

Health Care Employer Compliance with State and Federal Workplace Standards

June 24, 2021

In response to increased COVID-19 vaccination rates in Michigan and across the United States, many Michigan and federal agencies have amended or updated their COVID-19 workplace guidelines, standards and rules. A summary of these changes, as they apply to health care employers, is printed below.

As summarized below, the workplace rules for health care employers have changed and are now primarily addressed by the Occupational Safety and Health Administration (“OSHA”) COVID-19 Emergency Temporary Standard (“ETS”). Importantly, OSHA’s ETS incorporates various CDC recommendations. Although OSHA’s ETS exempts certain qualifying health care employers from its workplace provisions, all physicians and other providers of health care services (whether or not exempted under OSHA’s ETS) should continue following CDC recommendations when treating patients, including its screening and facemask recommendations. Consistent with this, the Michigan Department of Health and Human Services (“MDHHS”) published facemask recommendations on June 22, 2021. Relative to health care facilities, such as hospitals, ambulatory care settings (including medical practice offices) and surgical centers, the MDHHS facemask recommendations state that “As of now CDC health care guidance remains unchanged. Facilities should continue to follow CDC guidance.”

Occupational Safety and Health Administration (“OSHA”)

On June 17, 2021, OSHA filed a COVID-19 Emergency Temporary Standard (“ETS”) which became effective on June 21, 2021. OSHA’s ETS requires covered health care employers which are not excluded from the ETS, to continue to do the following:

- Implement a COVID-19 plan for each workplace;
- Designate one or more COVID-19 safety coordinators;
- Conduct a workplace-specific hazard assessment;
- Implement policies and procedures to determine employees’ vaccination status;
- Limit and monitor points of entry in settings where direct patient care is provided;
- Screen and triage all clients, patients, residents, and other visitors entering the setting where direct patient care is provided;
- Ensure that facemasks are worn by all non-vaccinated employees;
- Ensure that all non-vaccinated employees are separated by six feet of physical distance where feasible;
- Install barriers at fixed work locations outside of direct patient care areas where each non-vaccinated employee is not separated by at least six feet of distance from all other people;
- Screen all employees before each day of work and/or shift;
- Notify employees of COVID-19 exposures in the workplace (except where services are normally provided to suspected or confirmed COVID-19 patients);
- Implement removal policies for employees who have suspected or confirmed COVID-19;
- Provide medical removal protection benefits to those employees quarantined or in isolation, of up to \$1,400 per week, until the employee meets return to work criteria (this does not apply to employers with 10 or fewer employees);
- Implement training requirements; and
- Implement record-keeping procedures.

In addition, the OSHA ETS provides a Mini Respirator Protection Program applicable to respirator use when such use is not specifically required by OSHA. While the ETS does not directly require health care employers to require patients or visitors to wear a facemask, the ETS does incorporate by reference the [CDC’s COVID-19 Infection Prevention and Control Recommendations](#). This incorporated CDC guidance recommends health care facilities

advise patients to wear source control before entering the facility and further provides that source control measures are recommended for everyone in a health care facility.

Importantly, the ETS's requirements for health care employers **do not** apply to any of the following:

- The provision of first aid by an employee who is not a licensed health care provider;
- The dispensing of prescriptions by pharmacists in retail settings;
- Non-hospital ambulatory care¹ settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings;
- 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 and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not present;
- Health care support services not performed in a health care setting (e.g., off-site laundry, off-site medical billing); or
- Telehealth services performed outside of a setting where direct patient care occurs.

Accordingly, health care employers in non-hospital ambulatory care settings (including many physician's offices) in which all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are excluded, are not required to abide by the health care provisions of OSHA's ETS discussed above. Notwithstanding the inapplicability of the ETS, all health care employers are encouraged to continue to follow public health guidance from the CDC as well as general OSHA guidance.

OSHA's ETS does not apply to non-health care employers.

Michigan Occupational Safety and Health Administration ("MIOSHA")

Effective June 22, 2021, MIOSHA issued revised COVID-19 Emergency Rules which supersede the agency's Emergency Rules issued on May 24, 2021. The revised Emergency Rules require compliance with the OSHA ETS and apply only to health care employers covered by the Michigan Occupational Safety and Health Act.

Michigan Department of Health and Human Services ("MDHHS")

Effective Tuesday, June 22, 2021, MDHHS rescinded its broad Gatherings and Face Mask Order ("Order"). The Order had previously imposed indoor capacity limitations, restrictions on organized sports gatherings, and required facemasks to be worn in all indoor gatherings, among others. MDHHS's rescission of the Order does not, however, affect any proceedings or prosecutions based on conduct that occurred prior to June 22, 2021, nor does it affect compliance by health care employers with OSHA's ETS.

As discussed above, on June 22, 2021, MDHHS released a "[Rapid Public Health Alert](#)" addressing facemask recommendations in various settings. The Alert recommends that health care facilities continue to follow CDC health care guidance. Current CDC health care guidance recommends health care employers advise patients to put on their own well-fitting source control before entering the facility.

Centers for Disease Control and Prevention ("CDC")

¹ "Ambulatory care" means healthcare services performed on an outpatient basis, without admission to a hospital or other facility. It is provided in settings such as: offices of physicians and other healthcare professionals, hospital outpatient departments, ambulatory surgical centers, specialty clinics or centers, and urgent care clinics.

In May 2021, the CDC published recommendations for Fully Vaccinated² individuals, providing that Fully Vaccinated individuals could resume activities without wearing a mask and without physically distancing. Significantly, however, these recommendations were *not* intended for health care settings. In the event of any conflict between OSHA’s ETS and CDC standards, health care employers need to follow OSHA’s ETS.

Rather than following the CDC’s recommendations for Fully Vaccinated individuals, health care personnel (“HCP”) are encouraged to continue to abide by the [Interim Infection Prevention and Control Recommendations for Health care Personnel During the Coronavirus Disease 2019 \(COVID-19\) Pandemic](#) and the accompanying [Updated Health care Infection Prevention and Control Recommendations in Response to COVID-19 Vaccination](#) published by the CDC.

These health care specific recommendations, which are presently still applicable to all HCP, encourage continued physical distancing and the use of source control³ for patients, residents, visitors, and HCP, regardless of vaccination status. However, the CDC does provide that Fully Vaccinated HCP may dine and socialize together in break rooms and conduct in- person meetings without source control or physical distancing. However, if unvaccinated HCP are present, the CDC recommends that all HCP, including Fully Vaccinated HCP, wear source control and unvaccinated HCP should physically distance from others.

The CDC health care recommendations also continue to encourage quarantine and/or isolation for both Fully Vaccinated and unvaccinated individuals if they have been exposed to COVID-19, although there is some flexibility for Fully Vaccinated individuals. For example, Fully Vaccinated HCP with higher-risk exposures who are asymptomatic do not need to be restricted from work for 14 days following their exposure and, although not preferred, the CDC advises that health care facilities can consider waiving quarantine for Fully Vaccinated patients and residents following prolonged close contact with someone with SARS-CoV-2 infection as a strategy to address critical issues (e.g., lack of space, staff, or PPE to safely care for exposed patients or residents) when other options are unsuccessful or unavailable.

Other Requirements

All Michigan employers are required to maintain compliance with Michigan’s COVID-19 Employment Rights Act, MCL 419.401 *et seq.*, which requires unvaccinated employees who have been or are suspected of having been exposed to COVID-19 and all employees who are experiencing COVID-19 symptoms, to not report to work until the applicable return to work requirements are met.

In addition, all employers who are not subject to OSHA’s ETS (including any exempted health care employers) should continue to follow [CDC guidance](#) and [OSHA guidance](#), even absent any specific MDHHS, MIOSHA, or OSHA ETS requirements. Pursuant to OSHA’s general duty clause, all employers have a legal obligation to provide their employees with “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.” To ensure compliance with the general duty clause, employers who are not subject to OSHA’s ETS (including any exempted health care employers) should continue COVID-related measures to protect workers who are unvaccinated or otherwise may be at risk from COVID exposure, such as requiring any (i) workers who are infected, (ii) unvaccinated workers who have had close contact with someone who tested positive for COVID-19, and (iii) workers with COVID-19 symptoms (regardless of vaccination status), to stay home from work until they can return based on the latest CDC return

² “Fully Vaccinated” means individuals for whom (i) 2 weeks have passed following their second dose in a 2-dose series, such as the Pfizer or Moderna vaccines; or (ii) 2 weeks have passed following their single-dose vaccine, such as Johnson & Johnson’s Janssen vaccine.

³ “Source control” means the use of well-fitting cloth masks, facemasks, or respirators to cover a person’s mouth and nose to prevent spread of respiratory secretions when they are breathing, talking, sneezing, or coughing.

to work recommendations. OSHA's guidance includes additional measures for employers to assess in order to ensure compliance with its general duty clause.