

Client Alert

Employment and Labor | Health Care

Health Care Settings Subject to New COVID-19 Requirements Issued by New Jersey and OSHA

Health care settings continue to be at the center of testing and treatment for COVID-19 and are the focus of new safety requirements implemented to minimize risks of transmission. Last month, Governor Murphy issued an [Executive Order](#) related to vaccination management, COVID-19 testing, and data collection, which mandates “covered health care and high-risk congregate settings” to establish a policy requiring “covered workers” to either submit proof of full vaccination or to submit to weekly COVID-19 testing. This requirement goes into effect on September 7, 2021.

In addition, the Occupational Health and Safety Administration (OSHA) has implemented an emergency temporary standard (ETS) applicable to certain health care settings, which includes extensive safety and health measures. The ETS provides for certain exceptions for coverage, and while the precise definitions are complicated and must be consulted, the focus appears to be on those settings where employees are interacting with patients who are suspected or confirmed for COVID-19. Unlike the Executive Order, the OSHA ETS does not include vaccine or testing requirements; however, certain New Jersey health care providers will be covered by both measures.

Which health care and high-risk congregate settings must comply with the Executive Order?

The scope of this Executive Order is quite broad and will impact most health care settings across New Jersey, both in terms of the covered health care settings and the covered workers to which the vaccine or testing requirements will apply.

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The Executive Order defines “health care facility” extremely broadly as including:

acute, pediatric, inpatient rehabilitation, and psychiatric hospitals, including specialty hospitals, and ambulatory surgical centers; long-term care facilities; intermediate care facilities; residential detox, short-term, and long-term residential substance abuse disorder treatment facilities; clinic-based settings like ambulatory care [which would include all private medical offices], urgent care clinics, dialysis centers, Federally Qualified Health Centers, family planning sites, and Opioid Treatment Programs; community-based healthcare settings including Program of All-inclusive Care for the Elderly, pediatric and adult medical day care programs, and licensed home health agencies and registered health care service firms operating within the State.

High-risk congregate settings under the Executive Order include:

State and county correctional facilities; secure care facilities operated by the Juvenile Justice Commission; licensed community residences for individuals with intellectual and developmental disabilities (“IDD”) and traumatic brain injury (“TBI”); licensed community residences for adults with mental illness; and certified day programs for individuals with IDD and TBI.

“Covered workers” is defined to include full and part time employees and independent contractors, as well as individuals with operational, custodial and administrative support roles.

How to Comply and Penalties for Violations

Covered workers are not required to provide proof of having been fully vaccinated under the Executive Order, but those who do not submit proof of full vaccination must submit to COVID-19 testing one to two times per week. The settings covered by this Executive Order may choose to impose more frequent testing as well. A covered worker will not be considered fully vaccinated until two weeks have elapsed since receipt of the second dose of a two-dose series, or a single dose of a one-dose.

Acceptable proof of full vaccination includes: (1) CDC COVID-19 Vaccination Card; (2) Official record from the New Jersey Immunization Information System or other State immunization registry; (3) Record from a health care provider portal/medical record system on official letterhead signed by a physician, nurse practitioner, physician’s assistant, registered nurse or pharmacist; (4) Military immunization or health record from the U.S. Armed Forces; or (5) Docket® mobile phone application record or any state specific application that produces a digital health record. Records of such proofs must be maintained confidentially.

Those employees who do not submit proof of vaccination must submit to weekly testing, which can be either antigen or molecular tests with Emergency Use Authorization from

the Food and Drug Administration or operating pursuant to the Laboratory Developed Test requirements by the U.S. Centers for Medicare and Medicaid Services. Covered settings may provide onsite COVID-19 tests, which can be either an antigen or molecular test. Covered settings must have a policy for tracking test results and are required to report results to the local public health department. However, in all other respects, vaccination and testing information must be kept confidential and separate from the employees' personnel records.

The penalties for violations are stringent. Pursuant to N.J.S.A. 9:49, a violation may be considered a disorderly conduct offense, which can carry a penalty of a fine of up to \$1,000 or 6 months imprisonment.

It should be noted that the requirements of the Executive Order with respect to screening and testing of unvaccinated workers do not override any requirement imposed by the covered setting regarding the testing and screening of symptomatic workers or vaccinated workers.

OSHA's COVID-19 Emergency Temporary Standard (ETS) for Health Care Settings

Published on June 21, 2021¹ and in further effort to ensure the safety of health care workers, the OSHA ETS for health care and related industries provides that, unless an exception applies, in settings where employees provide health care services or health care support services, employers must develop and implement COVID-19 plans.

The analysis to determine whether an exception applies is complicated, and OSHA offers a [flowchart](#) to assist with this analysis. Among these exceptions are:

- Private medical practices, where (i) the office is in a non-hospital setting, (ii) ALL non-employees are screened prior to entry, and (iii) anyone with suspected or confirmed COVID-19 is not permitted to enter the premises.
- Well-defined hospital ambulatory care settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings.
- Home health care settings where all employees are fully vaccinated, all non-employees are screened prior to entry, and people with suspected or confirmed COVID-19 are not present.
- Well-defined areas where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present, the requirements in the ETS for personal protective equipment (PPE), physical distancing, and physical barriers do not apply to employees who are fully vaccinated.

¹ Covered health care employers must comply with all provisions in the ETS as of July 6, 2021 except those requirements related to ventilation, physical barriers, and training, which had a compliance deadline of July 21, 2021.

For those covered health care settings with more than 10 employees, the COVID-19 plan must be in writing. It is not practicable to list every requirement in this alert without making it quite lengthy, but the following will highlight some of the notable plan requirements:

- A designated safety coordinator who understands and is able to identify COVID-19 hazards in the workplace, is knowledgeable in infection control and has the authority to ensure compliance with the COVID-19 plan
- A workplace hazard assessment (including involvement of non-managerial employees)
- Policies and procedures to minimize the risk of transmission of COVID-19 to employees, which are extensive and include but are not limited to:
 - Limiting points of entry for patients and screening patients, clients and visitors at entry
 - Social distancing when indoors
 - Physical barriers between fixed work stations in non-patient areas
 - Cleaning and disinfecting surfaces and equipment in patient areas and in high touch areas at least once per day
 - Providing hand sanitizer with a minimum of 60% alcohol or easily accessible handwashing facilities
 - Providing Personal Protective Equipment (PPE) to employees with close contact exposure (within six feet in same room) to a person with suspected or confirmed COVID-19
 - Ensuring HVAC systems are used per manufacturer instructions and utilize Minimum Efficiency Reporting Value of 13 or higher if the system permits
 - Screening employees each workday/shift
 - Employees required to promptly notify employer of positive COVID-19 test, a suspected COVID-19 case or of COVID-19 symptoms
 - When an employee who has been physically present in the workplace tests positive, that employee must notify a designated employee within 24 hours

Employees should be trained on COVID-19 transmission and informed of their right not be retaliated against for exercising their rights under this ETS. Finally, health care settings with more than 10 employees must retain records of positive COVID-19 cases and all covered health care settings must report any COVID-19 fatalities and in-patient hospitalizations to OSHA.

ETS Requires Employers Pay Employees Forced to Quarantine or Isolate Under Defined Circumstances

Significantly, the ETS requires covered employers with ten or more employees to provide employees with substantial “medical removal protection benefits” if the employee must be removed from the workplace when the employer knows that the employee:

1. Is COVID-19 positive, meaning that the employee was confirmed positive for or was diagnosed by a licensed health care provider with COVID-19;
2. Has been told by a health care provider that they are suspected to have COVID-19;
3. Is experiencing recent loss of taste and/or smell, with no other explanation; or is experiencing both fever ($\geq 100.4^{\circ}$ F) and new unexplained cough associated with shortness of breath; or
4. Is required to be notified by the employer of close contact in the workplace to a person who is COVID-19 positive, UNLESS the employee has been fully vaccinated against COVID-19 (i.e., 2 weeks or more following the final dose), or had COVID-19 and recovered within the past 3 months, AND the employee does not experience the symptoms listed in item 3.

When an employee must quarantine or isolate under the aforementioned circumstances, medical removal benefits entitle the employee to regular pay the employee would have received had the employee not been absent from work, up to \$1,400 per week until the employee is able to return to work. After three weeks of this leave, employers with 500 or less employees may reduce the benefits paid to two thirds of the employee's regular rate of pay (up to \$200 per day). If an employee removed from the workplace is too ill to work remotely, OSHA directs the employer to provide the employee with sick leave or other leave in accordance with the employer's policies and applicable law. The employer's payment obligation is reduced by the amount of compensation the employee receives from any other source, such as a publicly or employer-funded compensation program. Employers may also be entitled to an American Rescue Plan tax credit if they pay sick and family leave for qualified leave from April 1, 2021, through September 30, 2021. More information on the tax credit is available from the [IRS](#).

Resources for Compliance

OSHA provides a lengthy [COVID-19 plan template](#) to assist health care providers, which may be customized for each workplace. There are [additional resources](#) available to health care providers including worksite checklists, sample employee screening questionnaires, an employee training presentation on the Health care ETS and a sample COVID-19 log. OSHA also offers an [FAQ](#) on the ETS standard.

Enforcement and Penalties

Violations of the OSHA ETS may carry a maximum penalty of \$13,653 per serious violation or per day for failure to abate beyond the abatement date. Willful or repeated violations carry a penalty of \$136,532 per violation. OSHA will use its discretion to determine whether an entity's failure to comply with the ETS standard despite its best efforts warrants relaxation of the enforcement penalties. However, the agency expects that most employers should be able to achieve compliance within the stated deadlines. When addressing penalties for violations, the agency will also consider the size of the company and any past violations.

Takeaways

Health care settings continue to be at the frontline as we battle COVID-19. State and Federal guidelines and mandates are evolving, extremely complicated and can be difficult to navigate. As a threshold matter, it is critical to determine which measures apply to the health care setting. Compliance is critical to minimize the risks to patients and employees and to avoid penalties for non-compliance. Clear communication with employees is crucial to ensure that they are familiar with the requirements and expectations, as well as to understand the employer's efforts to keep them safe. We are available to provide assistance on the issues discussed in this alert.

Attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

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