

CLIENT ALERT

OSHA Releases Highly Anticipated Safety Rule for Healthcare Employers and Updated Guidance for All Employers

June 14, 2021

On June 10, 2021, the Occupational Safety and Health Administration (“OSHA”) released a much-anticipated COVID-19 Emergency Temporary Standard (“ETS”) but limited to the protection of healthcare workers. Shortly after taking office in January 2021, President Biden had directed OSHA to review and determine whether such a standard was necessary to protect workers while continuing to safely re-open the economy. The June 10th release was OSHA’s response to this directive. Following an extensive scientific analysis, OSHA determined that an ETS focused on healthcare settings, where workers are more at risk of coming into contact with COVID-19, would be most impactful. Pivoting from its position in May 2020 that an ETS was not necessary, OSHA concluded that the current “patchwork of state and local regulations,” as well as its own enforcement under the General Duty Clause, were not adequate, and that healthcare workers “who form the backbone of the nation’s medical response” to the pandemic confront a “grave danger” from COVID-19 in the workplace necessitating the protections of the ETS.

At the same time, OSHA released updated COVID-19 guidance for other industries, aimed at protecting unvaccinated workers, with special emphasis on industries where prolonged close contact is inevitable, such as manufacturing, grocery, and high-volume retail settings. OSHA indicated that it will continue to work with the CDC and other federal partners to update industry-specific guidance going forward as the situation progresses.

Safety Rule for Health Care Employers

The ETS applies to workers who provide healthcare services, defined as services by professional healthcare practitioners (e.g., doctors, nurses, emergency medical personnel). It also applies to workers who provide healthcare support services, meaning services that facilitate the provision of healthcare services (e.g., patient intake/admission, patient food services, equipment and facility maintenance, medical equipment cleaning/reprocessing services). The rule becomes effective on the date it is published in the Federal Register, which is expected to happen shortly. The ETS is long and detailed—916 pages in all—but the most significant takeaways and deadlines for compliance follow below.

Within 14 days of the effective date, covered employers must:

- Develop and implement a COVID-19 plan that includes a workplace hazard assessment. Employers must seek input and involvement from workers and worker representatives in both the hazard assessment and plan development. For employers with more than 10 employees, this plan must be written.
- Monitor and limit entry access when workers are providing patient care, and screen patients, clients, and visitors for COVID-19 symptoms.
- Screen employees daily before each work day and shift. This may be conducted by asking employees to self-monitor before reporting to work.
- Provide employees with paid time off to get vaccinated and recover from any side effects.

- Provide and ensure workers wear face masks indoors and in a vehicle with other people. Workplaces must also provide and ensure employees use respirators and other personal protective equipment (“PPE”) to protect them from exposure to COVID-19 where necessary.
- Ensure that employees are separated from other people by at least 6 feet when indoors, unless the employer can demonstrate that separation is not feasible (e.g., when employees are providing hands-on medical care).
- Implement cleaning and disinfection practices in accordance with the CDC’s “COVID-19 Infection Prevention and Control Recommendations” and “Guidelines for Environmental Infection Control.”

Within 30 days of the effective date, covered employers must:

- Install cleanable or disposable solid barriers at each fixed work location outside of direct patient care areas (e.g., lobby, check-in desks) where each employee is not separated from all other people by at least 6 feet, unless the employer can demonstrate that it is not feasible to do so.
- Ensure that HVAC systems are used in accordance with manufacturer’s instructions and that filters are maintained to ensure proper ventilation.
- Train workers in a language they understand regarding COVID-19 policies and the ways in which the virus could be transmitted at work.

The ETS also provides that OSHA can cite employers for retaliating against any workers who voice concerns about unsafe working conditions related to COVID-19.

Significantly, the ETS exempts (i) pharmacists dispensing prescriptions in retail settings; (ii) healthcare support services not performed in a healthcare setting (e.g., off-site laundry or medical billing); (iii) employers performing healthcare services on an outpatient basis in a non-hospital setting, such as doctors’ offices, *if* non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter; and (iv) employers performing healthcare services on an outpatient basis in a hospital setting or home healthcare setting *if* (1) all employees are fully vaccinated, (2) non-employees are screened prior to entry, and (3) people with suspected or confirmed COVID-19 cases are not present. The ETS makes clear that these employers may still make reasonable accommodations for employees who cannot be vaccinated due to protected medical or religious reasons without compromising their exempt status. In other words, employers in these settings may avoid the requirements of the ETS if they require the employees to be vaccinated, while making exceptions where appropriate for employees with protected reasons for declining vaccination. This is consistent with the [EEOC’s latest guidance under the ADA and other federal EEO laws](#).

Updated OSHA Guidance for Employers Across All Industries

OSHA’s updated guidance, which applies to employers other than those covered by the ETS, focuses on protecting unvaccinated workers and those who are otherwise at-risk (e.g., those with underlying medical conditions that render them susceptible to COVID-19 regardless of vaccination status). OSHA expressly acknowledges the recent CDC guidance advising that most fully-vaccinated people can resume activities without wearing masks or physically distancing, except where required by applicable law. As such, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at risk, unless required by state or local law.

To protect unvaccinated and at-risk workers, OSHA recommends that employers take the following steps:

- Grant paid time off for employees to get vaccinated.
- Instruct workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for COVID-19, and all workers experiencing COVID-19 symptoms to stay home.
- Implement physical distancing for unvaccinated and otherwise at-risk workers in all communal work areas.
- Provide unvaccinated and otherwise at-risk workers with face coverings or other surgical masks. All workers should be supported if they chose to wear a face covering, regardless of vaccination status.
- Educate and train workers on COVID-19 policies and procedures in a language they understand.
- Suggest that unvaccinated customers, visitors, or guests wear face coverings, especially in public-facing workplaces such as retail establishments, if their unvaccinated or at-risk employees are likely to interact with these unvaccinated individuals.
- Perform routine cleaning and disinfection after an infected or confirmed case of COVID-19 in the workplace.

Employers must continue to follow other applicable mandatory OSHA standards and rules, including recording and reporting COVID-19 infections and deaths and prohibiting retaliation against workers who raise concerns regarding COVID-19 related hazards in the workplace.

In sum, employers in covered healthcare settings should take immediate steps to prepare to timely comply with the ETS. Employers in all other settings who have unvaccinated or at-risk workers should continue to implement health and safety measures to protect these individuals from COVID-19 hazards. Employers should also be mindful of state and local requirements and restrictions and continue to follow CDC guidance. Employers are also encouraged to consult with counsel with any questions regarding the legality of their policies and procedures in light of these recent developments.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies

Partner – Washington, D.C.
Phone: +1.202.624.2690
Email: tgies@crowell.com

Daniel W. Wolff

Partner – Washington, D.C.
Phone: +1.202.624.2621
Email: dwolff@crowell.com

Katie Erno

Counsel – Washington, D.C.
Phone: +1.202.624.2926
Email: kerno@crowell.com