

After OSHA COVID-19 Emergency Temporary Standard for Healthcare Employers Expired ...

By Patricia Anderson Pryor, Michael R. Bertoncini, Jenifer M. Bologna & Sarah R. Skubas

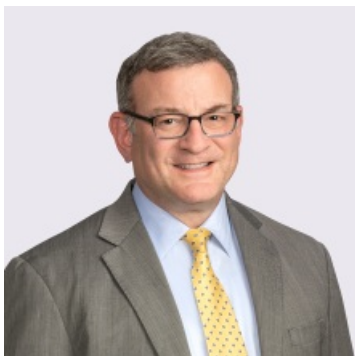
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Meet the Authors



Patricia Anderson Pryor

Office Managing Principal
513-322-5035
Patricia.Pryor@jacksonlewis.com



Michael R. Bertoncini

Principal
(617) 305-1270
Michael.Bertoncini@jacksonlewis.com



Jenifer M. Bologna

Principal

More than six months after the Occupational Safety and Health Administration (OSHA) promulgated an [Emergency Temporary Standard](#) for healthcare employers (Healthcare ETS), OSHA announced its intentions to propose an infectious diseases standard covering all industry sectors in April 2022. The agency said the new standard will address airborne, droplet, and non-bloodborne contact diseases.

Healthcare ETS

The Occupational Safety and Health Act (OSH Act) authorizes OSHA to “provide ... for an emergency temporary standard to take immediate effect upon the publication in the Federal Register” which “shall be effective until superseded by” a permanent standard. The OSH Act directs the agency to promulgate a permanent standard “no later than six months after publication of the emergency temporary standard.” 29 USC § 655(6)(c).

OSHA promulgated the Healthcare ETS on June 21, 2021, and it expired on December 21, 2021. More than 40 unions and employee advocates petitioned OSHA to promulgate a permanent standard, but OSHA demurred and provided no public response to the petitioners. The National Nurses Union has implored the agency to continue enforcement of the healthcare employer ETS under a National Emphasis Program that extends through July 2022 and to make the healthcare standard’s provisions permanent.

But the agency’s authority to do so is in doubt. The OSH Act does not explain what happens to the ETS if a permanent standard is not promulgated within six months.

To date, OSHA has not made any public statements concerning the continued applicability of the Healthcare ETS. The agency’s website still touts the Healthcare ETS. Its last statement, from November:

OSHA has determined that the requirements of the healthcare ETS released on June 10, 2021, remain necessary to address the grave danger of COVID-19 in healthcare. OSHA will continue to monitor and assess the need for changes in the healthcare ETS each month.

The agency’s FAQs on the vaccine-or-test emergency temporary standard states, “[I]f the Healthcare ETS is no longer in effect at any point while the [the vaccine-or-test ETS] is in effect, some employees in settings covered under [the healthcare ETS] may become covered by [the vaccine-or-test ETS].” However, it is uncertain whether OSHA believes the Healthcare ETS is still in effect or whether under the law it is possible for it to still be in effect.

The Healthcare ETS applied to healthcare settings where COVID-19 patients are treated, and it required employers with more than 10 employees to develop and



Sarah R. Skubas

Principal
(860) 522-0404
Sarah.Skubas@jacksonlewis.com

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implement written COVID-19 plans that included the following elements:

- Assigning a designated safety coordinator;
- Patient screening and management;
- Policies and procedures to comply with CDC guidelines;
- Facemask and PPE requirements;
- Protections while using aerosol-generating procedures on persons with suspected or confirmed COVID-19;
- Physical distancing;
- Solid barriers at employee work stations;
- Cleaning and disinfection protocols;
- HVAC system requirements;
- Health screening and medical management requirements;
- Paid leave for vaccinations and vaccination recovery;
- Employee training;
- Anti-retaliation protections;
- Employee COVID-19 logs; and
- Reporting work-related COVID-19 fatalities and in-patient hospitalizations.

If the Healthcare ETS has expired, do employers still need to comply with these requirements, many of which are not included in the new vaccine-or-test ETS? Alternatively, do healthcare employers need to comply with the vaccine-or-test ETS requirements to which they had been excepted while the Healthcare ETS was in effect? As has been throughout the pandemic, this is uncharted waters. In the absence of further guidance or clarity from OSHA, it is unclear what position OSHA may take on this. Regardless of whether the Healthcare ETS or the vaccine-or-test ETS applies, OSHA could utilize the General Duty Clause of the OSH Act to require that healthcare employers take greater precautions than generally required for healthcare workplaces. On December 23, 2021, the U.S. Centers for Disease Control and Prevention issued updated [Emergency Guidance for Healthcare Facilities to Prepare for Potential Omicron Surge](#).

Next Steps

Until additional guidance is available, healthcare employers should determine if they may be covered under the vaccine-or-test OSHA ETS for employers with at least 100 employees and begin to prepare for compliance. In addition, they may want to continue the precautions advised by the Healthcare ETS while waiting for further guidance.

The issues are far from resolved. The U.S. Supreme Court [is set to hear oral arguments](#) on the vaccine-or-test ETS on January 7, 2022.

If you have questions or need assistance on the OSHA ETS, please reach out to the Jackson Lewis attorney with whom you regularly work, or any member of our [Workplace Safety and Health Practice Group](#) or our [OSHA ETS Team](#).

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