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What home-based care providers need to know about the new OSHA COVID-19 **Emergency Temporary Standard**

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For those who thought the pandemic might now be over and we could ease up on concerns related to COVID-19 precautions, it may be time to reconsider. On June 17, the Occupational Health and Safety Administration (OSHA) issued new Emergency Temporary Standard (ETS) specifically applicable to employers that provide "healthcare services." The standards address COVID-19 precautions and employer obligations that will become effective as early as July 5, 2021 – a mere 14 days after first appearing in the Federal Register on June 21. This means that agencies providing healthcare services — as defined by OSHA — in a patient's home must be in general compliance with this new set of rules beginning on July 5. It is worthwhile to note that providers will have until July 21 to implement some of the more far reaching and complex requirements imposed by the ETS, but that is the extent of the implementation grace period that is being allowed under ETS.

The ETS has four parts – the healthcare provisions, the Mini Respiratory Protection Program, severability provisions, and Incorporation by Reference, which specifically relates to other governmental agency publications that have a direct bearing on COVID-19 guidance and precautions.

The OSHA website, where the standards can be found, includes several documents and tools designed to make implementation of the new standard easier for non-exempt providers. Readers will want to take advantage of them, especially the COVID-19 plan template, readiness checklist, and training materials. In this tip sheet, we are going to cover what home-based care providers should know about the ETS and, most importantly, what needs to be done in the event of compliance gaps.

Compliance with the ETS

What agencies should know

The ETS applies in "all settings where any employee provides healthcare services or healthcare support services." Providers that deliver "healthcare services" – defined as services provided by professional healthcare practitioners such as nurses, among others, for the purpose of "promoting, maintaining, monitoring or restoring health" including home health and hospice – are subject to the standard. This definition makes it clear that home health agencies and hospice agencies are subject to the standard. The standard applies to the settings where employees provide "healthcare services" or "healthcare support services." Healthcare support services include administration, intake, scheduling, billing, and the like; however, the provisions of the ETS do not apply to support services that are provided offsite from a healthcare setting. Because home health and hospice providers do not provide healthcare services at their parent, branch or drop site locations, these administrative locations will not be subject to the ETS. Thus, for purposes of the ETS, the implementation obligation for home-based care providers extends only to the residential settings in which patient or client services are delivered. This does not mean that home care administrative locations are not subject to regulation. OSHA has issued guidance that applies to employers outside of a healthcare setting. These would apply to home care administrative settings.

Because of the definition of healthcare services, there may be a question about whether personal services or other providers of non-skilled home care services will be obligated to comply. Healthcare services are "services that are provided to individuals by professional healthcare practitioners. "Healthcare practitioner" is not defined in the regulation. OSHA states that healthcare practitioners "generally have either licensure or credentialing requirements." This opens the possibility that "healthcare practitioner" could include delivery of non-skilled care. In most jurisdictions, personal services and similar agencies are not considered healthcare providers. These entities may avoid coverage under the ETS, because they are not healthcare practitioners. However, the reference to licensure or credentialing requirements raises the possibility that OSHA may take a broader view of this term. This is a new rule. OSHA has indicated a desire for broad coverage, and providers should monitor how this develops and seek legal counsel.

For these non-skilled employees who work for a home health or hospice provider, the issue is different. The ETS applies "to all settings where any employee provides healthcare services." Every patient's home is a setting where home health or hospice employees provide healthcare services. This means that when non-skilled employees go into the same home, the ETS applies, unless an exception applies. The ETS provides an exception for home care settings where:

1. "all employees are fully vaccinated,"
2. "all non-employees are screened prior to entry" and
3. "people with suspected or confirmed COVID-19 are not present."

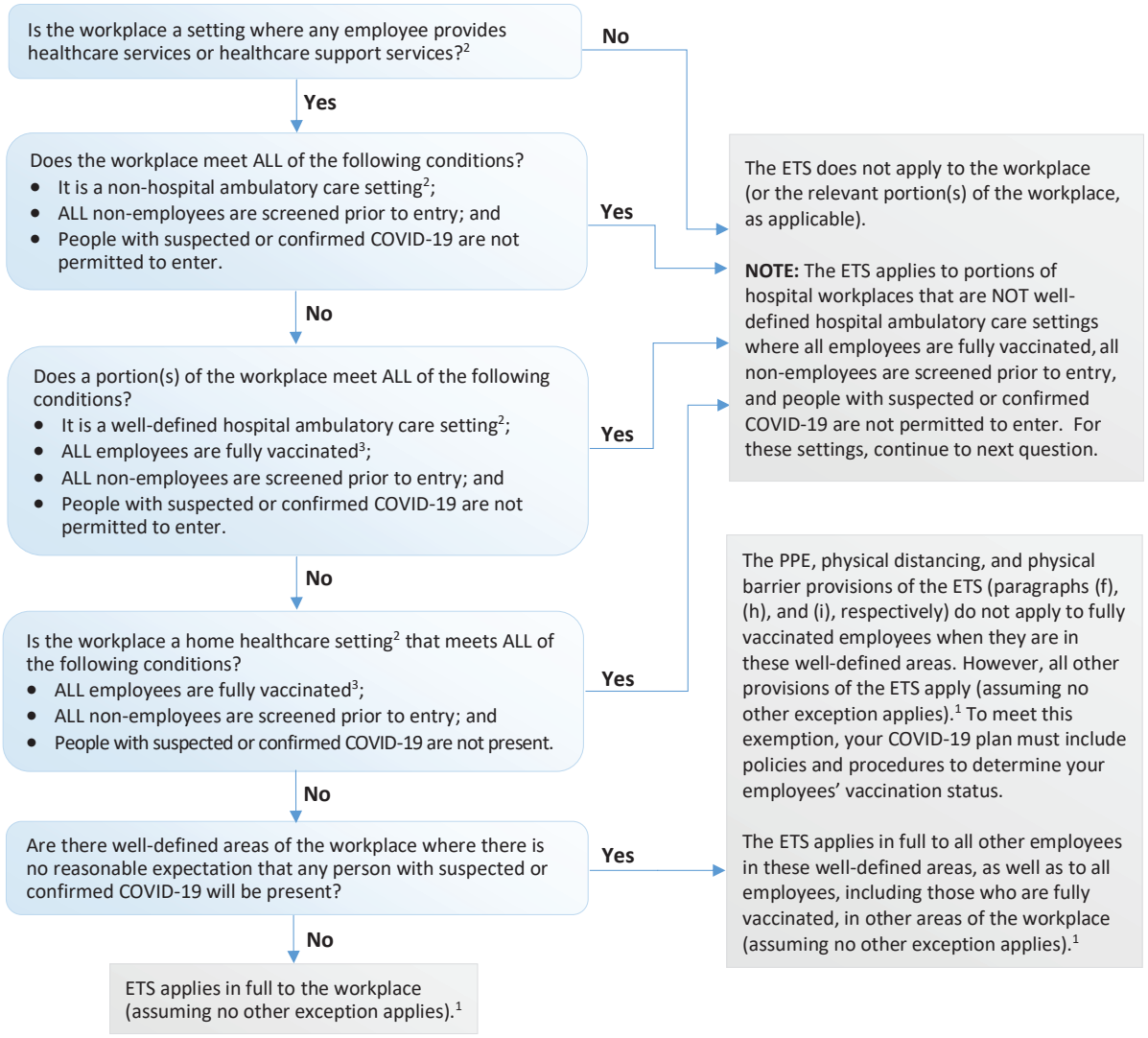
The presence of this exception makes it clear that the home continues to be covered, even if a home health aide or other non-skilled employee is in the home providing home health or hospice care.

This exception is important for home health and hospice providers, as it provides a potential avenue to avoid applying the ETS in patients' homes. This exception may not prove to be useful for home care providers. The 100% vaccinated and 100% screening of non-employees prior to entry appear to present significant challenges to compliance.

The interpretive guidance goes on to suggest that employers who provide reasonable accommodations to employees who decline to be vaccinated for religious or disability reasons would not necessarily be precluded from relying on the vaccination exemption requirement that all employees be fully vaccinated. For example, if an employee is unable, due to health issues, to obtain a vaccination, then a reasonable accommodation may be allowing the employee to work remotely rather than in the office. And, if the reasonable accommodation is provided, the employer could still demonstrate compliance relative to those employees who do not require reasonable accommodation.

Also, with respect to the temporary standard, OSHA has made it clear that the ETS is not intended to supersede state or local requirements aimed at COVID-19 precautions and control. Thus, agencies will want to keep in mind that the OSHA standard may be duplicative of existing requirements especially in states like California, Michigan, New York, Oregon, and Virginia where state standards have already been adopted.

The following OSHA flow chart is designed to help employers determine applicability of the ETS.



What agencies should do

The first step is to understand whether or not the ETS applies to the organization.

If all employees are vaccinated except for those that require a reasonable accommodation, exemption could be possible even for Medicare-certified home health agencies and hospices. For those organizations exclusively providing non-skilled services, it may depend upon whether the provider is considered a healthcare provider under state law. When in doubt, the advice of competent counsel should be sought.

Once it is determined that the agency is obligated to comply with the ETS, a comprehensive examination of the requirements — and work that must be done to comply — will be in order.

ETS implementation considerations

Many of the ETS requirements will be enforceable as of July 5, 2021 – 14 days after the ETS first appeared in the Federal Register, while others will be enforceable as of July 21, 2021.

COVID-19 plan

What agencies should know

Agencies with more than 10 employees are obligated under the ETS to develop a comprehensive written COVID-19 plan, with input from non-managerial employees. OSHA has devised a template that can be used for this purpose.

What agencies should do

Each agency should establish a COVID-19 plan that should take into account all of the agency's healthcare settings (patient homes, residential facilities, etc.) with itemization of specific COVID-19 considerations along with the agency-specific guidance pertaining to the following:

- Hazard assessment for each healthcare setting to identify workplace COVID-19 hazards and risks.
- Policies and procedures that align with guidelines imposed by the Centers for Disease Control and Prevention (CDC) related to transmission risk and precautionary measures.
- Appointment of one or more Safety Coordinators with authority to ensure compliance with the agency's COVID-19 and ETS related policies and procedures.
- Patient screening practices as well as standard and transmission-based precautions as a prelude to patient care.
- Mitigation of potential residential hazards and implementation of protective measures including the use of personal protective equipment and withdrawal from the area if patient, family and/or employee protections are found to be insufficient.
- Agency protocols for the conduct of aerosol generating procedures.
- Guidance concerning physical distancing and barriers.
- Cleaning and disinfection guidelines.
- Ventilation filtering precautions, as applicable.
- Employee health screening and notification procedures.
- Employer notifications to employees of COVID-19 exposure or illness and removal of exposed/infected staff members from the workplace.
- Return to work criteria for previously removed employees.
- Protection of employee privacy and anti-retaliation protections.
- Employee vaccination policies.
- Employee training expectations and content.
- Communication protocols to guide coordination among multiple employers when agency staff are deployed to facilities or patient care venues that are under separate control.
- Recordkeeping requirements.
- Reporting, monitoring, and measuring effectiveness.

Operational practices should be consistent with the plan. Likewise, policies and procedures should be aligned, implemented, and monitored in the context of plan content.

Paid leave and anti-retaliation requirements

What agencies should know

Agencies with more than 10 employees are obligated under the ETS to provide paid leave to employees who are precluded from working due to exposure or COVID-19 infection. Similarly, paid time off for vaccinations must be provided.

In general, employees must be given benefits to which they would normally be entitled if they are precluded from working due to COVID-19 exposure or infection and must also receive compensation at their regular rate of pay up to a maximum of $1,400 per week for the duration of the COVID-19 related absence until such time as the employee meets the criteria that would enable a return to work. For agencies with fewer than 500 employees, beginning in the third week of the absence the employer can reduce the employee's pay by 2/3 and the maximum to which the employee is entitled reduces to $200 per day or $1,000 per week.

There is some concern that this aspect of the ETS may exceed the Department of Labor's (DOL) authority. This is a potential area of future challenge.

In addition to the paid leave provisions of the ETS, there are also specific anti-retaliation measures related to an employee's exercise of their rights under the ETS. The anti-retaliation measures extend to discharge and/or discrimination based on the employee's exercise of rights under the ETS.

What agencies should do

Agencies must develop a policy for providing paid sick leave to removed employees that complies with the requirements imposed by the ETS. This may make it necessary, for the sake of fairness if nothing else, to extend paid leave benefits to office/administrative employees who are not engaged in direct patient care and, therefore, are not covered by ETS.

Agencies should also be sure that their human resources policies and procedures are up to date and in keeping with the compensatory and anti-retaliation requirements under the ETS.

Daily screening for employees providing patient care

What agencies should know

Under the auspices of the Safety Coordinator(s), agencies must conduct daily COVID-19 screenings or hazard assessments as a means of determining whether employees might be COVID-19 positive and, as a result, fit for work. OSHA has developed an employee screening tool that can be used for this purpose.

What agencies should do

Agencies should implement and monitor the conduct of screenings for employees in the field and engaged in direct patient care. Consideration should also be given to implementation of screenings for office employees such as Case Managers or Clinical Supervisors who may be called upon from time to time to deliver or supervise delivery of patient or client services. Screening questions should include the following "Yes/No" questions where a "Yes" answer may preclude the employee from working:

- Have you experienced any of the following symptoms of COVID-19 within the last 48 hours?
  - Fever or chills
  - Cough
  - Shortness of breath or difficulty breathing
  - Fatigue
  - Muscle or body aches
  - Headache
  - Loss of taste or smell
  - Sore throat
  - Congestion or runny nose
  - Nausea or vomiting
  - Diarrhea

- Have you tested positive for COVID-19 in the past 10 days?
- Are you currently awaiting results from a COVID-19 test?
- Have you been diagnosed with COVID-19 by a licensed healthcare provider within the past 10 days?
- Have you been told that you are suspected to have COVID-19 by a licensed healthcare provider in the past 10 days?

For employees in the field who do not regularly come to the office to begin a day of patient visits, the screening tool can be completed remotely.

Employee training

What agencies should know

The ETS specifically prescribes several areas of mandatory employee training relative to COVID-19.

What agencies should do

Agencies should implement a specific employee training program that addresses the following:

- Employer specific policies and procedures related to patient screening and management.
- Tasks aimed at prevention and workplace situations that could result in the spread of COVID-19.
- The existence of multi-employer agreements with facilities such as residential or skilled nursing facilities related to infection control policies and procedures, use of common areas and shared equipment.
- Personal Protective Equipment (PPE) policies and procedures adopted by the agency and PPE limitations.
- Proper use of PPE including donning, doffing, and disposal of items of PPE.
- Storage and care of PPE.
- Employer policies related to cleaning and disinfection of the workplace and equipment.
- Employee health screening and available sick leave benefits to which employees may be entitled.
- Removal of employees from the workplace following exposure or a diagnosed infection and work restoration criteria that enable the employee's return to active work assignment.
- The identity of the agency's Safety Coordinator(s).

When situations such as changes in job tasks or assignments warrant additional training, the agency should arrange to provide it. Training should also be structured to provide for interactive questions and answers with a person who is knowledgeable about the subject matter and the agency's own policies and procedures.

Personal Protective Equipment and the Mini Respiratory Protection Program

What agencies should know

Agencies must supply facemasks, such as surgical masks, to employees and must also take steps to require wearing of masks indoors and when traveling in a car with others for work. Exceptions do apply, however, including the following:

- When the employee is alone in a room or office, a facemask need not be worn.
- When the employee is eating or drinking and at least six feet away from others or separated by a physical barrier, a facemask is not required.
- When wearing a facemask is precluded due to a medical condition or disability as defined by the Americans with Disabilities Act (ADA) or a religious belief.

In those situations where employees providing direct patient care services are provided respirators in lieu of a face mask, the provisions of the Mini Respiratory Protection Program (MRPP) requirements apply. Types of respirators that are covered by the MRPP include elastomeric respirators, powered air-purifying respirators (PAPR), and tight-fitting respirators with filtering facepieces.

What agencies should do

Under the MRPP, employers that provide respirators must take steps to ensure that employees have appropriate instructions and training related to putting on and removing the respirator and using it. Employees must be cautioned to keep track of personal equipment and avoid workplace hazards. User seal checks must be performed and problems with seal checks must be addressed and resolved.

Employers must ensure that a filtering facepiece respirator used by an individual employee is reused only by that employee and only when or if the respirator is not visibly soiled or damaged. During periods of reuse, employees must check for damage to the fabric or seal and complete a seal check. Respirators can only be worn for a maximum of five days, total; however, reuse of single use respirators is discouraged. PAPR respirators may only be reused when there is no damage to the respirator, the respirator is regularly cleaned and disinfected, and a change schedule is in place for cartridges, canisters or filters. Processes to ensure that employer obligations are met with respect to respirator use should be implemented if not already in place.

In situations where an employee cannot wear a facemask because it presents a hazard of serious injury or death, the employer must ensure that each such employee wears an alternative type of protection such as a face shield. When used, face shields must be cleaned at least daily and must not be reused if damaged. Employees not wearing facemasks must be at least six feet away from other people unless the employer can demonstrate that the distance requirement is not feasible.

In the performance of aerosol generating procedures on a person suspected or confirmed with COVID-19, an elastomeric respirator or PAPR should be used in lieu of a filtering facepiece respirator. And, when aerosol generating procedures are performed on a person with confirmed or suspected COVID-19, only those individuals necessary for patient care should be present.

OSHA® For more information about respirator use and employee instructions, agencies can refer to OSHA's respiratory protection safety and health topics page.

Other prevention measures

What agencies should know

- Agencies must implement cleaning and disinfection processes to prevent the spread of infection. Most of the cleaning and disinfection guidelines promulgated by the CDC are well known to agencies at this point. The ETS makes following them a mandatory requirement.
- In buildings, such as residential or inpatient hospice units that are owned or controlled by the provider, care must be taken to maximize the number of air changes per hour and employ the use of Minimum Efficiency Reporting Value (MERV) 13 or higher filters. If such filters are not compatible with the HVAC system in use, the employer must use the highest efficiency filter that is appropriate for the system.

What agencies should do

Employers should clean and disinfect high-touch surfaces and equipment at least daily, following manufacturers instructions. Alcohol-based hand solutions must be provided and must have alcohol content of at least 60%.

Recordkeeping and reporting provisions

What agencies should know

Recordkeeping requirements under the ETS establish the need for a COVID-19 log, in which the employer tracks any and all instances of COVID-19 exposure and/or infection whether or not the exposure or infection is related to a work event. Employers must also "retain all versions of the COVID-19 plan implemented to comply with [the ETS]."

The log must contain, for every instance or event, the employee's name, contact information, occupation, work location(s), the employee's last date of attendance, the date of the positive test or diagnosis related to COVID-19, and the first date upon which symptoms were experienced. The log must be updated within 24 hours of the employer's first knowledge of the event and must be maintained in a confidential manner, much the same way as a medical record would be maintained. The content of the log must not be disclosed except as required by the ETS or other applicable federal law. As long as the ETS is in effect, the log must be kept current.

Upon request for a record, employers have until the end of the business day following the request to produce the record along with a copy of the COVID-19 plan, the individual log entry for a particular employee and a redacted version of the log without employee names, contact information, occupational information and includes only the record of where the unidentified employee worked, the last day of presence in the workplace before removal, the date of the employee's positive test or diagnosis and the date upon which symptoms were first experienced, if any.

In addition to the log requirements, employers must report to OSHA within eight hours of its knowledge concerning an employee death related to COVID-19 and within 24 hours of learning of an employee's hospitalization related to COVID-19.

Compliance and enforcement dates

What agencies should know

There are two key dates with respect to implementation of the ETS: July 5, 2021 and July 21, 2021.

By July 5, 2021 the following provisions should be in place in response to the ETS:

- Vaccination and reasonable accommodation policies and procedures should be in place with demonstrable compliance if exemption from the ETS is anticipated.

For agencies that are not pursuing an exemption based on vaccination and screening protocols, the following should be in place by July 5:

- For agencies with more than 10 employees, the written COVID-19 plan should be developed with input from non-managerial employees.
- Patient screening and management protocols should be in place and reflective of agency policy.
- Employee screening protocols should be in place and reflective of agency policy.
- Policies and procedures that address the following topics should be in place:
- Adherence to transmission-based precautions based on guidance from the CDC.
- Use of personal protective equipment and respirators, as applicable.
- Physical distancing.
- Cleaning and disinfection of the workplace and equipment.
- Paid leave for vaccinations and recovery from COVID-19.
- Anti-retaliation provisions under the ETS.
- Employer and employee notifications of COVID-19 positive tests.
- Removal of employees who have been exposed or tested positive to COVID-19 and benefits related to paid time off for recovery.
- Implementation and maintenance of the COVID-19 log.
- Reporting and recordkeeping requirements related to COVID-19 deaths, hospitalizations and infections, respectively.

By July 21, 2021 agencies should address the following provisions, as applicable:

- Installation of physical barriers at workstations where physical distancing is not possible. For most home-based care providers' administrative offices this will not be a requirement as no patient care services are performed in agency administrative offices.
- On-site ventilation requirements.
- Employee training on COVID-19 risks, prevention, and mitigation.

The appearance of these new requirements tells us that the COVID-19 threat may be diminished but is not over. Agencies should look through the requirements and close compliance gaps as necessary and as soon as possible.

About the authors

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