

OSHA and COVID-19: Nationwide Emergency Temporary Standard

OSHA issued its long-awaited Emergency Temporary Standard on COVID-19 in the workplace last week. It will become effective on June 21, 2021, when it is scheduled to be published in the Federal Register.

KEY POINTS ABOUT THE ETS

The **first point** about the new ETS is that it is limited to healthcare settings. That means non-covered employers will continue to be governed by the General Duty Clause of the OSH Act when it comes to COVID workplace safety (but see below about potential surprises). As a practical matter, given how OSHA has handled COVID for the past year, that means by industry standards as provided largely by the CDC and similar agencies. However in issuing the new healthcare ETS, OSHA promised to provide new guidance for non-healthcare settings.

The **second point** about the ETS is that it is voluminous and complex—or at least the materials surrounding it are. The preamble to the ETS is some 253 pages in the Federal Register. The regulatory text is eight pages in the Federal Register, but the regulation incorporates more than 700 page of additional materials (not in the 253-page preamble), which are guidance documents from the Centers for Disease Control (CDC), the Environmental Protection Agency (EPA), the American National Standards Institute (ANSI), and the International Safety Equipment Association (ISEA) (see list of incorporated materials, linked below).

The **third point** is about those 700 or so pages of additional incorporated materials. These documents were issued by the CDC, EPA, and ANSI/ISEA principally as “evidence-based guidelines” or “consensus standards” that often are framed in non-mandatory language. However, OSHA is incorporating them as mandatory rules “where the provisions into which they are incorporated are mandatory,” and “OSHA will be able to cite employers who do not follow them” (quotations are from OSHA’s Preamble to the Regulatory Text).

Fourth, the question of who is covered by the ETS is not intuitive, and there may be some surprises. For instance, not all doctor’s offices or hospital units are covered, while some “non-healthcare” employers may be partially covered. For instance, a manufacturing facility or a private college with an infirmary could find itself under the ETS, but only for the facilities that provide healthcare services (see coverage flow chart, linked below).

The **fifth point** is that the ETS stands a pretty good chance of being challenged in court. OSHA has issued an ETS only six times in its history, the last one being almost forty years ago, and only one of the six survived a court challenge. The fact that it applies only to healthcare may dampen the zeal for a court challenge, but the extensive nature of the requirements and accompanying materials may add back some of that zeal.

THE BASICS OF THE NEW ETS

The basic requirements of the new COVID Healthcare ETS are outlined below. A covered employer must address these areas for their workplaces and must comply with the specific requirements of the ETS in these areas:

- Written COVID-19 Plan for the workplace
- Patient screening and management for COVID
- Employee screening and management for COVID
- Standard and Transmission-Based Precautions
- Personal protective equipment (facemasks, face shields, respirators, other)
- Aerosol-generating procedures for persons with COVID
- Physical distancing of all persons in the workplace
- Physical barriers between persons
- Cleaning and disinfection daily or more frequently
- Ventilation/HVAC Program
- Paid leave for vaccinations and adverse reactions
- Paid leave and benefits for employees “medically removed”
- Training on COVID programs and procedures
- Recordkeeping and Reporting (including separate COVID Log)
- Mini-Respiratory Protection Program
- Employee Rights, Notification, Anti-Retaliation

EXPLANATIONS AND OFFICIAL GUIDANCE

OSHA has issued extensive supporting materials to help distill the volume and complexity, and we have listed some of the key materials below, with embedded links. Other materials are available at the cited webpage.

- [OSHA Summary of the COVID Healthcare ETS](#)
- [OSHA Flow Chart for Determining Coverage of the ETS](#)
- [OSHA Webpage on COVID Emergency Temporary Standard](#)
- [OSHA ETS Preamble and Regulatory Text \(Combined\)](#)
- [List of Materials Incorporated into the ETS \(with links\)](#)
- [OSHA FAQ on the COVID Healthcare ETS](#)