



OSHA Emergency Temporary Standard

Provider Scope

The Occupational Safety and Health Administration's ("OSHA") COVID-19 Health Emergency Temporary Standard ("ETS") became effective when published in the Federal Register on June 21, 2021 issuing new workplace requirements to reduce the risk that workers may contract COVID-19: [Federal Register :: Occupational Exposure to COVID-19; Emergency Temporary Standard](#). Physical barriers, ventilation and training requirements were required compliance 30 days following (July 21, 2021). All other provisions were required 14 days following (July 5, 2021.)

Though implicating healthcare services generally, the new regulations are not industry specific making it difficult to apply universal standards for whether a service is or is not within the scope. Further, direct care services differ by delivery from state to state and provider to provider. As such, providers will need to conduct an individual analysis of both the service and setting to determine appropriate compliance under the ETS.

Two-Step Scope Analysis

With few exceptions, the ETS applies "to all settings where any employee provides healthcare services or healthcare support services."¹ To apply, the provider must first employ individuals to provide healthcare services or healthcare support services. If healthcare services are being delivered, the provider must then determine the workplace setting where services are delivered to meet compliance measures.

Healthcare Services or Healthcare Support Services

The ETS defines "healthcare services" to mean "services that are provided to individuals by professional healthcare practitioners (e.g., doctors, nurses, emergency medical personnel, oral health professionals) for the purpose of promoting, maintaining, monitoring, or restoring health. Healthcare services are delivered through various means including: hospitalization, long-term care, ambulatory care, home health and hospice care, emergency medical response, and patient transport. For the purposes of this section, healthcare services include autopsies."²

"Healthcare support services" are defined as "services that facilitate the provision of healthcare services. Healthcare support services include patient intake/admission, patient food services, equipment and facility maintenance, housekeeping services, healthcare laundry services, medical waste handling services, and medical equipment cleaning/reprocessing services."³

¹ 29 CFR §1920.502(a)(1)

² 29 CFR §1920.502(b)

³ 29 CFR §1920.501(b)

While direct care workers are not traditionally licensed in the same way doctors and nurses are, the definition is left broad and includes reference to services such as home health and patient transport. Within its posted rationale for the ETS, OSHA specifically identified “in-home healthcare workers”⁴ as having a high risk of infection from working closely with beneficiaries, family members, or other caregivers in enclosed spaces. These factors should be taken into consideration of whether the service is being delivered by a professional healthcare practitioner.

Workplace Setting

Though setting is not explicitly defined, “workplace” is defined as “a physical location (e.g., fixed, mobile) where the employer’s work or operations are performed.”⁵

“Physical location” is defined as “a site (including outdoor and indoor areas, a structure or a group of structures) or an area within a site where work or any work-related activity (e.g., taking breaks, going to the restroom, eating, entering, or exiting work) occurs. A physical location includes the entirety of any space associated with the site (e.g. workstations, hallways, stairwells, breakrooms, bathrooms, elevators) and any other space that an employee might occupy in arriving, working, or leaving.”⁶

If services are determined to be provided by a healthcare practitioner, the provider must follow the ETS. Though a COVID-19 plan is required for each workplace, the ETS requirements are different for physical locations controlled by the employer and those “controlled by a person not covered by the OSH Act (e.g. homeowners, sole proprietors).”⁷ Without further guidance defining controlled settings, providers will also need to exercise judgment in whether the service is delivered in a provider-controlled environment.

See ETS FAQ #5⁸:

Most of the time, my employees are working at a private residence. What additional information do I need to include in my COVID-19 plan to address COVID-19 hazards at these locations?

Employers with employees who, in the course of their employment, enter into private residences or other physical locations controlled by persons not covered by the OSH Act (e.g., homeowners, sole proprietors) must include policies and procedures in their COVID-19 plans to protect their employees entering those locations. These policies and procedures must address employee withdrawal from the residence in the event those protections are inadequate.

Please note that the ETS also does not apply to home healthcare settings where all employees are fully vaccinated and all non-employees are screened prior to entry, and people with suspected or confirmed COVID-19 are not present (paragraph (a)(2)(v)).

*** Non-Healthcare Settings: As a reminder, services determined outside of the scope of the ETS does not discharge employers of the general duty of care to its employees and adherence to all other rule and statute related to safety and COVID-19.**

⁴ “In-home healthcare workers provide medical or personal care services, similar to those provided in long-term care facilities, inside the homes of people unable to live independently. Patients receiving in-home care could receive services from different types of providers (e.g., a nurse administering medical care, a physical therapist assisting with exercise, a personal care services provider assisting with daily functions such as bathing).” IV Rationale for the ETS, A. Grave Danger, III. Impact on Healthcare Employees, B. Studies Focusing on Employees in Healthcare General Surveillance and Surveys Across the U.S., In-Home Healthcare Providers: <https://www.federalregister.gov/d/2021-12428/p-20>

⁵ 29 CFR §1920.501(b)

⁶ 29 CFR §1920.501(b)

⁷ 29 CFR §1920.501(c)(7)(iii)

⁸ [COVID-19 Healthcare ETS - Frequently Asked Questions | Occupational Safety and Health Administration \(osha.gov\)](https://www.osha-slc.gov/covid-19-healthcare-ets-frequently-asked-questions)

Questions to Support the Two-Step Scope Analysis

Each provider will need to engage in a service-by-service and workplace-by-workplace assessment to determine whether a service is delivered by a healthcare practitioner and whether the setting is provider-controlled. As further guidance becomes available, revisit this analysis to compare against current information. Consulting an attorney engaged to protect your interests is best practice in interpreting and applying state and federal regulation.

Questions for consideration:

Healthcare Services

- Does your state have a regulation or statute defining the service and/or medical necessity? How does it compare against the OSHA definition?
- Does your state have a regulation or statute defining “home health” and is the service distinctly differently?
- Does your state require independent licensure or certification of the employees delivering the service?
- Does your state require licensed practitioners to oversee or be present during the provision of services?
- Regardless of state requirement, do you independently require licensure, certification, or clinical oversight?
- Have you received benefit, monetary or otherwise, under designation as a healthcare service?

Provider Controlled Setting

- Is the service provided in someone’s private residence?
- If the service is provided in someone’s home, does the state require certification and licensure of the home as a provider facility?
- Is the service provided on public ground or within a setting controlled by another employer?
- Are there clearly defined or identified healthcare services provided within the setting?
- Are services limited to a well-defined area?

Exceptions

- Are all employees fully vaccinated?
 - o [This does not necessarily apply as an absolute for employees with a bona fide reason they cannot be vaccinated, such as an accommodation under the American Disabilities Act.⁹]
- Are all non-employees screened for COVID-19 symptoms prior to entry?
- Are people with suspected or confirmed COVID-19 present?

⁹ [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission \(eeoc.gov\)](#)

Resources:

- OSHA Fact Sheet: [Subpart U—COVID-19 Healthcare ETS \(osha.gov\)](#)
- Workplace Flow Chart: [Is your workplace covered by the COVID 19 Healthcare ETS? \(osha.gov\)](#)
- ETS FAQ: [COVID-19 Healthcare ETS - Frequently Asked Questions | Occupational Safety and Health Administration \(osha.gov\)](#)
- COVID-10 Plan Template: https://www.osha.gov/sites/default/files/COVID-19_Healthcare_ETS_Model_Written_Plan.docx

This worksheet and content contained is intended to convey general information only and should not be construed as legal advice or opinion. No attorney-client relationship has been formed and information presented may not reflect the most current legal developments. Consulting an attorney engaged to protect your interests is best practice in interpreting and applying state and federal law and regulation.