

LEGAL UPDATES

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# OSHA Clarifies Healthcare Employer Obligations Regarding COVID-19 Hazard

On December 27, 2021, the Occupational Safety and Health Administration (OSHA) issued a Statement clarifying the status of the OSHA COVID-19 Healthcare Emergency Temporary Standard (Healthcare ETS) that was originally issued on June 21, 2021 and expired on December 21, 2021. The expiration of the Healthcare ETS without the issuance of a permanent standard caused uncertainty among healthcare employers regarding future compliance obligations and OSHA's enforcement intentions relating to COVID-19 hazards.

## Healthcare employer compliance obligations regarding COVID-19 hazard

According to OSHA's Statement, the Healthcare ETS is withdrawn, except for certain recordkeeping and reporting provisions, while OSHA continues to prepare a permanent standard to protect healthcare workers from infectious diseases, including COVID-19 hazards. In the interim, OSHA intends to enforce the General Duty Clause and its general standards, including the Personal Protective Equipment (PPE) and Respiratory Protection standards to help protect healthcare workers from COVID-19 hazards. OSHA's Statement indicated that compliance by healthcare employers with the terms of the expired Healthcare ETS will satisfy their obligations under the General Duty Clause, Respiratory Protection and PPE standards. OSHA anticipates that it will publish a notice in the Federal Register consistent with its Statement shortly.

## OSHA enforcement deadlines

OSHA's Statement advised that it intends to "vigorously enforce" the general duty clause and its general standards with respect to COVID-19 hazards. Employers should recall that the Healthcare ETS applied to all healthcare settings where an employee provides healthcare services or support services unless the workplace fell within an exception.

The Healthcare ETS differs from OSHA's ETS promulgated in November 2021 (Vaccination or Testing ETS), which applies to employers with 100 or more employees. The Healthcare ETS requires covered employers to take a host of different actions to protect employees, but it does not require vaccination. In contrast, the Vaccination or Testing ETS requires the vaccination or testing of employees.

OSHA announced in its FAQs that the compliance deadlines under the Vaccination or Testing ETS are as follows: January 10, 2022 for all requirements except testing, and February 9, 2022 for the testing requirement. The compliance deadlines for the Vaccination or Testing ETS are subject to the highly anticipated decision that will follow arguments at the U.S. Supreme Court on January 7, 2022.

### **What this means to you**

Healthcare employers should adopt the following compliance measures regarding COVID-19 hazards based on OSHA's December 27, 2021 Statement:

Determine whether the workplace was covered by the now-expired Healthcare ETS.

Employers covered by the expired Healthcare ETS with more than 10 employees, must continue to comply with the following recordkeeping requirements: 1) establish and maintain a COVID-19 log to record instances in which an employee is COVID-19 positive; 2) provide for examination and copying of individual COVID-19 log entries for a particular employee to that employee and to anyone with written authorized consent of that employee; 3) provide a redacted version of the COVID-19 log as specified under the recordkeeping provisions of 29 CFR section 1910.502(q)(3)(iii); 4) maintain all other records required under 29 CFR section 1910.502(q)(3)(iv), including work-related confirmed cases of COVID-19. All covered employers regardless of size must report COVID-19 fatalities and hospitalizations consistent with 29 CFR section 1910.502(r); and

For all employers covered by the Healthcare ETS, it makes sense to stay the course, at least for the time being. By complying with the expired Healthcare ETS, you can avoid potential or minimize potential liability under the General Duty Clause.

For healthcare employers with 100 or more employees that are subject to the Vaccination or Testing ETS, continue to monitor the legal challenge currently pending before the U.S. Supreme Court

regarding OSHA's Vaccination or Testing ETS, which will be decided on or after January 7, 2022 and be prepared to comply with the requirements of the Vaccination or Testing ETS by January 10, 2022 in the event the U.S. Supreme Court rules in favor of OSHA. Of course, healthcare employers should also be monitoring the status of the CMS rule mandating vaccination.

## **Contact us**

For additional guidance regarding strategies and compliance with various OSHA requirements related to COVID-19 hazards, contact Brittany Falkowski, Brian Hendrix or your Husch Blackwell attorney.

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## **Your comprehensive COVID-19 legal resource**

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.