

# OSHA ETS: What Health Care Providers Need to Know

*Amundsen Davis Labor & Employment Alert*  
June 18, 2021

On June 10, 2021 OSHA issued its COVID-19 Emergency Temporary Standard (ETS) for the health care industry, along with general guidance for all other employers, which we already touched on in a previous post. However, there remains a lot to unpack, as there are many unanswered questions, especially for the health care field. Below we dig a bit deeper into the ETS and its practical implications for health care providers.

**Are you covered?** The first question—and it is not as clear cut as it may seem—is whether the ETS applies to your business. OSHA has issued a flowchart to attempt to answer this question. However, it still remains murky for some. Generally, the ETS applies to settings where coronavirus patients are treated (including hospitals, nursing homes and assisted living facilities) and covers “all settings where any employee provides health care services or health care support services.” These are defined as:

- **Health care services** are services that are provided to individuals by professional health care practitioners (doctors, nurses, emergency medical personnel, oral health professionals) for the purpose of promoting, maintaining, monitoring, or restoring health, and are delivered through various means including hospitalization, long-term care, ambulatory care, home health and hospice care, emergency medical response, and patient transport.
- **Health care support services** are services that facilitate the provision of health care services, which include patient intake/admission, patient food services, equipment and facility maintenance, housekeeping services, health care laundry services, medical waste handling services, and medical equipment cleaning/reprocessing.

The ETS contains several exemptions to its coverage, and it does not apply to:

1. the dispensing of prescriptions by pharmacists in retail settings;
2. non-hospital ambulatory care settings (outpatient settings such as doctor’s offices) where all non-employees are screened before entering and people with suspected or confirmed COVID-19 are not allowed to enter;
3. well-defined hospital ambulatory care settings and home health care settings where all employees are fully vaccinated, all non-employees are screened prior to entry, and people with suspected or confirmed COVID-19 are not

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- permitted to enter those settings or are not present;
4. health care support services not performed in a health care setting (off-site services); and
  5. telehealth services performed outside of a setting where direct patient care occurs.

Moreover, in certain situations, such as where a health care setting is embedded with a non-health care provider (such as a medical clinic in a manufacturing facility), the ETS applies only to the embedded health care setting and not the other parts of the facility.

Also, in well-defined areas in a health care setting where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present the ETS provisions for PPE, physical distancing, and physical barriers do not apply to fully vaccinated employees. To meet this exception, the COVID-19 plan for the employer must include policies and procedures to determine employee vaccination status.

**ETS Mandates.** If you are an entity covered by the ETS, then what exactly does it require of you? The main requirements are what you have likely had in place throughout the pandemic:

- Development of a COVID-19 plan. This applies to all covered employers with 10 or more employees.
- Provide PPE and ensure employees properly wear facemasks that meet OSHA standards when physical distancing is not possible.
- Cleaning, disinfecting, installing barriers and maintaining social distancing.
- Follow general screening and management practices for COVID-19.
- Record Keeping/Reporting. Employers must retain all versions of their COVID-19 plan, log and record each instance an employee is COVID-19 positive whether or not the infection was at work, report each work-related COVID-19 fatality and in-patient hospitalization within 24 hours.
- Vaccination PTO. Employers must provide reasonable time and paid leave for employees to receive COVID-19 vaccinations and recover from any side effects. OSHA defines “reasonable time” as four hours of paid leave for each dose, and 8 hours of leave for any side effects of the dose.
- Training on the basics of COVID-19 and employer and workplace specific policies on all other ETS requirements, such as screening, cleaning, and sick leave policies.

**Medical Removal Protection (MRP) Benefits.** Employers with more than 10 employees must provide paid leave to employees if the employee is removed from the workplace under the ETS – basically if the employee is unable to work due to COVID-19 or COVID-19 exposure, regardless of whether the employee was exposed at work or outside the workplace.

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- For employers with more than 10 but fewer than 500 employees, the employee is entitled to their regular rate of pay, up to \$1,400 per week for the first two weeks. Beginning in the third week, if the removal continues that long, then the employee shall receive two-thirds the rate of their regular pay, up to \$200 a day.
- For employers with 500 or more employees, the employer must pay up to the \$1400 cap each week during the entire period of removal, until the employee meets the return to work criteria, which must be made in accordance with guidance from a licensed health care provider or applicable guidance from the CDC.
- For all employers with more than 10 employees they must continue to provide the benefits to which the employee is normally entitled.
- The employer is not required to provide overtime pay, even if the employee had regularly worked overtime hours in recent weeks.
- The employer may reduce the amount paid to the removed employee by compensation the employee receives for lost earnings from any other source, such as employer-paid sick leave or other PTO.
- For employers with fewer than 500 employees, tax credits are available under the American Rescue Plan for voluntarily provided COVID-19 sick leave through September 30, 2021.

**Implementation Timeline.** Covered employers must comply with most provisions of the standard within 14 days of publishing, and with the provisions regarding physical barriers, ventilation, and training within 30 days. OSHA states it will use its enforcement discretion to avoid citing employers who are making a good faith effort to comply with the ETS. However, OSHA has made no secret it is overall increasing its enforcement, and is encouraging more in-person inspections. Employers who believe they may be subject to the ETS should review it carefully and consult with experienced employment counsel regarding their obligations under the ETS.

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