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OSHA's Healthcare Emergency Temporary Standard Is Promulgated: The Countdown to a Legal Challenge Begins

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On June 21, 2021, the federal Occupational Safety and Health Administration (OSHA) had its Occupational Exposure to COVID-19, Emergency Temporary Standard (ETS) published in the Federal Register, making it immediately effective on that date. 86 FR 32377 (June 21, 2021). OSHA has the authority to issue an ETS, for immediate application upon publication in the Federal Register, without first proceeding through typical notice-and-comment rulemaking, if OSHA "determines" that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and an ETS is "necessary to protect employees from such danger." 29 USC §655(c)(1).

Any person "adversely affected" by the ETS may raise a legal challenge in the U.S. Court of Appeals of their principal place of business or residence, within 60 days after the ETS's publication, and the court could then issue a stay of the rule's implementation. 29 USC §655(f)(1). By statute, the "determinations of [OSHA] shall be conclusive if supported by substantial evidence in the record considered as a whole." *Id.* OSHA has not successfully issued an ETS in more than four decades; the open legal issue is whether OSHA's ETS will survive legal challenge, if any is raised.

Despite its broad title in the Federal Register, the ETS, to be codified at 29 CFR §1910.502, is targeted to specific employment "settings," *i.e.*, "all settings where any employee provides healthcare services or healthcare support services." 29 CFR §1910.502(a)(1). OSHA further narrows the scope of the ETS to apply to those employees who are licensed healthcare providers and likely to be involved in the care of people suspected or confirmed to have COVID-19 and certain fully vaccinated employees. *See generally*, *id.* at §1910.502(a)(2) and the OSHA decision tree "Is Your Workplace Covered by the ETS?" The ETS requires that affected employers (1) have a COVID-19 plan, typically in writing, with a designated person in charge of implementing the plan, and based on a risk assessment, providing policies and procedures for control of COVID-19 transmission; (2) institute patient screening and management; (3) implement policies and procedures for precautions, including regarding PPE, response to aerosol-generating procedures, cleaning/disinfecting, physical distancing, and barriers; (4) ventilation standards; (5) have health screening and paid medical removal of employees after illness and exposure; (6) have paid vaccination leave; (7) provide

training and communication, including regarding anti-retaliation protections; (8) institute recordkeeping of all COVID-19 cases, regardless of work-relatedness; and (9) institute a "mini respiratory protection program" when use of respirators are not otherwise required, but the employee or employer chooses to upgrade a facemask to an N95 or similar respirator. Employers must comply with all provisions within 14 days, *i.e.,* by July 5, 2021, except for the provisions regarding physical barriers, training, and ventilation, which have a July 21, 2021 compliance date.

The ETS is accompanied by a preamble of more than 200 pages, much of it devoted to OSHA's determinations regarding the grave danger and need for the ETS generally and each provision specifically. In the preamble, OSHA recognizes and addresses the most likely legal challenges to the ETS. OSHA begins by framing the ETS as an action which OSHA was required to take, because the OSH Act provides that OSHA "*shall* provide… for an emergency temporary standard" upon a finding of grave danger and need for the ETS. 29 USC §655(c)(1); 86 FR at 32380.

With respect to the grave danger element, OSHA's position is that it need only show that the dangers to workers from COVID-19 are "incurable, permanent, or fatal…as opposed to easily curable and fleeting effects on their health." 86 FR at 23280 quoting *Fla. Peach Growers Ass'n, Inc. v. U.S. Dep't of Labor*, 489 F.2d 120, 132 (5th Cir. 1974). OSHA begins by discussing the nature of the disease, including its health and "other adverse effects", including "observed disparities in risk based on race and ethnicity," and continues by addressing the transmission of the virus and the effect of vaccines on OSHA's determination of grave danger, the effect on healthcare workplaces in particular. 86 FR at 32381, *et seq*. OSHA finds that "the advent of vaccines does not eliminate the grave danger …in healthcare workplaces where less than 100% of the workforce is fully vaccinated," due to spread among unvaccinated workers, the risk of breakthrough infection among the vaccinated, and vaccine hesitancy among health care workers. *Id.* at 32398. OSHA hedges that '[i]f and when OSHA finds a grave danger from the virus no longer exists for the covered workforce (or some portion thereof), or new information indicates a change in measures necessary to address the grave danger, OSHA will update the ETS, as appropriate." *Id.* at 32399. In the meantime, relying on "CDC guidance and the best available evidence, OSHA finds a grave danger in healthcare for vaccinated and unvaccinated HCP involved in the treatment of COVID-19 patients." *Id.*

Reflecting that OSHA's last attempt at issuing an ETS was rejected by the court for failure to show the necessity of the rule, given already existing OSHA standard, OSHA spent most of the preamble addressing the necessity issue. *See Asbestos Info. Ass'n/N. Am. v. OSHA,* 727 F.2d 415, 425-26 (5th Cir. 1984). In this case, the necessity element is particularly difficult for OSHA to establish, including because of its own prior response to COVID-19 in the workplace. OSHA notes that since January 2020 and continuing through October 2020, it has received requests for an ETS. However, beginning in May 2020, OSHA rejected those attempts given its existing enforcement tools, including for PPE, respiratory protection, and the General Duty Clause. When sued by the AFL-CIO for failing to issue a COVID-19 ETS for all workers, the U.S. Court of Appeals for the D.C. Circuit found that "in light of the unprecedented nature of the COVID-19 pandemic, as well as the

regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments, ...OSHA reasonably determined that an ETS is not necessary at this time." *In re Am. Fed'n of Labor & Cong. of Indus. Orgs.,* No. 20-1158, 2020 WL 3125324 (D.C. Cir., June 11, 2020).

OSHA recognizes that, after it decided against issuing an ETS, some state and local governments issued their own requirements and guidelines, leading to a "patchwork of state and local regulations [providing] inadequate and varying levels of protection for workers across the country, and [causing] problems for many employees and businesses." *Id.* at 32413. Thus, OSHA "does not believe its prior approach—enforcement of existing standards and the General Duty Clause coupled with the issuance of nonbinding guidance—has proven over time to be adequate to 'reduce the risk that workers may contract COVID-19' in healthcare settings." *Id.*

To support this decision, OSHA critiques the inadequacy of several tools it has already used for its COVID-19 enforcement efforts, including its main weapon—the General Duty Clause. *See, e.g., id.* at 32415, *et seq.* OSHA finds several weaknesses in the use of the General Duty Clause, including because it imposes a "heavy litigation burden on OSHA." OSHA would have to prove that the COVID-19 infection hazard was present at the particular workplace that was cited and that each abatement method that OSHA recommends would materially reduce the hazard at that particular workplace. Moreover, OSHA admits that it could not use the General Duty Clause to enforce the ETS's requirements for paid time for vaccination, its side effects, and medical removal. *Id.* at 32420. OSHA also notes that an ETS is necessary for it to address willful violations of the law by clarifying "what exactly employers are required to do to protect employees," implying that the General Duty Clause does not do so. *Id.* at 32420. OSHA notes that the Clause is further limiting because it would not permit it to cite the employer on a "per-instance basis" for each employee that OSHA determines was not adequately protected. OSHA also critiques the General Duty Clause for its "limited application to multi-employer worksites, like hospitals," thus giving OSHA the ability to, for example, cite the hospital for exposing a non-employee to a COVID-19 hazard. *Id.* at 32420-21.

OSHA also critiques the efficacy of its voluntary guidance for protecting workers, including the lack of compliance and the need for a "more consistent national approach," that "levels the playing field" among all employers. *Id.* at 32422. OSHA proceeds to show that its previous reasons for rejecting an ETS, issued "at an early phase of the pandemic," do not preclude OSHA's action now. The agency agrees with criticism, including that issued by the Department of Labor's Office of Inspector General, that "the combination of guidance and General Duty Clause authority has done little to protect employees [and] will not protect employees covered by this ETS...." *Id.* at 32423. OSHA also rejects that availability of vaccines has made the ETS unnecessary, and finds that "the potential for higher immunity rates later on does not obviate the need to implement the ETS now." *Id.* at 32424. OSHA's position reflects that although the ETS is immediately effective, OSHA must now open a notice-and-comment procedure and either issue a permanent standard according to those methods within 6 months, or the ETS is no longer applicable. 29 USC §655(c)(3).

OSHA's justification for the ETS is hampered by both a lack of data and evolving data. OSHA admits that it does not have the data to conduct its typical risk assessment, and that it cannot state the number of healthcare workers that have contracted COVID-19. OSHA asserts that such an assessment "is not necessary in this situation" because the "gravity of the danger presented by a disease with acute effects like COVID-19…is made obvious by a straightforward count of deaths and illnesses…." *Id.* at 32411. OSHA estimates that the ETS will save 776 lives over the next 6 months, based on a seven-step estimating process, which OSHA also modifies in certain circumstances. 86 FR at 32537.

OSHA also has the data-based challenges of declining infections, hospitalizations, and death; the lack of data that any state-promulgated ETS had any effect on work-related transmission of the virus; declining worker complaints about COVID-19 related hazards; and the paucity of data showing that healthcare workers face greater risks at work than in the community at large. In addition, while declaring that its current enforcement methods are not effective, OSHA has sparse data showing that is the case. The Department of Labor's Office of Inspector General found that it was OSHA's tepid enforcement in 2020 that led to greater COVID-19 hazards in the workplace, and OSHA's March 2021 National Emphasis Program addressing COVID-19 has barely gotten off the ground. Moreover, none of the agency's COVID-19 General Duty clause cases have reached the point of decision by the Occupational Safety and Health Review Commission, which would indicate whether OSHA could effectively rely on the General Duty Clause, including as a deterrent to other employers who have not been cited.

The time clock for a legal challenge to the ETS has started. If challenged, OSHA must show that its preamble provides "substantial evidence" such that "a reasonable mind might accept [it] as adequate to support a conclusion." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 522 (1981). As the court noted in *Asbestos Info. Ass'n,* this standard requires that the court "take a 'harder look' at OSHA's action than we would if we were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the Administrative Procedure Act." 727 F.2d at 421. To protect the ETS from legal challenge, OSHA has included a severability clause in the regulation itself, stating that "each individual section and provision of the ETS can continue to sensibly function in the event that some sections or provisions are invalidated, stayed, or enjoined." 86 FR at 32617. Whether this COVID-19 Healthcare ETS becomes OSHA's first emergency rule in more than 40 years is now an active question, including whether there are parties who wish to take the public position of opposing protections for health care workers during a pandemic.

For information or advice on OSHA guidance, standards and enforcement during the pandemic, please contact the author. Additional information regarding working during the COVID-19 pandemic can be found in *Jenner & Block's Corporate Environmental Lawyer* blog and in the Jenner & Block COVID-19 Resource Center.

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