

OSHA Taking Its Time to Issue COVID-19 Emergency Temporary Standard

March 18, 2021

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The Occupational Safety and Health Administration (OSHA) was directed under an [executive order](#) to promulgate an [Emergency Temporary Standard](#) (ETS) to address COVID-19 no later than March 15, 2021. It has yet to do so.

U.S. Department of Labor (DOL) officials reportedly told business groups that the agency, in fact, has decided to issue an ETS, but they did not account for the delay. Instead, DOL representatives have indicated that OSHA has provided the White House Office of Information and Regulatory Affairs a draft ETS for review. Such a review normally could be completed, and the standard published, within two weeks, and the standard could become effective immediately.

OSHA has not published the text of the ETS, but there are clues to its possible contents. For example, the agency published a 12-page [Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#), which expands on earlier guidance related to COVID-19 preventive measures and addresses some new topics, such as workplace testing programs, employee vaccinations, and sick leave policies.

Labor organization and progressive organizations have indicated that they expect the ETS to guarantee pay and benefits to workers who take leave due to potential COVID-19 exposures or diagnoses.

Importantly, the guidance incorporates recent recommendations from the U.S. Centers for Disease Control and Prevention (CDC) that responds directly to some of the challenges employees and employers have reported over the past year. For example, the guidance details expectations for remote work policies, using of the hierarchy of controls in response to COVID-19 hazards (*e.g.*, preference is for use of engineering controls to eliminate or reduce a hazard before implementing other controls), and removing and excluding potentially sick workers from the workplace.

For additional clues to the ETS, employers may do well to consider provisions enacted by several of the 28 “State Plan” states (*i.e.*, California, Michigan, Oregon, and Virginia) that operate their own partial or comprehensive workplace safety and health programs. They have enacted state-based emergency temporary standards of their own. State emergency temporary standards commonly include requirements that employers provide Infectious Disease Preparedness and Response Plans and employee training, among other obligations.

Any federal ETS likely will be enjoined in federal court, especially if it follows the standard enacted in California. The California standard requires employer-funded COVID-19 testing during work hours, mandates paid leave, and potentially brings unsuspecting employers into the Respiratory Protection standard. Employers nationwide may need to prepare Infectious Disease Preparedness and Response Plans and train employees accordingly, with little time to prepare.

By contrast, during the Trump administration, OSHA declined to promulgate an ETS, instead

favoring existing tools, including standards that address Personal Protective Equipment, Respiratory Protection, Sanitation, and Recordkeeping, and the General Duty Standard, a catch-all for recognized hazards not covered under an existing standard.

In the meantime, OSHA has implemented a National Emphasis Program directing agency resources to [target industries](#) and employers with workers who have experienced increased potential exposure to COVID-19, such as healthcare employers with frontline COVID-19 workers, restaurants, and construction sites. Employers operating in targeted areas may experience additional enforcement scrutiny over their COVID-19-related protocols in the event of a complaint, COVID-19 occurrence, outbreak, COVID-19 hospitalization or fatality case investigation, or related referral.

If you have questions or need assistance, please reach out to a member of the [Jackson Lewis Workplace Safety and Health Practice Group](#).

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