

Better Late Than Never – OSHA Is Finalizing COVID Rules Nearly Three Years into the Pandemic

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The Occupational Safety and Health Administration is finally poised to implement a permanent COVID-19 safety standard for healthcare employers, nearly three years after the pandemic first began in the United States.

OSHA did not issue any COVID-specific regulations for employers in the healthcare industry until its June 19, 2021 Emergency Temporary Standard (ETS). Because the ETS was temporary in nature it expired after six months. The only component of the ETS remaining in effect is the recordkeeping requirement, which requires employers to establish and maintain a COVID-19 log to record COVID-19 cases in their workplace. OSHA subsequently announced in March 2022 its intention to engage in permanent rulemaking and is now in the final stages of that process. Although the text of the rule is not public, the permanent rule is anticipated to mirror the ETS in some ways and change to reflect the dynamic nature of the COVID-19 pandemic in other ways.

During the notice and comment period of its permanent rulemaking, OSHA has been soliciting feedback from the regulated community. Based on public comments and its press releases, OSHA seems likely to enact a permanent standard with some deviations from the ETS based on the evolving nature of the COVID-19 virus and the guidance about preventing its spread. Put simply, both the virus itself and recommended mitigation strategies have changed since the ETS, so OSHA's rule will likely reflect those changes. Potential changes are expected to include:

- Aligning the final rule with Centers for Disease Control (CDC) recommendations regarding COVID-19, including isolation and return-to-work guidance;
- Setting forth broader, thematic requirements rather than detailed, specific requirements to address issues like cleaning, ventilation or use of barriers, which would allow employers to adjust to changing government guidance;
- Tailoring controls and requirements to certain specific factual circumstances rather than

requiring the same controls regardless of local infectious disease conditions;

- Accounting for the continued need for vaccinations by eliminating the concept of “fully vaccinated” from the final rule, and requiring employer support for getting vaccinations;
- Potentially relaxing certain requirements, including for masking and physical distancing, depending on vaccination rates amongst the entire staff and/or the general community;
- Implementing a time cap of one year from the date of the last entry for COVID-19 log retention; and
- Having the standard cover a potential new novel strain evolved from the current COVID-19.

OSHA has also stated it does not intend to introduce any type of vaccination mandate. While OSHA has suggested there will be some changes in the standard’s requirements as compared to the ETS, it is also expected certain requirements will remain. For example, it is likely that the standard will focus on the importance of HVAC and ventilation improvements, removal of infectious persons from the workplace, training employees on COVID-19 signs and symptoms, and recording and reporting COVID-19 infections that occur among employees.

The rule is currently undergoing review by the Office of Information and Regulatory Affairs (“OIRA”). The final rule will be published following the conclusion of OIRA review. Healthcare-related businesses should be ready to reactivate any preexisting plan they had to comply with the ETS if any/all of their protocols were shelved, and those who have maintained protocols will need to adjust based on any nuances in the permanent standard. Covered employers that were not in compliance with the ETS should prepare to develop a plan quickly to be ready for implementation.

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National Law Review, Volumess XIII, Number 9

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