

Insights

OSHA Withdraws Healthcare Emergency Temporary Standard, Recordkeeping Obligations Remain in Place

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On December 27, 2021, the U.S. Occupational Safety and Health Administration ("OSHA") withdrew the non-recordkeeping portions of the Healthcare Emergency Temporary Standard ("Healthcare ETS"). In its **Statement on the Status of the OSHA COVID-19 Healthcare ETS** ("Statement"), OSHA announced that it is working on a permanent and final standard, and that it will continue to enforce safety standards under the **general duty clause**.

Under the Occupational Safety and Health Act ("OSH Act"), an emergency temporary standard is effective until superseded by a permanent standard, and the OSH Act states that such permanent standard shall occur within six months of the emergency temporary standard's promulgation. OSHA adopted the Healthcare ETS on June 1, 2021, and the six-month period for the Healthcare ETS expired December 21, 2021.

OSHA announced that it intends to work to issue a final standard that will protect healthcare workers from COVID-19 hazards. Despite the withdrawal of the non-recordkeeping portions of the Healthcare ETS, OSHA "strongly encourages all healthcare employers to continue to implement the ETS's requirements in order to protect employees from a hazard that too often causes death or serious physical harm to employees." OSHA noted that "the danger faced by healthcare workers continues to be of the highest concern and measures to prevent the spread of COVID-19 are still needed to protect them."

According to OSHA's Statement, OSHA will continue to vigorously enforce its general standards to help protect healthcare employees from the dangers of COVID-19, including Personal Protective Equipment (PPE) and Respiratory Protection Standards (**29 CFR 1910 Subpart I**). OSHA stated that compliance with the terms of the Healthcare ETS will be deemed to satisfy employers' obligations under the general duty clause and the PPE and Respiratory Protection Standards. OSHA further noted that "[c]ontinued adherence to the terms of the [H]ealthcare ETS is the simplest way for employers in healthcare settings to protect their employees' health and ensure compliance with their OSH Act obligations."

What does OSHA's withdrawal of the non-recordkeeping portions of the Healthcare ETS mean for covered employers with 100 or more employees under the **OSHA Vaccination and Testing Emergency Temporary Standard** ("OSHA ETS")? We have previously discussed the requirements and status of the OSHA ETS **here** and **here**. By the plain language of the OSHA ETS, healthcare settings which are "subject to the requirements of § 1910.502 [the Healthcare ETS]" are exempt; however, it remains unclear how the partially withdrawn Healthcare ETS and the OSHA ETS interact in terms of employer exemption in this instance. Employers subject to the Healthcare ETS remain subject to its active provisions, albeit in a dramatically reduced form. OSHA has not issued further guidance or commentary on this issue at this time.

This update to the Healthcare ETS contributes to an evolving and challenging compliance landscape for healthcare employers in the COVID-19 era. Here are some key risk management considerations for entities covered by the Healthcare ETS:

- Maintain full compliance with all recordkeeping provisions of the Healthcare ETS (**29 CFR 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r)**), as these provisions remain in effect.
- Determine whether to continue maintaining compliance with the remaining provisions of the Healthcare ETS. While these provisions are technically no longer in force, continued compliance will be viewed favorably by OSHA and may facilitate a smoother transition to achieving compliance with a final standard, once promulgated.
- Determine whether to establish compliance under the OSHA ETS in settings subject to the Healthcare ETS; while there is a technical argument that the Healthcare ETS remains in effect (and thus exempts such settings from the OSHA ETS), choosing not to comply with the OSHA ETS without definitive guidance from OSHA may subject a covered employer to heightened risk.
- Continue to monitor the legal and regulatory landscape to identify new or updated compliance obligations.

Our attorneys will continue to monitor the status of OSHA's emergency temporary standards and rulemaking processes. For more information on the OSHA Healthcare ETS, mandatory vaccination-or-test programs, or other COVID-19 related compliance questions, please contact **Shelley M. Jackson**, **Virginia A. Talley**, or any member of Krieg DeVault LLP's **Labor and Employment** Practice.

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