

OSHA Healthcare Employer COVID-19 Emergency Temporary Standard Has Expired

Yesterday, the Occupational Safety and Health Administration (OSHA) COVID-19 Healthcare Emergency Temporary Standard (ETS), which went into effect on June 21, 2021, expired, per the Occupational Safety and Health Act provisions governing emergency standards. The ETS imposes COVID-19 safety standards on settings where any employee provides healthcare services or healthcare support services. Facilities subject to the healthcare ETS have been exempt from the OSHA vaccination-and-testing emergency temporary standard; **however, with the expiration of the ETS, OSHA-covered healthcare facilities are likely to need to comply with the vaccination-and-testing rule if they employ more than 100 people.**

The Occupational Safety and Health Act permits OSHA to develop emergency temporary standards if the agency determines that employees are exposed to grave danger from exposure to agents determined to be physically harmful, and an ETS is necessary to protect employees from such danger. An ETS is only permitted for six months, at which time the agency must replace it with a permanent rule established through standard rulemaking procedures. The six-month deadline for the Healthcare ETS was yesterday and OSHA made no indication that it would seek to extend the COVID-19 healthcare rule – the latest update on the healthcare ETS website is a November posting affirming the necessity of continued enforcement of the ETS. Upon expiration, facilities subject to the COVID-19 healthcare ETS will lose the exemption granted by the vaccine-and-testing ETS, thus requiring compliance with same.

On November 4, OSHA published a second ETS; a “vaccine-and-testing” ETS requiring businesses with 100 or more employees to require their employees to either be fully vaccinated against COVID-19 or submit to weekly testing and mandatory use of personal protective equipment.

On November 12, a federal court issued a nationwide injunction of this rule, causing OSHA to suspend implementation and enforcement. Then on December 17, a federal court of appeals overturned the stay issued by the lower court, causing CMS to set a January 10, 2022, implementation deadline and a February 9, 2022, enforcement deadline. The Supreme Court has agreed to hear this case and has asked counsel for both sides to submit a brief by December 30, the same date that briefs are due to the court in the CMS vaccine mandate challenges.

The lifting of the court-ordered stay on the OSHA vaccine-and-testing ETS, along with the expiration of the healthcare ETS, seems to impose vaccine-and-testing ETS requirements on healthcare facilities where they were previously exempt. The vaccine-and-testing ETS specifically exempts from its requirements “settings where any employee provides healthcare services or healthcare support services *when subject to* the requirements of [the healthcare ETS].” With the expiration of the healthcare ETS, healthcare facilities with 100 or more employees are no longer “subject to” the requirements of that ETS and will need to develop policies to comply with the provisions of the vaccine-and-testing ETS by the January 10 implementation deadline.

FHA is seeking clarification on the question of whether or not the Department of Labor will require facilities under the CMS vaccine rule to also comply with the provisions of the ETS. At this time an FAQ on the CMS rule states that the CMS rule has supremacy over the OSHA rule, however, the FAQ was written at a time when most healthcare facilities were exempted from the OSHA rule. At this time the OSHA FAQ is silent regarding the CMS rule.

In the event both rules apply, affected facilities should be aware that the CMS and OSHA rules, while similar, are not identical. For example, the OSHA vaccine-and-testing ETS does not require that every person on staff must either be vaccinated or have been granted an eligible religious or medical exemption. Instead, OSHA requires that staff either be vaccinated or subject to weekly testing AND use of appropriate personal protective equipment (PPE).

As affected facilities consider policies to implement the OSHA vaccine-and-testing ETS, they are advised to consider how those policies will interact with the CMS vaccine mandate, should the Supreme Court uphold both rules. Generally speaking, those policies should assume that the more stringent rule will be the one that is enforced. Using the example above, a hospital will probably need to develop a policy that a) requires all staff to be vaccinated, subject to applicable exemptions, and b) those exempted staff will be required to test weekly and wear appropriate PPE. This is because the CMS rule that requires that all staff be vaccinated unless there is an applicable exemption, this is a more rigid standard than OSHA's rule allowing staff to choose testing and PPE over the vaccine. However, the CMS rule does not explicitly require unvaccinated (exempted) staff to test or don PPE, a more explicit standard for unvaccinated staff than CMS requires, so the OSHA rule would apply.

Like the CMS rule, the OSHA rule conflicts with the state's new law regarding vaccine exemptions. Most importantly, the state requires businesses to offer a broader array of exemptions and does not require a combination of testing and the use of PPE for exempt employees. In these cases, the analysis applied to the preemption of the CMS rule should apply here and favor compliance with OSHA where conflicts exist. That said, there may be nuances of the state rule that would apply even where other conflicts would not. For example, that state requires employers to cover the cost of testing and provide PPE whereas OSHA permits employers to pass those costs onto employees. OSHA has been explicit that a rule requiring the employer to pay for testing and PPE is not in conflict with their rule.

Finally, the legal challenges to the OSHA vaccine-and-testing ETS are not totally resolved. The Supreme Court has asked the parties in the OSHA cases – states, employers, and private citizens on one side, the federal government on the other – to submit briefs supporting their arguments by December 30. This is the same deadline for parties in the CMS vaccine mandate lawsuits to submit to the Supreme Court. Given the court's urgency to be briefed on these cases, it is possible that we will have a resolution prior to the January 10 deadline that will grant clarity about what federal vaccine requirements remain in place. **Until then, affected FHA members should continue to develop policies and plans to implement both the OSHA and CMS rules.**

In the coming days, FHA will update its vaccine mandate resources to reflect the impact of the expiration of OSHA's COVID-19 healthcare ETS. Those resources may be found on the FHA website or by clicking the link [here](#).