

## **OSHA & COVID-19: *Where Are We At?***

The Occupational Safety and Health Administration [OSHA] launched back in March 2021 (revised in July) a national emphasis program [NEP] focusing enforcement efforts on work sites where workers have significant documented exposure to SARS-CoV2 the source of the COVID-19 infections, transmission and illness. National Emphasis Programs (NEPs) are temporary programs that OSHA periodically uses to focus investigations and inspections on particular hazards associated with certain industries. Because OSHA had no specific standard covering COVID-19 the NEP was a form of preventive maintenance; (without specific a standard OSHA has a more difficulties pressing successful enforcement and abatements because it has to push through several layers of judicial obstacles -including direct court challenges. Under the NEP OSHA would program inspections and investigations based on previous OSHA investigation involving COVID-19 and/or establishments with elevated rates of COVID in 2020. For enforcement OSHA would use some existing standard (e.g. respiratory protection) as well as the General Duty Clause (an all purpose standing directive in the actual OSHA Act that requires employers provide safe and healthy work environments).

This NEP follows on OSHA guidance released in January 2021 [*Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*]; basic directions to put into practice a COVID protection program and better identify risks which could lead to exposure and infection. This guidance addresses workplace settings to identify risks of being exposed to and/or contracting COVID-19 at work and to help determine appropriate control measures. OSHA points directly to CDC guidance for prescribed protections –like social distancing, altering work schedules, and improving ventilation.

### **COVID {Healthcare} Emergency Temporary Standard**

In June 2021 OSHA issued a COVID Emergency Temporary Standard following a mandate from President Biden. The standard covered about 10.3 million healthcare workers at hospitals, nursing homes, and assisted living facilities, as well as emergency responders and home healthcare workers. It requires these facilities to conduct a hazard assessment and have a written plan to mitigate virus spread, including personal protective equipment [e.g. respirators—though because of supply-chain and service shortages strict enforcement of this rule were relaxed), screening everyone who enters the facility for COVID-19; ensuring proper ventilation; and establishing physical distancing requirements for unvaccinated workers. It also requires employers to give workers time off for vaccination though it did not mandate that employers require workers to be vaccinated. Employees who have COVID or who may be contagious must work remotely or otherwise be separated from other workers, or be given paid time off. An anti-retaliation clause was also installed to shield workers who complain about unsafe conditions. The standard did not apply outside the designated in the health care sector. Instead OSHA updated its *Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*.

*However, and it's a big however, every OSHA ETS has a statutory deadline—six months; after that it then must be replaced with a permanent final rule. The [Healthcare] ETS has hit that automatic deadline. And OSHA has announced that a final rule cannot be completed in the timeframe required by the OSH Act, so OSHA is withdrawing most of the stated requirements of the {Healthcare} ETS.*

[OSHA data on COVID—Mar 2021-Sept20/21 over 279 Citations

2000 COVID investigations

609 were general inspections, //444 called 'rapid response' //

388 COVID fatality inspections//

30 inspections conducted under the (Healthcare)ETS]

## **OSHA's COVID {Vaccination}ETS: Designed to Increase Vaccination Rates**

The most recent phase of OSHA's involvement with COVID is OSHA's promulgation of a Emergency Temporary Standard this past November {2021} designed to increase vaccination rates, period Unlike the previous COVID ETS that applied only to healthcare this (Vaccination) ETS covers all firms (with 100 or more employees) under OSHA's jurisdiction; that is most of the private sector from construction to transportation to retail, more than 84 million workers– At the same time, the Centers for Medicare and Medicaid services on a parallel tract issued their independent vaccination mandate regulation covering 17 million workers at approximately 76,000 health care facilities, including hospitals and long-term care facilities that receive Medicare or Medicaid funds.

This OSHA (Vaccination) ETS directs employers to have a policy that will A] Determine the vaccine status of all employees; B} Requires employees to be vaccinated or if unvaccinated to submit to weekly COVID testing also wear a mask in congregate work setting. [Without requiring employers to pay for testing, nor face coverings].C} Require employees to report to the employer if they test positive for COVID-19 or receive a COVID-19 diagnosis. Employers must then remove the employee from the workplace, regardless of vaccination status.

What the (Vaccination) ETS standard does not reference are any other mitigation measures – such as improving ventilation, masking mandates regardless of vaccination status, social distancing, alternating work shifts, reconfiguring work stations, hand hygiene and when employees are infected instruction for testing and quarantine. All measures recommended by CDC and by incorporation in OSHA's previous directive 'Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace.'

Almost immediately lower courts have blocked both the (Vaccination) OSHA ETS, as well as the mandate from the Centers for Medicare and Medicaid. The US Department of Labor, however, successfully challenged the injunction against the (Vaccination) ETS; a higher court overruled the lower courts and lifted the blocking injunction. The requirements of the OSHA (Vaccination) ETS standard will move forward, with a month delay -- OSHA responded to the Court's decision by setting new deadlines for compliance. Also, no citations will be issued before February 9 (2022), "so long as the employer is exercising reasonable, good faith efforts to come into compliance." Opponents of the rule have already appealed to the US Supreme Court. But, it is more than interesting to note that the Supreme Court has so far refused appeals to block New York's and Maine's state mandates requiring health care workers be vaccinated. The court has also similarly rejected challenges to vaccination requirements at Indiana University, in New York City's school system and at a Massachusetts hospital. Time will only tell how the Supreme Court will respond to this latest opposition.

Meanwhile employers are ratcheting up the pressure for vaccinations. Employers like Kroger's, e.g., declared it would no longer provide 2 weeks paid leave for unvaccinated employees with COVID, plus they added a \$40 a month surcharge to their health plan for any unvaccinated employee. Delta announced a \$200 a month surcharge for any unvaccinated employee on the company's health plan.

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