Update

New OSHA Emergency Temporary Standard and Its Application to Home-Based Care Providers

Last week, the Occupational Safety and Health Administration (OSHA) released a new emergency temporary standard (ETS) to address the on-going COVID-19 pandemic.

The first issue is coverage. The ETS only applies to settings where any employee provides "healthcare services." The term "healthcare services" means services 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." OSHA somewhat unhelpfully states in the 900-plus page explanation that accompanies the rule that this phrase covers those who "generally have either licensure or credentialing requirements." For some in-home care providers this does not necessarily resolve whether they are covered by the ETS.

Our reading of this definition leads us to conclude that the ETS would not cover an agency if: (1) it only provides non-medical home care (2) in client homes (3) in a state that does not require caregivers to be licensed, certified or registered, and (4) the agency doesn't actually provide caregivers with such credentials. We think all four criteria must be present to escape coverage under the ETS because otherwise there is an argument that some of the agency's employees work in a setting where healthcare services are provided.

Putting to the side the question of what is meant by healthcare services, there is a specific exemption for "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." There is no definition of "home healthcare" in the ETS, but it appears this phrase is not meant to be limited to just Medicare certified home health agencies. Rather, it appears this phrase is intended to capture all home-based care providers who may be otherwise covered by the ETS's definition of providing "healthcare services" as discussed above.

This provision speaks to one of the overarching themes that becomes apparent when reading this ETS: OSHA is pushing to encourage employers to bring *all* their staff to full vaccination status. Note the asterisks around "all" in the previous sentence. The ETS specifically states: "OSHA does not intend to preclude the employers of employees who are unable to be vaccinated from the scope [of this] exemption. . . . Accordingly, where an employer reasonably accommodates an employee who is unable to be vaccinated in a manner that does not expose the employee to COVID-19 hazards (e.g., telework, working in isolation), that employer may be within the scope [of the] exemption. . . ." Thus, if you mandate the vaccine, but include exceptions for medical conditions and religious beliefs, then you may still be able to avail yourself of this exception and not have to comply with the ETS.

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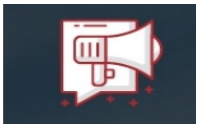

This ETS also does not apply to settings where no healthcare services are actually provided. For example, it is unlikely that the ETS would apply to your office where scheduling, coordination, billing and other administrative tasks are performed.

One final note on coverage: The ETS is not meant to replace those steps taken by state and local governments that go further, or to replace any recommendations from the CDC. This means, for example, if you operate in California, Virginia, Oregon or New York, you may have duel obligations. Of course, to the extent the ETS duplicates applicable state or local requirements, you are then already ahead of the compliance game discussed below.

So, what must you do if you are a covered employer? The ETS requires employers to take several steps within 14 days of the ETS being published in the Federal Register (unless otherwise noted below):

- Develop and implement a written COVID-19 plan for each workplace type (e.g., client homes and facilities where the agency deploys staff). Note, the OSHA website is supposed to include a model plan (but one is not available yet), but we will be working on crafting a template plan specific to in-home care providers in the coming week. That template will be available on Polsinelli's Online Solution for Home Care (POSH).
    - The plan requires the employer to designate a safety coordinator to implement and monitor the plan.
    - To implement the plan, the employer must conduct a workplace-specific hazard assessment, which must include the input and involvement of non-managerial employees "and their representatives". Thus, if your employees are organized by a union, then you would need to involve the union in this hazard assessment process.
    - The plan must address specific hazards identified by the assessment, and include policies and procedures to:
        - Minimize the risk of transmission of COVID-19
        - Effectively communicate and coordinate with other employers where employees share the same physical location (this would cover the situation where you deploy staff to a facility)
        - Protect employees who enter private residences, including procedures for employee withdrawal from that location if protections are inadequate
- Screen patients/clients and implement other applicable patient management strategies in accordance with CDC's COVID-19 Infection Prevention and Control Recommendations.
- Develop and implement policies and procedures to adhere to Standard and Transmission-Based precautions in accordance with the CDC's 225-page Guideline for Isolation Precautions.
- Provide and ensure each employee wears appropriate PPE, including respirators for exposure to people with suspected and confirmed COVID-19. (Note: the ETS includes a "Mini Respiratory Protection Program" section for employers to provide respirators to employees instead of facemasks. This section would apply in situations where employees are not exposed to people with suspected or confirmed COVID-19.)
- Ensure physical distancing where possible when employees are indoors.
- Where feasible, install cleanable or disposable solid barriers at each fixed work location in non-patient care areas where employees are not able to stay at least 6 feet apart. (This provision likely has limited application to in-home care providers and employers have 30 days after the ETS is published in the Federal Register to comply with this requirement.)
- Follow standard practices for cleaning and disinfection of surfaces and equipment in accordance with CDC's COVID-19 Infection Prevention and Control Recommendations and Guidelines for Environmental Infection Control.

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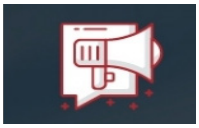

- Ensure that employer-owned or controlled existing HVAC systems are used in accordance with manufacturer's instructions and design specifications for the systems and that air filters are rated Minimum Efficiency Reporting Value (MERV) 13 or higher if the system allows it. (Note, employers are not required to install new HVAC systems, and have 30 days after the ETS is published in the Federal Register to comply with these requirements.)
- Screen employees before each work day and each shift. This may be accomplished by asking employees to self-monitor.
- Require employees to report COVID-19 illness and symptoms.
- Notify employees within 24 hours of COVID-19 exposure in the workplace.
- Remove from the workplace employees with symptoms of COVID-19 and those confirmed to have COVID-19. (There are several provisions in this area that limit who should be removed and how long the removal should last. Of particular note, those employees who are fully vaccinated or have had and recovered from COVID-19 within the past 3 months and remain asymptomatic do not need to be removed.)
- Continue to pay employees while they are removed from the workplace. (OSHA says this provision will encourage employees to report their COVID-19 status and symptoms, and employers who qualify for FFCRA tax credits may be able to completely offset this requirement. OSHA says that it has implemented similar requirements in the context of exposure to lead and cotton dust. Given that fully vaccinated employees who have been exposed to COVID-19 but remain asymptomatic do not need to be removed from the workplace and therefore not paid while removed, this provision appears to be another way OSHA is encouraging employers to mandate the vaccine.)
- Provide reasonable time and paid leave for vaccinations and vaccine side effects.
- Ensure all employees receive training so they comprehend COVID-19 transmission, tasks and situations in the workplace that could result in infection, and relevant policies and procedures. (Note: Employers may rely upon training provided prior to the effective date of the ETS to the extent it meets the relevant training requirements. Employers also have 30 days after the ETS is published in the Federal Register to comply with these requirements.)
- Inform employees of the anti-retaliation provisions under the ETS.
- Establish a COVID-19 log (if more than 10 employees) of all employee instances of COVID-19 without regard to occupational exposure.
- Report to OSHA work-related COVID-19 fatalities within 8 hours and in-patient hospitalizations within 24 hours. (Note: OSHA says that the ordinary requirement to only report fatalities that occur within thirty (30) days of the work-related incident does not apply. Equally, the in-patient hospitalization reporting requirement applies even if it occurs more than twenty-four (24) hours after the work-related incident.)

Please note, this was a high-level overview of the 44 page ETS and therefore you should discuss your particular circumstances with an attorney to determine if you are covered and what specifically you may be required to do if so.

We will be sure to reach out if anything changes and if you would like to schedule a call or have any questions please contact us at aspinola@polsinelli.com or by phone at 404.253.6280. Also, if you would like to learn more about POSH, please email onlinesolutions@polsinelli.com.

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