Special Report

Permanent Healthcare COVID-19 Standard Update: OSHA Sets Hearing Date on Deviations to Proposed Rule

By Catherine A. Cano &

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Meet the Authors

Catherine A. Cano

Principal
(402) 391-1991
Catherine.Cano@jacksonlewis.com

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Occupational Safety and Health Administration (OSHA) has partially reopened the record on the rulemaking for the permanent healthcare COVID-19 standard, known as the rule on "Occupational Exposure to COVID-19 in Healthcare Settings" (docket number OSHA-2020-0004). While the proposal generally tracks the agency's expired 2021 healthcare emergency temporary rule (ETS), it also potentially departs from the ETS in some areas.

Comments on the proposal are due by April 22, 2022. An online public hearing will be held on April 27, 2022. Individuals interested in testifying must submit their notice of intention to appear by April 6, 2022.

Background

OSHA first published the healthcare ETS on June 21, 2021. The Occupational Safety and Health Act of 1970 requires that, after six months, OSHA supersede an emergency temporary rule with a permanent rule. OSHA was unable to do this by the December deadline. Instead, OSHA withdrew most of the ETS, but left it in effect as a notice of proposed rulemaking.

On January 5, 2022, National Nurses United and several other unions filed an Emergency Petition for a Writ of Mandamus in the U.S. Court of Appeals for the D.C. Circuit to compel OSHA to issue a permanent standard for healthcare occupational exposure to COVID-19 and to retain and enforce the healthcare ETS.

When OSHA first published the healthcare ETS, it received only 481 comments. That comment period ran out before the COVID-19 Delta and Omicron variants emerged. Since that time, the vaccination rate among healthcare employees has increased due to state, Centers for Medicare & Medicaid Services, and employer vaccine mandates. Further, data and knowledge about the virus continue to develop.

Now, OSHA is soliciting information, studies, and feedback on a number of issues on which it is considering deviating from language in its proposal. OSHA also is encouraging commenters to explain their preference, or not, for particular policy choices.

Information Requests in Comments

Some areas in which OSHA is soliciting information for its proposal are:

1. Alignment with Centers for Disease Control and Prevention (CDC) Guidance.

OSHA is considering whether it is appropriate to align its final rule with some or all of the CDC's latest recommendations.

2. More flexibility for employers.

OSHA is considering restating various healthcare ETS provisions as broader requirements. OSHA provides as examples, how employers must implement particular policies and procedures (such as criteria for medical removal and return to work, cleaning, ventilation, barriers, aerosol-generating procedures) and a "safe harbor" enforcement policy for employers who are in compliance with CDC guidance applicable during the period at issue.

3. Removal of scope exemptions.

The healthcare ETS had exempted employers in certain circumstances (*e.g.,* ambulatory care facilities where COVID-19 patients are screened out and home healthcare). OSHA is considering whether to cover employers regardless of screening procedures for non-employees or vaccination status of employees to ensure all workers are protected to the extent there is a significant risk. This is because rulemaking under section 6(b) of the Act requires a finding of significant risk from exposure to COVID-19, rather than the finding of grave danger OSHA made in issuing the healthcare ETS under Section 6(c) of the Act.

4. Tailoring controls to address interactions with people with suspected or confirmed COVID-19.

This could eliminate certain requirements that were in the healthcare ETS and that applied to all areas of covered healthcare settings. For example, OSHA could consider imposing cleaning requirements or medical removal provisions only with respect to staff exposed to COVID-19 patients. It also could consider eliminating facemask requirements for staff not exposed to COVID-19 patients. However, OSHA also could consider adding a provision on necessary mitigation measures when there is an outbreak, and it is soliciting feedback on how to define an outbreak.

5. Vaccination.

OSHA is not considering a mandatory vaccination requirement for the final rule. While the agency is not planning to change the definition of "fully vaccinated" to include booster shots, OSHA is considering aligning with the Advisory Committee on Immunization Practices and the CDC, which are using the phrase "up to date" to describe vaccination recommendations beyond the primary vaccination series.

OSHA is also considering a requirement that employers pay employees up to four hours, including travel time, to receive a vaccine, as well as paid sick leave to recover from side effects. It is unclear what this can cost healthcare employers given the current vaccine rates among healthcare employees and recommendations around a second booster.

OSHA is considering relaxing requirements for employees who are vaccinated as follows:

- For masking, barriers, or physical distancing for vaccinated workers in all areas of healthcare settings, not just where there is no reasonable expectation that someone with suspected or confirmed COVID-19 will be present.
- In healthcare settings where a high percentage of staff is vaccinated (OSHA also is accepting comment on what that percentage should be).
- For exposure notification for vaccinated employees.

6. Limited coverage of construction activities in healthcare settings.

The healthcare ETS did not expressly include employers that engage in construction work in covered healthcare settings. However, OSHA is considering the same treatment of employees performing construction work as maintenance or custodial workers in the same facility. OSHA notes that it could consider exceptions for construction work in spaces where construction employees would not be exposed to patients or other staff.

7. COVID-19 recordkeeping and reporting provisions.

Covered healthcare employers are required to maintain a log of every instance in which an employee is COVID-19 positive, regardless of where the employee was infected. In addition, employers must report work-related COVID-19 fatalities and hospitalizations, even if the incidents fall outside the standard reporting time periods.

OSHA is soliciting input on whether it should amend these requirements in light of experiences involving the COVID-19 Delta or Omicron variants. OSHA also intends to cap the retention period for the COVID-19 log to one year from the date of the last entry on the log, rather than for the life of the standard.

8. Triggering requirements based on community transmission levels.

The healthcare ETS requires specific control strategies, such as personal protective equipment, when employees treat people with suspected or confirmed COVID-19. OSHA is considering tying control strategies to the level of community transmission of COVID-19. For example, this could mean that heighted precautions would be triggered only when a community is in high or substantial transmission levels. OSHA also seeks input on that approach, including potential impacts on compliance and enforcement.

9. The potential evolution of the SARS-CoV-2 virus into a second novel strain.

OSHA acknowledges that a future variant of SARS-CoV-2 could evolve and be designated another novel coronavirus strain, while resulting in a disease similar to the current illness. Thus, it is considering extending the final standard to subsequent related strains of the virus that pose similar risks and are transmitted through aerosols. OSHA invites input on this approach, as well as alternatives.

10. The health effects and risk of COVID-19 since the healthcare ETS was issued.

OSHA is interested in data related to the Delta and Omicron variants since August 2021. It requests data on the following:

- The average number of days healthcare workers have taken away from work resulting from a COVID-19 infection or quarantine and the percentage of healthcare workers who have taken days away from work due to a COVID-19 infection or quarantine;
- The health effects for fully vaccinated employees and fully vaccinated and boosted employees who tested positive for COVID-19, including days away from work, hospitalizations, long COVID (characterized by long-term consequences persisting or appearing after typical convalescence period of COVID-19) and fatalities;
- The percentage of healthcare workers who are at elevate risk of severe COVID-19

infections;

- The rate of infection, long COVID, hospitalization, and death among healthcare workers compared to the general public; and
- The health effects and transmission rate of other variants, including Omicron BA.2.

OSHA also requests data and information related to vaccination:

- The vaccination rate of healthcare workers, including the rate of healthcare workers who are fully vaccinated and boosted;
- The clinical indicators that will reliably predict the degree and duration of protection afforded by prior infection;
- Vaccine efficacy and how such efficacy decreases over time;
- The appropriate interval of additional vaccine doses and booster doses; and
- Unintended consequences, such as decreases in staffing retention, or other impacts, such as increases in staffing retention, due to the alternatives in the healthcare ETS.

In addition, OSHA is rethinking how it defines affected employees, affected industries, and associated cost estimate (considering telework). As an example, the healthcare ETS had excluded workers in the 65-74 age group.

Finally, OSHA is considering using all sources of data on which it relied in the healthcare ETS and the Vaccine-or-Test emergency temporary standard, as well new data sources. Sources may include, for example:

- CDC Daily Tracker: Daily Tracker Home
- Demographic Trends of COVID-19 cases and deaths in the U.S. reported to CDC
- Rates of COVID-19 Cases and Deaths by Vaccination Status
- Rates of laboratory-confirmed COVID-19 hospitalizations by vaccination status

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OSHA cautions employers that, until there is a permanent standard, healthcare employers should continue to comply with the terms of the healthcare ETS. OSHA is currently in the midst of a three-month blitz of follow-up inspections in the healthcare industry. Employers who are following the healthcare COVID-19 ETS will have a safe harbor from citations under the general duty clause, respirator, and recordkeeping standards.

If you have questions or need assistance with drafting and submitting comments for the healthcare COVID-19 rulemaking or any other OSHA matters, please reach out to the Jackson Lewis attorney with whom you regularly work or any member of our Workplace Safety and Health Practice Group.