

3 Things Employers Should Know As DOL Virus Rule Kicks In

By **Vin Gurrieri**

Law360 (June 18, 2021, 9:59 PM EDT) -- The U.S. Department of Labor's recently unveiled emergency COVID-19 safety rule for health care employers will take effect Monday.

On June 10, the DOL's Occupational Safety and Health Administration issued the so-called emergency temporary standard, or ETS, which sets workplace safety parameters for employers in the health care sector for the duration of the COVID-19 pandemic. The highly anticipated interim rule will take effect right away and be subject to a 30-day comment period after it is published in Monday's Federal Register, with the agency accepting feedback on the regulations themselves and on the issue of whether a final rule is warranted.

Kevin Troutman, co-leader of Fisher Phillips' health care industry group and a member of the firm's COVID-19 task force, told Law360 shortly after the ETS was first unveiled that the health care sector "has some unique circumstances" when it comes to workplace safety, something that the Labor Department acknowledged in issuing the ETS.

"OSHA recognized that because health care workers may be the ones who are actually providing hands-on care to people infected with the COVID virus — patients with COVID — that they need special protections," Troutman said. "And OSHA seems to clearly recognize vaccines as being one of those key protections. So, their focus is on protecting the unvaccinated workers."

Here, Law360 looks at three ways the rule and its accompanying guidance will affect employers.

Compliance Dates Vary

Even though the ETS applies only to health care employers, it includes a sweeping array of rules, requirements and mandates that they have to follow, variations of which are familiar to employers that have spent more than a year trying to weather the pandemic.

Those mandates include having a written COVID-19 safety plan in place for employers with at least 10 workers, making sure that patients are properly screened for virus symptoms, making sure that ventilation systems meet an established baseline, and training employees on COVID-19 safety procedures.

Where things may get tricky, however, is the date by which employers have to comply with various

provisions: 14 days after the rule takes effect for most mandates, but 30 days for others.

Requirements that fall into the 30-day bucket include ensuring adequate ventilation in facilities, giving employees required training and erecting any barriers at certain work locations when 6 feet of distancing isn't possible.

Daniel Kaplan, co-chair of Foley & Lardner LLP's labor and employment practice, told Law360 that some of those time frames may be easier for employers to pull off than others.

While Kaplan doesn't expect that crafting written COVID-19 safety plans will be a difficult task for employers, screening people who enter facilities and limiting points of entry could prove tougher.

"That's got to be implemented within 14 days, and I think many health care locations have seen a reduction in the restrictions on family members and others who visit loved ones in the hospital. And they're now going to have to [ramp] that back up because they're going to have to now do screening and triage pretty much at any entry point," said Kaplan, whose practice includes defending employers in workplace health and safety matters. "That's going to create, I think, some backlog and some confusion."

Similarly, upgrading ventilation systems for health facilities that don't meet OSHA's standard could be taxing for employers as far as procuring the parts and equipment necessary if supply is hard to come by, and some health systems with a lot of workers could find it difficult to get trainings completed in the 30-day time frame, according to Kaplan.

Moreover, the requirement to erect barriers that falls within the 30-day period could also be problematic for some employers — particularly those that haven't already had to do so, Kaplan said, adding that it remains to be seen whether OSHA "takes a broader view of where physical barriers are necessary."

"If they do, then that physical distancing or physical barrier requirement could be a challenge," Kaplan said.

CDC's Stance Gets Confirmed

In conjunction with the ETS, OSHA on June 10 unveiled an updated series of voluntary guidelines for employers that operate outside the health care sector to protect unvaccinated workers, particularly in industries such as meatpacking and high-volume retail where close contact between people is common.

The new outline tracks guidance issued by the Centers for Disease Control and Prevention **in May** that recommends loosening virus-related restrictions among those who are fully vaccinated against COVID-19. That includes vaccinated people not having to wear a mask or physically distance indoors or outdoors, save for certain exceptions, so long as no laws require otherwise.

The ETS similarly tips its hat toward the CDC's recommendations, saying that fully vaccinated health care workers don't have to wear masks or adhere to masking or distancing requirements if they are in "well-defined areas where all employees are fully vaccinated" and where people who have or could potentially have the virus aren't reasonably expected to be present. The rule includes a carveout for certain employers with workplaces where all employees are fully vaccinated and people who may have COVID-19 are barred.

Prior to OSHA's June 10 guidance being issued, the workplace safety watchdog had not fully thrown its weight behind the CDC's recommendations, which effectively left employers unsure about how to proceed, according to Alana Genderson, a member of Morgan Lewis & Bockius LLP's OSHA practice.

"The CDC itself had a carveout for workplaces, saying, 'This is our recommendation, but this is subject to state, local, territorial ... laws as well as workplace rules,'" Genderson said. "So, the CDC guidance threw it back to employers and OSHA was throwing it to the CDC. What [OSHA's guidance] does is close the loop, and it's really important for employers to have that clarity now that they can, in fact, rely on CDC guidance."

Genderson noted that many employers had feared jumping the gun ahead of OSHA to adopt their own policies that tracked the CDC's recommendations over concerns that OSHA would eventually take a different position — a compliance nightmare that didn't come to pass.

"Many employers were concerned that if they changed their policy for fully vaccinated individuals, OSHA was going to publish an ETS or publish guidance on their industry in particular that would restrict them from doing so in some way," Genderson said. "So, this guidance is actually a really big deal and, unless you're a health care employer, this is the most important development."

By updating guidance that had been last revised in January, Fisher Phillips' Troutman said, OSHA also clarified that vaccinated and unvaccinated workers could be treated differently, as was outlined in CDC's guidance. That position could ultimately have the effect of nudging more workers to get vaccinated even if no mandate that they do so exists.

"It's still going to be up to employers even outside of health care to make sure that the unvaccinated workers are still wearing masks and practicing distancing. That's really important because that means employers are going to need to be able to distinguish between who's vaccinated and who's not," Troutman said. "Ultimately, that may serve as an incentive — maybe more than any other incentives we've heard about — for people to get vaccinated because that's the way to do away with masking and distancing in the workplace."

Tweaks to Worker Hospitalization Reporting

Things like personal protective equipment, screening and vaccines have been at the forefront of employers' minds since the pandemic began. But the ETS includes numerous other provisions that could sneak up on employers if they aren't careful — including a new standard for how and when employers must report to OSHA that a worker with COVID-19 was admitted to a hospital.

Under normal circumstances, U.S.-based employers must report a work-related fatality only if it occurs within 30 days of an incident or report an in-patient hospitalization if it occurs within 24 hours of a workplace incident, according to the Labor Department.

But in an FAQ document that accompanied the ETS, the Labor Department made clear that employers covered by the emergency rule must report every work-related COVID-19 fatality or employee hospitalization, no matter how much time passes between the workers' exposure to COVID-19 on the job and their death or hospitalization.

More specifically, OSHA said that employers must report every employee COVID-19 fatality within eight

hours and every COVID-19-related hospitalization within 24 hours of learning about it.

Genderson said the reporting requirement "has been a point of confusion for employers," but that it accounted for the reality of the way COVID-19 manifests itself by eliminating the general reporting requirement that employers report a hospitalization that occurs within 24 hours of a workplace exposure.

As an illustrative example, she said that a scenario where a construction worker needs to be hospitalized after getting hit in the head with debris is a far different scenario from a worker being infected with COVID-19, where symptoms aren't likely to occur for two to 14 days.

"In essence, what [the ETS] did is say in the health care industry, if an employee is exposed and then hospitalized as a result of that exposure, that needs to be reported to OSHA regardless of whether the hospitalization occurs within 24 hours," Genderson said. "They've essentially fixed a glitch in the [regulations] that eliminated the requirement for employers outside of the health care industry to report COVID-19 hospitalizations."

--Editing by Abbie Sarfo.