(3) – the section setting forth the six-month deadline – speaks to OSHA's obligations to issue a permanent rule, not to a time limit on the duration an ETS may remain in effect.

So, while OSHA would be in violation of Sec. 6(c)(3) if it did not promulgate a permanent standard within six months, the remedy for that is not the archiving of the ETS, but rather a judicial decree to OSHA to hurry-it-up with the replacement rule. Viewing the issue in that way rests in part on the assumption that Congress sets

unrealistic deadlines in the OSH Act. To put six months in perspective, consider that in 2012, the Government Accountability Office found that it took OSHA on average of more than seven years to issue standards. Advocates for long-lasting emergency rules point to other rulemaking contexts where agencies are essentially excused for missing rulemaking deadlines. For example, OSHA's hexavalent chromium standard and the Chemical Safety Board's accidental release reporting rule both ignored statutory deadlines for years until stakeholders took those agencies to court because they were not moving quickly enough. In those instances, the agencies were simply ordered by federal judges to move faster. If we assume that federal judges acknowledge that rulemaking deadlines in the APA and the OSH Act are unrealistic, they may not hold OSHA strictly liable to them in the context of an ETS.

One reason OSHA may have voluntarily withdrawn this rule even though it believed it did not have to, is that it had a backstop of additional COVID-19 protections in the form of OSHA's newer COVID-19 Vaccination, Testing, and Face Coverings ETS; i.e., withdrawing the Healthcare ETS would not leave healthcare workers without regulatory protections, because they would become covered by the Vaccination rule. That could explain why the rule was not withdrawn right at the six month mark, because as of that date, the Stay of the Vaccination ETS had been in place until just four days before December 21st. It was somewhat of a surprise that the conservative US Court of Appeals for the Sixth Circuit lifted the Stay of the Vaccinate-or-Test ETS that had been in place since the day after OSHA issued that newer ETS. It looks like OSHA was gearing up to leave the Healthcare ETS in place, but after the surprising decision by the Sixth Circuit, pivoted and decided to withdraw the Healthcare ETS to avoid a fight about that.

But regardless whether the Healthcare ETS automatically expired on December 21st or if it was just a result of OSHA affirmatively withdrawing it (perhaps to avoid a possible lawsuit for extending the ETS much longer than six months), the Healthcare ETS is no longer in effect. In its announcement, OSHA explained its reasoning for withdrawing most of the Healthcare ETS, stating that it "anticipated a final rule cannot be completed in a timeframe approaching the one contemplated by the OSH Act."

Are There Some Portions of the Healthcare ETS That Are Still in Effect?

While the majority of the Healthcare ETS has been withdrawn (or expired), OSHA does make clear in its announcement that the recordkeeping and reporting provisions of the ETS; i.e., 29 CFR 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r), remain in effect. OSHA explains that:

"These [recordkeeping and reporting] provisions were adopted under a separate provision of the OSH Act, Sec. 8, and OSHA found good cause to forgo notice-and-comment in light of the grave danger presented by the pandemic."

These are the provisions of the ETS that required employers to maintain a separate COVID-19 Log (i.e., the shadow log of all COVID-19 cases involving employees, regardless whether they are work-related), and the enhanced COVID-19 reporting provisions (i.e., reporting COVID-19 hospitalizations and deaths regardless how long after the work-related exposure they occur). Briefly, these provisions require covered healthcare employers to:

- Record on a COVID–19 Log each confirmed COVID-19 case involving an employee, regardless whether the

case is connected to an exposure at work, within 24 hours of learning the employee is COVID–19 positive. The COVID-19 Log must contain, for each instance, the employee's name, one form of contact information, occupation, location where the employee worked, the date of the employee's last day at the workplace, the date of the positive test or diagnosis, and the date the employee first had one or more COVID–19 symptom, if any were experienced. The COVID-19 Log must be maintained as a confidential employee record, but must be promptly produced in specific forms in response to requests from employees, authorized employee representatives, and OSHA.

- Report to OSHA:
  - Each work-related COVID–19 fatality within 8 hours of the employer learning about the fatality, even if the employee succumbs to the illness more than 30 days after the exposure that caused the illness.
  - Each work-related COVID–19 inpatient hospitalization within 24 hours of the employer learning about the inpatient hospitalization, even if the employee is admitted to the in-patient service of the hospital more than 24 hours after the exposure that caused the illness.

While those provisions remain mandatory and enforceable, we discuss in more detail below other now-withdrawn provisions of the ETS for which there may be good reasons to continue to comply.

What OSHA Enforcement Risks Do Healthcare Employers Still Face?

Despite withdrawing the majority of the Healthcare ETS, OSHA goes on to state that, given the rise of the Delta variant this Fall, and now the spread of the Omicron variant this Winter, as well as OSHA's anticipated future issuance of a permanent COVID-19 rule for healthcare, ***OSHA strongly encourages all healthcare employers to continue to implement the Healthcare ETS's requirements***. OSHA concludes with some signals about enforcement. It provides that:

> **"As OSHA works towards a permanent regulatory solution, *OSHA will vigorously enforce the general duty clause and its general standards*, including the Personal Protective Equipment (PPE) and Respiratory Protection Standards, to help protect healthcare employees from the hazard of COVID-19[,]" specifying that "[t]he Respiratory Protection Standard applies to personnel providing care to persons who are suspected or confirmed to have COVID-19."**

Importantly, the agency also states that it:

> ***"will accept compliance with the terms of the Healthcare ETS as satisfying employers' related obligations under the general duty clause, respiratory protection, and PPE standards*. Continued adherence to the terms of the [H]ealthcare ETS is the simplest way for employers in healthcare settings to protect their employees' health and ensure compliance with their OSH Act obligations. *OSHA believes the terms of the Healthcare ETS remain relevant in general duty cases in that they show that COVID-19 poses a hazard in the healthcare industry and that there are feasible means of abating the hazard*."**

Accordingly, healthcare employers are cautioned to continue complying with the terms of the Healthcare ETS, or risk citations under OSHA's general duty clause or other specific standards.

Although OSHA does not distinguish in its announcement, from a practical perspective, we think there are some now-withdrawn provisions of the Healthcare ETS that are more relevant to general duty clause enforcement than others. That is, healthcare employers should continue to substantially comply with the aspects of the Healthcare ETS that have a direct link to safety and health, but should not face regulatory risk by ceasing certain provisions that are more administrative in nature. For example, the Healthcare ETS included requirements for paid leave during medical removal for COVID-19 positive employees, including setting specific dollar amounts for those mandatory employee benefits. Paid leave is quintessentially a wage and hour issue, not an administrative or engineering safety control. The medical removal is the safety control, and healthcare employers should keep in place requirements to identify and remove from the workplace confirmed or suspected COVID-19 positive employees, but providing paid leave for those periods should now be optional; i.e., it is hard to see how OSHA could support a general duty clause citation for suspending that paid leave benefit, so long as the employer is continue to follow isolation and quarantine guidelines.

Do Healthcare Employers Also Have to Comply with OSHA's Vaccinate-or-Test ETS?

In addition to continuing to comply with many of the now-withdrawn provisions of the Healthcare ETS, as discussed above, healthcare employers should also immediately take steps to come into compliance with OSHA's Vaccination, Testing, and Face Coverings ETS. Although OSHA provides that the requirements of its the Vaccinate-or-Test ETS do not apply to "[s]ettings where any employee provides healthcare services or healthcare support services when subject to the requirements of §1910.502 [OSHA's Healthcare ETS,]" that exemption no longer applies since the Healthcare ETS is withdrawn.

OSHA was artful in crafting the wording of that exemption, anticipating that the Healthcare ETS would no longer apply, one way or another. Indeed, OSHA issued guidance on that very point (*see* snippet below), stating that "***if the Healthcare ETS is no longer in effect at any point while [the Vaccinate-or-Test] ETS is in effect, some employees working in settings covered under [OSHA's Healthcare ETS] may become covered by [the Vaccination ETS].***" Since the Healthcare ETS is no longer in effect (except for the recordkeeping and reporting provisions), that exemption is dead, and healthcare employers with 100+ employees are now covered by the Vaccinate-or-Test ETS.

In terms of compliance deadlines, for background, as you have probably heard, a nationwide Stay of OSHA's Vaccination ETS had been issued in November by the Fifth Circuit, but that Stay was lifted on December 17th by the Sixth Circuit. It is now in the hands of the Supreme Court. As soon as the Stay was lifted, the Dept. of Labor issued a news release indicating that it will move forward immediately to implement and enforce the Vaccination ETS, but at least provided a few additional weeks for employers to get into full compliance. **The key first date to have everything in place except for testing of unvaccinated workers, is January 10th, followed by implementation of the testing program by February 9th.** Here is a little summary of what is due by when:

Note, however, technically compliance is required NOW, it is just that OSHA makes clear that it will use its enforcement discretion to not cite companies for non-compliance between now and the new January/February deadlines ***if the employers can demonstrate they have been making good faith efforts to come into***

compliance. Accordingly, we strongly recommend companies continue or reinstitute their efforts to develop the programs required by the Vaccinate-or-Test ETS and move toward compliance.

What Does Withdrawal of the Healthcare ETS Mean For the Life of the Vaccinate-or-Test ETS?

If history is any indication, and OSHA's word is to be trusted, we expect the Vaccinate-or-Test ETS to run until May 5, 2022 – six months from the date the standard was published in the Federal Register (November 5, 2021). Just like it announced when it issued the Healthcare ETS, OSHA announced in November that "OSHA anticipates that the ETS will be in effect for six months from the date of publication in the Federal Register."

We do not believe that the phased-in implementation dates, the six-week long judicial Stay, or the new enforcement discretion deadlines affect the six-month period from publication in the Federal Register.

However, as discussed above, we believe now that OSHA believes it has the authority to leave an ETS in place beyond six months.

Indeed, just as we saw in its announcement withdrawing the Healthcare ETS, OSHA signals that it believes that it has the authority to do something other than that:

> **"We will continue to monitor trends in COVID-19 infections and deaths as more of the workforce and the general population become vaccinated and the pandemic continues to evolve. Where OSHA finds a grave danger from the virus no longer exists for the covered workforce (or some portion thereof), or new information indicates a change in measures is necessary to address the grave danger, OSHA will update the ETS, as appropriate."**

All of that is to say, if you have been budgeting for testing unvaccinated workers only through May 5, 2022, you might consider some contingency planning.

Please contact Eric Conn, Chair of CMC's OSHA Practice or any other member of our COVID-19 Task Force if you have any questions, or if we can help you come into compliance with OSHA's new emergency rule.