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Client Alert: OSHA Issues New Standards for Protecting Employees in the Health Care Setting from COVID-19 in the Workplace

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On June 10, 2021, the Occupational Health and Safety Administration (OSHA) released its long awaited Emergency Temporary Standards (ETS) for COVID-19, establishing safety requirements for health care employers to control, prevent, and mitigate the spread of COVID-19 in the workplace. These standards are effective upon being published in the *Federal Register*, which is expected to occur in the very near future. A majority of the requirements must be implemented by health care employers within 15 days of publishing, although the standards applicable to physical barriers, training, and ventilation described below must be implemented within 30 days of publishing.

Application and Scope. ETS are *binding* on all employers nationwide where employees provide health care services or health care support services, subject to a handful of exemptions and exceptions. Health care services are very broadly defined to include health care provided in almost every setting comprised of, but not limited to, doctor's offices, dental offices, hospitals, long-term care, home health, and hospice. Likewise, support services include services that require direct patient contact, but also ones such as billing. A Workplace is defined to include fixed or mobile locations and includes indoor and outdoor areas, where any work or work-related activity takes place, such as breakrooms, elevators, and hallways.

ETS do not apply to:

- Employees providing first aid if the employee is not a licensed health care provider;
- The dispensing of prescriptions by pharmacies in retail settings;
- Telehealth services performed outside of a setting where direct patient care is provided; and
- Settings in which the support functions are not performed in the health care setting, such as offsite medical billing or laundry.

Certain health care employers can exempt themselves from ETS if they screen all non-employees prior to entry and do not permit people with suspected or confirmed COVID-19 to enter. "Screening" is defined as asking questions to determine if a person has symptoms of or is positive for COVID-19. The types of employers who can take advantage of this exemption are:

- Non-hospital ambulatory care settings, such as physician offices; or
- "Well-defined hospital ambulatory care settings" and home health care settings where all employees are fully vaccinated.

Additionally, a health care employer can be exempted from the requirements to provide personal protective equipment (PPE), ensure physical distancing, and provide physical barriers in "well-defined areas" where all employees are fully vaccinated and there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present. However, the employer must still comply with all of the remaining requirements described below.

The ETS exemptions above, that require all employees to be vaccinated, permit the employer to qualify for the exemption even if there are employees who are unable to be vaccinated for health or religious reasons and to whom the employer has provided accommodations to work in a setting where the employee is not exposed (e.g., telehealth or isolation). There is, however, no mention as to COVID-19 vaccination accommodations that have been provided to pregnant employees.

When emergency responders and health care providers enter non-health care settings to provide health care service, ETS apply only to health care services provided by that employee.

If an employer maintains a health care operation within a non-health care setting, such as a walk-in clinic in a manufacturing facility or a retail environment, the rules only apply to the health care setting and not the remainder of the location.

Requirements:

A Plan. OSHA's new standards require health care employers who are not exempt or excepted to develop, monitor, and update as needed a COVID-19 plan for each workplace. If the employer has multiple workplaces, it can develop the plans by type, including the site-specific requirements in each plan. Employers who have more than 10 employees must have a written plan. The employer must seek input from non-managerial employees in developing the plan. In the written plan, employers must designate and identify safety coordinator(s) to implement and monitor the plan. The coordinator(s) must be knowledgeable in infection control principles and practices in the workplace and have authority to ensure compliance.

The employer must conduct a workplace specific assessment to identify the COVID-19 hazards. The plan must include policies and procedures to address and minimize the risk of transmission of COVID-19 for each employee, although the plan need not address each employee individually. Further if the employer wishes to designate well-defined areas where all employees are vaccinated and there is no reasonable expectation that persons with suspected or confirmed COVID-19 can enter in order to be exempt from certain of the requirements below, the employer must include policies and procedures for determining employees' vaccination status. If the employer shares a physical location with another employer (other than delivery employers), the employers must communicate and coordinate their respective plans and notify each other if the employees are exposed to conditions that do not meet ETS requirements. Finally, if the employer has employees who go into non-OSHA covered environments (like homes) there must be a procedure for employees to exit if the protections in that setting are not adequate.

Patient Screening and Monitoring. In settings where direct care is provided – “face-to-face, hands-on” – contact for the purpose of treatment, diagnosis, and monitoring, the employer must:

- Limit and monitor patients at the point of entry (inapplicable to emergency responders and licensed health care providers who enter non-health care settings to provide health care service);
- Screen and triage all clients, patients, residents, delivery people, and other visitors and non-employees entering the setting; and
- Implement patient management strategies consistent with the Centers for Disease Control and Prevention’s (CDC) COVID-19 Infection Prevention and Control Recommendations.
- Employers are encouraged to use telehealth where possible.

Standard and Transmission-Based Precautions. Employers must develop and implement policies and procedures to adhere to Standard and Transmission-Based Precautions in accordance with the CDC’s “Guidelines for Isolation Procedures.”

Personal Protective Equipment. Employers must provide enough medical procedure masks (surgical, dental, or isolation masks) that are Food and Drug Administration (FDA) cleared, authorized by an FDA Emergency Use Authorization (EUA) or offered and distributed as described in an FDA enforcement policy so that employees can change at least once a day or more often as needed, or when soiled or damaged. Employers must ensure the mask is worn over the nose and mouth when indoors or in a vehicle. The following exceptions apply:

- Employee is alone in a room;
- Eating and drinking, provided each employee is six feet away from any other person or separated by a barrier;
- Employees are wearing a respirator;
- It is important to see a person’s mouth (communicating with a person hard of hearing) and the person cannot wear a clear facemask. In this case the employer must ensure the employee is wearing alternative protection, such as a face shield certified to ANSI/ISEA Z 87 standards, that covers the eyes, nose, and mouth, wraps around the sides of the face, and extends below the chin;
- When an employee cannot wear a face mask due to a medical necessity, or medical condition or disability, including persons who cannot remove a face mask independently. In this case the employer must ensure the employee wears a face shield if conditions permit it;
- Religious exceptions under Title VII of the Civil Rights Act;
- Wearing a facemask presents a hazard of serious injury or death to the employee, in which case employer must ensure the employee wears a face shield if conditions permit; any employee not wearing a face mask must stay six feet away from any other persons if feasible.

Face shields must be cleaned daily and not damaged.

Employers must provide respirators certified by the National Institute for Occupational Safety and Health (NIOSH) or authorized by the FDA under an EUA, gloves, an isolation gown, and eye protection for employees who may be exposed to people with suspected or confirmed COVID-19 or when engaged in aerosol generating procedures. For situations involving both a person with confirmed or suspected COVID-19 and an aerosol procedure, the employer is encouraged to use elastomeric respirators or PARS. Aerosol generating procedures are ones in which the procedure generates aerosols that can be infectious and are of respirable size. Employers may provide respirators in lieu of a face mask and must permit the employee to use his own respirator instead of a face mask.

The employers must provide respirators and other PPE in adherence with the Guidance for Standard and

Transmission-Based Precautions in the CDC's "Guidelines for Isolation Precautions" in health care settings.

Aerosol Generating Procedures on COVID Patients (suspected or confirmed). In addition to the above PPE requirements that apply when performing aerosol generating procedures, employers must limit the number of employees present during the procedure to essential employees, ensure the procedure is performed in an airborne infection isolation room (AIIR), if available, and after the procedure is completed clean and disinfect the room and the equipment.

Physical Distancing. Employers must ensure that employees are separated from all other people at least six feet indoors except when not feasible for a specific activity or when people are in movement, such as passing in hallways. When it is not feasible to maintain the six feet, the employer must ensure distancing as far apart as feasible. This can be accomplished with telehealth, telework, and reducing the number of people in the office or on break at a given time.

Physical Barriers. Employers must install cleanable or disposable barriers in work locations outside of patient care areas or resident's rooms (such as front desks, check in, etc.). The barriers must be high enough to block face-to-face pathways, but can have a pass through space at the bottom. Employers have until 30 days from publication in the *Federal Register* to comply.

Cleaning and Disinfection. Employers must clean and disinfect all patient care areas, resident rooms, medical devices, and equipment in accordance with CDC's "COVID-19 Infection Preventions and Control Recommendations" and "Guidelines for Environmental Infection Control." In all other areas, the employer must clean high touch surfaces and equipment at least once a day. If a person who is COVID-19 positive has been in the workplace within the last 24 hours, the employer must clean and disinfect all areas, materials, and equipment that have likely been contaminated in accordance with CDC's "Cleaning and Disinfecting Guidance." Employers must provide alcohol based hand rub that is at least 60 percent alcohol or provide readily available handwashing facilities.

Ventilation. Employers who own or control buildings with existing HVAC must ensure that the system is being used in accordance with manufacturer's instructions and design specifications, that the amount of the outside air being circulated, and number of air changes, is maximized. Air filters must be rated MERV 13 or higher, if compatible, and if not, employers must use filters with the highest compatible filtering efficiency. Employers must maintain and replace filters and clean intake ports. If an employer has an AIIR, the employer must maintain and operate it in accordance with design and construction criteria. Employers have until 30 days from publication in the *Federal Register* to comply.

Health Screening and Notice of Exposure. Employers must screen every employee before each workday and each shift. This screening can be accomplished by having employees self monitor before reporting to work or in person by the employer. Employers must also require employees to promptly notify the employer when: the employee has tested positive for or been diagnosed with COVID-19; has been told by a licensed health care provider that the employee is suspected to have COVID-19; experiences a recent loss of sense of taste or smell; or is experiencing a fever of greater than 100.4 degrees and a new unexplained cough associated with shortness of breath.

If an employer is notified that a person (employee, patient, vendor, delivery person, etc.) who has been in the workplace has tested positive for or been diagnosed with COVID-19, the employer must within twenty-four (24) hours:

- Notify each employee who was not wearing a respirator and was in close contact with the person. The notice must state that the person was in close contact with someone who was COVID-19 positive and

- provide the date the contact occurred;
- Notify all other employees who were not wearing respirators who work in the well-defined portion of the workplace (same floor, for example) in which the COVID-19 positive person was present during the potential transmission period (two days prior to symptoms or two days prior to specimen collection if asymptomatic until the person was isolated). The notice must identify the date(s) the COVID-19 positive person was in the workplace;
- Notify other employers whose employees were not wearing respirators and were either present in the well-defined portion of the workplace (same floor) or were in close contact with the COVID-19 positive person during the potential transmission period. The notice must identify date(s) and location(s) the COVID-19 positive person was in the workplace.

The notice requirements are not triggered by the presence of a COVID-19 positive patient in a workplace where services are normally provided to suspected or confirmed COVID-19 patients (emergency room, testing sites, etc.). Employers are prohibited from including any employee's name, contact information, or occupation in a notice required by ETS.

Quarantining. If an employer is notified that an employee has tested positive for COVID-19 or been diagnosed with COVID-19 by a licensed health care provider, the employer must immediately remove the employee from the workplace. The employee may only return the employee to the workplace in accordance with the guidance of a licensed health care provider or the [CDC's Isolation Guidance](#) and [Return to Work Healthcare Guidance](#)

If an employer is notified that an employee has been told by a licensed health care provider that the employee is suspected to have COVID-19; experiences a recent loss of sense of taste or smell; or is experiencing a fever of greater than 100.4 degrees and a new unexplained cough associated with shortness of breath, the employer must immediately remove the employee from the workplace. The employee may return the employee to the workplace either:

- In accordance with the guidance of a licensed health care provider or the [CDC's Isolation Guidance](#) and [Return to Work Healthcare Guidance](#) ; or
- By providing the employee with a polymerase chain reaction (PCR) COVID-19 test at no cost. If the results are negative, the employee can return to work. If the results are positive or the employee refuses to take the test, the employee must remain out of the workplace until the conditions in the above bullet point are met.

Employers must also remove from the workplace each employee who was not wearing a respirator and was in close contact with a COVID-19 positive person in the workplace, unless the employee: is fully vaccinated or had COVID-19 within the last three months; and is not experiencing a fever of greater than 100.4 degrees or a new unexplained cough associated with shortness of breath. Employees removed because of close contact may be returned to the workplace:

- 14 days after removal;
- In accordance with the guidance of a licensed health care provider or the [CDC's Isolation Guidance](#) and [Return to Work Healthcare Guidance](#); or
- By providing the employee with a PCR COVID-19 test at no cost. If the results are negative, the employee can return to work. If the results are positive or the employee refuses to take the test, the employee must remain out of the workplace until the conditions in the above bullet points are met.

The employer can require that any employee removed from the workplace work remotely or in isolation if suitable work is available. During the period of remote or isolation work, the employer must continue to pay

the employee their same regular pay and benefits.

When an employee is able to return to the workplace, they are entitled to be returned to their former job status with all rights and benefits, as if they had not been removed.

Medical Removal Protection Benefits. Employers with 11 or more employees as of the date the ETS is published in the *Federal Register* must provide Medical Removal Protection Benefits to employees removed from the workplace until they return to the workplace as follows:

- The employer must continue to provide the employee benefits to which the employee is normally entitled;
- For employers with 500 or more employees, the employer must pay the employee the same regular pay the employee would have received had the employee not been absent up to a maximum of \$1,400 per week; and
- for employers with fewer than 500 employees, the employer must pay the employee the same regular pay the employee would have received had the employee not been absent up to a maximum of \$1,400 per week for the first two weeks and thereafter only two-thirds of the same regular pay, but capped at \$200 per day.

The employer's obligation to continue an employee's regular pay is reduced by the amount of compensation that the employee receives from any other source, such as a publicly or employer funded program (paid sick leave, administrative leave, etc.). Further, as to employees that the employer has the option to provide a PCR test at no cost to the employer in order to avoid quarantine, if the employee refuses the PCR test then the employee is not entitled to the above Medical Removal Protection Benefits.

Training. An employer must ensure each employee receives training in a language the employee understands, so that the employee comprehends at least the 12 topics set forth in section (n) of the ETS. These topics, include but are not limited to, employer-specific policies and procedures concerning COVID-19 governing patient screening and management; preventing the spread of COVID-19; PPE; cleaning and disinfection; health screening and medical management; multi-employer workplace agreements as to COVID-19 safety; and available sick leave policies, COVID-19 benefits under applicable state and federal law and supportive policies (telework, flexible hours, etc.). An employer may rely on training completed prior to the effective date of the ETS to the extent it covered all topics set forth in section (n). However, an employer must ensure each employee receives additional training whenever changes occur that affect the employee's risk of contracting COVID-19. The training must include the opportunity for interactive questions and be provided by someone knowledgeable as to the covered subjects. Employers have until 30 days from publication in the *Federal Register* to train all employees.

Vaccination. An employer must support COVID-19 vaccination for each employee by providing reasonable time and paid leave to each employee for vaccination and any side effects experienced following vaccination.

Anti-retaliation. An employer must inform each employee that they have a right to the protections required by the ETS and that the employer is prohibited from discharging or discriminating against an employee for exercising their right to the protections required by the ETS or for engaging in actions required by the ETS. Further, the ETS prohibits employers from retaliating against any employee removed from the workplace pursuant to the ETS.

Recordkeeping. Employers with 10 or fewer employees are not required to comply with the ETS's recordkeeping requirement.

Employers with more than 10 employees must: retain all versions of the COVID-19 plan implemented to comply with the ETS; and establish and maintain a COVID-19 Log to record each instance identified by the employer in which an employee is COVID-19 positive, *regardless* of whether the instance is connected to exposure to COVID-19 at work.

The COVID-19 Log must contain, for each instance, the employee's name; one form of contact information; the employee's 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 of COVID-19; and the date the employee first had one or more COVID-19 symptoms, if any were experienced. The COVID-19 Log must be recorded within 24 hours of the employer learning that the employee is COVID-19 positive and must be maintained as though it is a confidential medical record and must not be disclosed except as required by the ETS or other federal law.

The COVID-19 Log is intended to assist employers with tracking and evaluating instances of employees who are COVID-19 positive without regard to whether those employees were infected at work. The tracking will help to evaluate potential workplace exposures to other employees.

Employers must make available, for examination or copying, all versions of its written COVID-19 plans to any employees, their personal representatives, and their authorized representatives by the end of the next business day following a request.

With regard to the COVID-19 Log, employers must provide an individual employee access to their particular COVID-19 Log entry, not the entire COVID-19 Log, by the end of the next business day following a request. Employers must also provide a redacted version of the COVID-19 Log that removes the names of employees; their contact information; and their occupations, to any employees, their personal representatives, and their authorized representatives by the end of the next business day following a request.

Reporting COVID-19 Fatalities and Hospitalizations to OSHA. Employers must report to OSHA; each work-related COVID-19 fatality within eight (8) hours of the employer's learning about the fatality; and each work-related COVID-19 in-patient hospitalization within twenty-four (24) hours. Reports must follow the requirements of 29 CFR part 1904.39, except for 29 CFR 1904.39(a)(1) and (2) and (b)(6).

What if employers fail to comply? Employers who fail to comply with OSHA's new ETS potentially face the threat of random, future inspections by OSHA along with fines that may result from these inspections. In its previously released COVID-19 National Emphasis Program (NEP), OSHA identified a list of industries that will be the primary focus of these on-site inspections, which included health care providers. Further, OSHA has been tasked with increasing its number of on-site inspections in 2021 to four times the amount that were conducted in 2020.

Additionally, it is important to note, OSHA's ETS contains an explicit anti-discrimination provision prohibiting employers from discharging or discriminating against employees exercising their rights under the ETS, voluntarily wearing their own PPE, or raising a "reasonable concern about infection control related to COVID-19." This means that if an employee complains about or reports an employer's workplace is unsafe or non-compliant, an employer should not retaliate against an employee.

Health care employers need to start preparing as soon as possible to comply with the ETS. A majority of the requirements will become effective 15 days after the ETS is published in the *Federal Register*, with the remaining requirements becoming effective 30 days after publishing. If you have any questions or need assistance in complying please contact Shumaker's, Health Care or Employment Law Groups.