



## *Birmingham Medical News: The DOL's COVID-19 ETS For Healthcare Providers is Now Effective*

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On June 21, 2021, the Occupational Safety and Health Administration ("OSHA") published an Emergency Temporary Standard ("ETS") that requires healthcare employers to take certain precautions to protect workers from COVID-19. The requirements of the ETS went fully into effect on July 21, 2021. This article briefly discusses who exactly the ETS applies to and some of the requirements the ETS imposes. The article culminates with our answers to some frequently asked questions regarding the ETS.

### **Who the ETS Applies To**

The ETS applies to "all settings where any employee provides healthcare services or healthcare support services." The ETS does not apply to the following situations:

- The provision of first aid by an employee who is not a licensed healthcare provider;
- The dispensing of prescriptions by pharmacists in retail settings;
- Healthcare support services not performed in a healthcare setting;
- Telehealth services performed outside of a setting where direct patient care occurs;
- Non-hospital ambulatory settings where non-employees are screened for COVID-19 prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter;

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- Well-defined hospital ambulatory care settings (g., non-hospital physician practices, outpatient practices, ambulatory surgical centers, and specialty clinics) if all employees are vaccinated, all non-employees are screened for COVID-19 prior to entry, and people with suspected or confirmed COVID-19 are not permitted to enter;
- Home healthcare settings if all employees are fully vaccinated, all non-employees are screened for COVID-19 prior to entry, and people with suspected or confirmed COVID-19 are not present

In the situations mentioned above, "screened" means asking questions to determine whether a person has COVID-19 or symptoms of COVID-19, and "ambulatory care" means "healthcare services performed on an outpatient basis, without admission to a hospital or other facility."

## **What the ETS Requires**

The ETS mandates 12 different types of requirements on covered healthcare providers. Those categories include:

- Creation of a COVID-19 Plan
- Patient screening and management
- Personal protective equipment
- Physical distancing
- Physical barriers
- Cleaning and disinfection
- Ventilation
- Health screening and medical management
- Vaccination
- Training
- Anti-retaliation
- Recordkeeping and reporting

While each of these categories contain detailed requirements, we discuss a few in more detail below.

### *Personal Protective Equipment*

The ETS requires employers to provide face masks to their employees and ensure employees wear them over the nose and mouth when indoors or occupying a vehicle with other people for work purposes. The ETS further requires employers to ensure that employees change their face masks at least once a day – and even more frequently if the mask is soiled, damaged, or patient care requires changing.

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The ETS does allow exceptions to the face mask requirements in the following circumstances:

- An employee is alone in a room.
- An employee is eating and drinking at the workplace, provided each employee is maintaining social distance from any other person.
- It is important to see the employee's mouth (g., communicating with a deaf individual) and a clear plastic face mask or barrier is not feasible.
- An employee cannot wear a face mask due to medical necessity, a medical condition, a disability (as that term is defined by the Americans with Disabilities Act), or a religious belief.
- When the employer can demonstrate that the use of a face mask presents a risk of serious injury or death.

## *Vaccination*

The ETS also requires employers to support COVID-19 vaccination administration by providing reasonable time and paid leave for vaccination and side effects experienced after vaccination.

## *Anti-Retaliation*

Pursuant to the ETS, employers are required to inform employees that they have a right to the protections afforded by the ETS, and all requirements of the ETS must be implemented at no cost to employees. Furthermore, employers are prohibited from discharging or discriminating against employees who exercise the rights afforded to them under the ETS.

## **FAQs about the ETS**

In this section, we answer some FAQs that are pertinent to the issues discussed above.

- *Question: If an employer is exempt from the ETS requirements by screening everyone who enters the facility, does the employer need to keep documentation of screening?*
  - Answer: Yes, employers should keep documentation demonstrating that they screened everyone, including employees and patients, in order to prove that they met the exemption under the ETS.
- *Question: Can employers utilize KN95 masks if N95 masks are not available?*
  - Answer: Yes, the ETS permits use of any FDA-approved surgical, medical, dental, or isolation mask.
- *Question: Can vaccinated employees stop wearing masks?*
  - Answer: Mask requirements do not apply in well-defined areas where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present and where all employees are fully vaccinated. If employees are not in an environment that meets these requirements, or one of the mask exceptions does not apply, masks are required. Furthermore, the

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CDC requires healthcare personnel working in a healthcare setting to wear well-fitting source control at all times while they are in the facility.

- *Question: Will the Department of Labor ("DOL") enforce the requirements that employers pay employees for time related to vaccine side effects?*
  - Answer: OSHA is a division of the DOL, which enforces federal wage and hour laws. At this time, employers should assume that the DOL intends to enforce these requirements unless the DOL releases guidance to the contrary.
- *Question: Will hospital employers who have mandated vaccines, but still have a small percentage of employees who are unvaccinated as an accommodation under either the ADA or Title VII, be able to be exempt from PPE and other physical barrier requirements?*
  - Answer: We do not have a definitive answer from OSHA at this time. However, OSHA recognizes that there are instances where an employee may not be vaccinated because of a religious belief. So, it appears the employer could still be exempt if the rest of the workforce is vaccinated.