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AUGUST 2021
ISSUE 8, VOLUME 11
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THE ADELMAN ADVANTAGE

by Rebecca Adelman

Making Sense of the OSHA COVID-19 Healthcare Emergency Temporary Standard

OSHA released on June 10 the COVID-19 Healthcare Emergency Temporary Standard (ETS). The ETS was in response to an Executive Order issued by President Joe Biden that directed the agency to take action to reduce the risk that workers may contract COVID-19 in the workplace. Following later in the article is a summary of the ETS requirements. **NOTE: OSHA updated the ETS on August 13. Adelman Law Firm has sample compliant forms and related employer information to implement best practices and to solve to regulatory conflicts in your nursing home or assisted living community.**

The primary purpose of the August 13, 2021 update is to align OSHA guidance with the Centers for Disease Control and Prevention's (CDC's) July 27 updated mask and testing recommendations for fully vaccinated individuals. The CDC guidance, which is now explicitly endorsed by OSHA, reversed course by recommending that fully vaccinated individuals wear masks in public indoor settings in areas of substantial or high community transmission, as classified by the CDC COVID Data Tracker.

Burdens, Confusion and Conflicts with Regulations and the ETS

Nursing home and assisted living healthcare providers have fought COVID-19 and worked tirelessly and courageously to care for residents across the country with and without COVID-19.

The life-giving and life-saving roles have never been more evident than during the course of this pandemic. With limited resources and ever-changing guidance amidst the tragic consequences in the vulnerable aged population, senior living leadership and their organizational partners have been supporting the efforts of healthcare employees and taking the needed steps to protect them. The safety and protection of all health care workers has always been a priority in long-term care.

A close reading of the ETS reveals challenges for long-term care providers including the inconsistencies between the new standard, CDC, and CMS regulatory requirements for nursing homes. The overarching industry position is that the ETS places a burden on facilities to determine how to comply with all requirements when some appear to conflict with each other. The recommendation is that OSHA refer to CDC guidance in specific areas to reduce confusion.

Nursing homes, for example, are already required by CMS to report any positive cases to staff (including contracted staff) and family members. Adding "other employers" is confusing and potentially redundant. While OSHA incorporated into the ETS some of CDC's COVID-19 guidelines and recommendations, there are requirements that contradict, or in some cases go far beyond, what CDC recommends; in some instances, the ETS does so in ways that may put health care workers at greater risk. This is particularly a concern in the areas where outdated CDC guidelines have been incorporated into the ETS by reference.

I've been advising organization leaders on employee policies for time-off for compliance with existing employment laws, organizational policies and now

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the ETS. Leaders have commented that it difficult to encourage staff to get vaccinated when they are required to pay all employees who are removed from the workplace (either due to a positive diagnosis or exposure) regardless of where they contracted the virus, if they took appropriate precautions, or if they are vaccinated.

There is a strong argument that the ETS does not provide any additional benefit beyond what senior living communities have already been doing, and continue to do, to protect their workforce throughout the pandemic.

The August 13 Updated ETS Guidance

OSHA Aug. 13 released updated guidance to employers designed to help them protect workers who are unvaccinated or those who are vaccinated but in areas of high Covid-19 transmission.

The guidance recommends that fully vaccinated workers in areas of substantial Covid-19 transmission wear masks to protect unvaccinated workers, recommends workers who've been exposed to the virus wear masks for up to 14 days, and clarifies recommendations to protect unvaccinated workers in manufacturing, meat, and agricultural processing.

The update isn't helpful for employers to create policies to avoid OSHA citations under the ETS. The guidance is confusing and unreliable so policies developed by providers may or may not comply. I advise that your policies establish that your organization is making its best efforts to comply with the law.

To add yet another level of conflict, shortly after the August update, the Biden administration announced plans to require nursing homes to vaccinate their staff against COVID-19 in order to receive federal funding.

ETS Summary

The ETS applies to healthcare settings where the office does not screen all non-employees prior to entry and locations where all employees are not fully vaccinated. We recommend maintaining written evidence and records of these requirements in office files.

COVID-19 plan - Each facility must develop a plan in writing.

Safety coordinator - Each facility must designate an individual with the authority to ensure compliance with the COVID-19 plan.

Hazard assessment - The facility should be assessed for any potential COVID-19-related hazards and a mitigation plan developed to address those hazards. Non-managerial employees must be involved in the hazard assessment and plan development. Screening COVID-19 screening must occur at points of entry where direct patient care is provided, and all patients, clients and other visitors or non-employees must be screened. All employees should be screened before each shift, and contact training between employees must be performed. Standard and transmission-based precautions based on CDC guidelines should be developed and implemented.

Facemasks – Per OSHA, the updated guidance reflects developments in science and data, including the Centers for Disease Control and Prevention's updated COVID-19 guidance issued July 27.

The updated guidance expands information on appropriate measures for protecting workers in higher-risk workplaces with mixed-vaccination status workers, particularly for industries such as manufacturing; meat, seafood and poultry processing; high volume retail and grocery; and agricultural processing, where there is often prolonged close contact with other workers and/or non-workers.

OSHA's latest guidance:

Recommends that fully vaccinated workers in areas of substantial or high community transmission wear masks in order to protect unvaccinated workers;

Recommends that fully vaccinated workers who have close contacts with people with coronavirus wear masks for up to 14 days unless they have a negative coronavirus test at least 3-5 days after such contact;

Clarifies recommendations to protect unvaccinated workers and other at-risk workers in manufacturing, meat and poultry processing, seafood processing and agricultural processing; and

Links to the latest guidance on K-12 schools and CDC statements on public transit.

Aerosol-generating procedures - When performing an aerosol-generating procedure on a person with suspected or confirmed COVID-19, only essential personnel should be present, the procedure should be performed in an airborne infection isolation room if available, and surfaces and equipment should be

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cleaned/disinfected after the procedure is completed.

Physical distancing - Six feet must be maintained, and barriers installed where appropriate. Cleaning requirements Specific cleaning protocols must be implemented.

• Patient areas, medical devices and equipment – Use standard practices for cleaning and disinfection in accordance with CDC's COVID-19 Infection Prevention and Control Recommendations and the CDC's Guidelines for Environmental Infection Control.

• In all other areas:

° Clean high-touch surfaces and equipment at least once a day using manufacturers' instructions.

° When employer is aware that a COVID-19 positive person was in the workplace within the last 24 hours, any areas, materials and equipment likely contaminated by the person must be cleaned and disinfected according to the CDC's Cleaning and Disinfecting Guidelines.

Hand sanitizer - Alcohol-based hand rub should be provided that is at least 60 percent alcohol, or provide readily accessible hand-washing facilities.

Air ventilation - Outside air circulation should be maximized to the extent appropriate. Air filters should be at MERV-13 or higher if HVAC will allow, or highest compatible filtering efficiency for the system should be utilized. Filters should be maintained and replaced as necessary. All intake ports that provide outside air should be cleaned and maintained regularly.

Time off - Employers must provide reasonable time and paid leave for employees to become vaccinated and recover from vaccine side effects.

COVID-19 training - All employees must receive COVID-19 training.

COVID-19 log - A COVID log must be developed and available that records each incident identified by the employer in which an employee is COVID-19 positive, regardless of whether the instance is connected to exposure at work.

Mini RPP - In situations where workers are not generally exposed to suspected or confirmed sources of COVID-19 but where respirator use could offer enhanced worker protection, the mini RPP program may be used.

Employee Time Off

Paid Leave for Vaccinations

Healthcare employers must provide paid time off during work hours for workers to get vaccinated and recover from any side effects. The paid leave can be in the form of an employee's accrued sick leave, if available, or additional paid leave provided by the employer solely for vaccination purposes. Employers can set a reasonable cap on leave for vaccination purposes. OSHA suggests that four hours per dose, plus up to eight additional hours per dose for side effects, will be considered sufficient for vaccine-related leave.

Mandatory Removal from the Workplace; Paid Leave and Job Protection Benefits

Another important feature of the ETS is the medical removal requirement. Employers must remove employees from the workplace if they: (1) experience a recent loss of taste and/or smell with no other explanation, have a fever accompanied by a new, unexplained cough and shortness of breath, or are told by a licensed healthcare provider that they are suspected to have COVID-19; (2) receive a positive COVID-19 test; or (3) for unvaccinated workers, have a known exposure to someone who is COVID-19 positive.

Significantly, workplaces with more than 10 employees must provide medical removal protection ("MRP") benefits, including paid leave, to employees who are removed from the workplace for these reasons and are unable to work remotely. MRP benefits must be available to such employees regardless of whether the symptoms or exposure are work related. The amount of paid leave depends on the size of the employer:

Employers with more than 10 but fewer than 500 employees must pay the employee's regular pay, up to $1,400 per week, for the first two weeks. For the third and any subsequent weeks, the employer must pay 2/3 of the employee's regular pay, up to $200 per day.

Employers with 500 or more employees must pay the employee's regular pay, up to $1,400 per week, until the employee is cleared to return to work.

MRP benefits can be offset by employer-provided paid sick leave or any other source of income an employee receives due to being removed from work.

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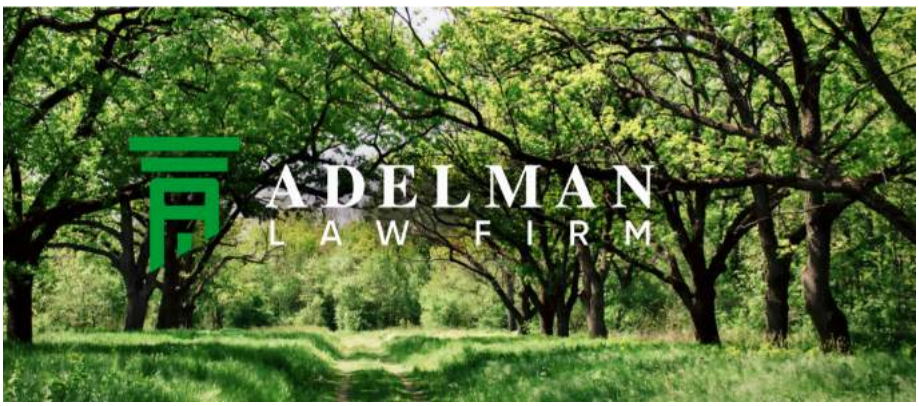
In some circumstances, employers can deny MRP benefits to employees who are suspected of having COVID-19 but refuse to be tested. Also, businesses with fewer than 500 employees may be able to take tax credits for paid leave under the American Rescue Plan, at least through September 2021.



Further, employees who experience medical removal from the workplace as mandated by the ETS cannot be discharged, regardless of the length of the absence. Thus, for larger healthcare employers, employees who develop severe COVID-19 infections (even due to exposure outside of the workplace) could be entitled to fully paid leave, as well as job protection beyond the 12 weeks that would normally be required by the Family and Medical Leave Act. OSHA expects that employers will hire temporary workers to fill these roles, despite also having to pay the salaries of workers who are removed from the workplace pursuant to the ETS. The potential expense to large healthcare employers may provide an incentive for employers to implement mandatory COVID-19 vaccination policies. With nursing homes having mandated vaccinations for employees, how will the ETS intersect with that requirement? OSHA will be re-evaluating monthly.

Anti-Retaliation Provision

The ETS includes non-retaliation provisions that permit OSHA to cite healthcare employers who retaliate against workers who voice concerns about COVID-related unsafe work conditions. Employers must notify employees of the anti-retaliation protections under the ETS, which are specifically directed to the rights employees may exercise under the ETS and actions employees may take as required by the ETS.

Final Thoughts

At a time when healthcare workers are faced with the fourth wave of the pandemic and need to focus on workplace and residents' safety and welfare and delivery of care, additional regulations and threats of sanctions are unreasonable in light of the regulations that have been developed by CMS related to the pandemic. Staffing shortages and the isolation of nursing homes as the healthcare provider for mandatory vaccinations with possible loss of already minimal funding creates more obstacles for our industry to overcome. OSHA should reconsider the ETS which is placing an undue burden on senior living communities or modify the guidance to reflect already existing regulatory compliance and reduce duplication. Our senor living communities need support not more regulations.

If you have questions or need assistance related to the ETS, please contact us. Ms. Adelman can be reached at **rebeccca@adelmanfirm.com**.

Rebecca Adelman is an entrepreneur, influencer, thought leader and founder of Adelman Law Firm and Claims Management, a Women's Business Enterprise National Council (WBENC) certified Women Business Enterprise (WBE) established in 2001. In 2021. She founded the Adelman-Mettle Care Alliance with Dr. BJ Miller and Sonya Dolan, founders of Mettle Health, a palliative care consulting provider. AMCA provides certification for risk mitigation programs in the senior living industry. For nearly 30 years, Rebecca has concentrated her practice in insurance defense and business litigation. The firm's practice extends through the Tri-States of Arkansas, Mississippi and Tennessee. Rebecca's insurance defense practice includes representation of insurance companies and long-term care providers and their insurers, both regionally and nationally. She also provides consulting services and educational programming to healthcare professionals and business associates. She has active practices in the areas of general liability, professional liability, premises, and employment law. She is a listed mediator serving all areas of business and healthcare litigation. Contact Rebecca at rebecca@adelmanfirm.com and visit www.adelmanfirm.com.

Getting on the Same Page by Paige Hector, LMSW

Do You Enjoy Unsolicited Advice?

A few weeks ago, I returned a portable air conditioner via the USPS and was issued a receipt and tracking number. After a couple weeks, I checked the tracking number and verified the item was returned but noticed the refund wasn't issued. My husband agreed to contact the company to inquire as to the refund status only to be told the company did not receive the item. We needed the receipt with the tracking number. The receipt was nowhere to be found. We were both frustrated, and I sensed he was particularly irritated as we both agreed that he last had the receipt. With an edge in my voice, I said, "If you'd just get a system to keep track of stuff like this…". Ugh. Not my best moment.

My response to my husband is an example of something called an empathy block and, in this situation, the particular flavor was criticism. Instead of connection with him and working collaboratively, my comment resulted in disconnection and added to both of our frustration.

Before I delve more deeply into empathy blocks, let's first define empathy. Simply put, empathy is hearing, verbally and nonverbally, the feelings and needs of ourselves or another person. Empathy calls for the skill to be fully present and not have an agenda.

Unfortunately, some of our habitual (how we were taught or socialized) response patterns can block empathy. Developed when we learned language as children, these response patterns are deeply ingrained. We usually resort to these habitual patterns in response to someone who is struggling or with whom we disagree. In my opening story, I used the empathy block of criticism when I ignored my husband's feelings and needs. I was also ignoring my feelings and needs in this example.

Another common empathy block is to give advice. Think about a time when the person you were talking with started giving you unsolicited advice. Were you jumping for joy that they were trying to solve the problem for you rather than just listening to you? Likely not! Giving advice is one type of empathy block. Let's explore more examples - there are so many! As you read through the list below, consider which empathy blocks are your "go to's". Often times, we don't even realize that we are responding in a way that results in disconnection rather than connection with another person. Besides criticism, I have become aware that I also have habitual responses of explaining and interrogating. The good news is that the more I'm aware of these habits, the more consciousness I can bring to my interactions and the choice to lean into more empathy.

I'll provide some context to better understand empathy blocks. I'd like to introduce you to George, a 70 year-old man living with hypertension, hyperglycemia, obesity, and chronic pain. He insists on double portions and keeps snacks in his room. His family brings him home-cooked and take-out meals. His blood sugars, when he allows them to

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be checked, vary wildly. His current life choices of eating beyond his daily caloric needs, storing food in his room which has resulted in insects, and declining his blood sugar being checked all have potential negative health implications.

Below is a list of empathy blocks from staff, indicated in bold font, with examples of each one in relation to George. As you read each example, think about how that message might be received and how it impacts the quality of the connection between the staff member and George. Then, imagine what *you* might feel like receiving those messages.

Advising: You really need to lose weight.

Interrogating: How did this happen?

Story Telling: This reminds me of my uncle who is obese and…

Educating: Eating a healthy diet will help.

Sympathizing: I feel so badly for you.

Diagnosing: It sounds like you're depressed and so you eat to feel better.

Judging: What a mess this is.

Correcting: No, your information is wrong.

One-upping: If you think your situation is bad, wait until you hear this.

Reassuring: Everything is going to be just fine.

Fixing: We'll get you a wide bed and bariatric commode.

Denial of Feelings: Don't be sad.

Minimizing: This isn't that bad.

Blaming: This is your fault for eating so much.

Criticizing: If you took better care of yourself, this would not have happened.

Labeling: Because you are morbidly obese...

Analyzing: You eat so much because you don't have any self-esteem.

Consoling: Don't worry, you'll be ok.

Shutting Down: Don't think about it. Be happy for what you have.

Explaining: The reason why I'm telling you this is so you will be more compliant with your diet.

I'm guessing that some of those were hard to read, that you may have felt sad or uncomfortable because your needs for respect, dignity, and compassion were not met. Empathy blocks create that type of disconnect between people.

Think of a recent experience when you were sharing your thoughts or feelings with someone, but something was missing, you just didn't feel heard or understood. Can you identify if one (or more) empathy blocks might have been at work?

The first step to making a different choice in how we show up in a conversation is to become aware of when our habitual and socialized response patterns enter our thoughts or directly into a conversation. When that happens and you become aware that you are thinking or speaking with an empathy block, there is no need to judge, blame, or criticize yourself. Instead, give yourself the gift of self-empathy and reflect on *your* feelings and needs in that situation. If you offered advice, were you feeling concerned and were trying to meet your need for contribution? If you realize that you were judging the other person, were you feeling insecure and needing to be understood?

Next month, we'll continue with George's story and explore his feelings and needs and how the interdisciplinary team can support George in a way that enhances his wellbeing, and how that creates a more rewarding experience for everyone, devoid of empathy blocks.

I would like to acknowledge Melanie Sears, RN, MBA, PhD and author of *Humanizing Health Care* and *Choose Your Words* for her mentorship and supporting me in my Nonviolent Communication learning journey.

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