

# NOW & NEXT

OSHA Alert

JUNE 9, 2022

## Fed/OSHA public hearing on permanent COVID-19 healthcare standard foretells potential future policy

By Rachel Conn and Shelagh Michaud

The hearing's focus on COVID-19 protections in healthcare settings gives insight into how Fed/OSHA may also approach COVID-19 policy for general industry.



### What's the Impact?

- / The hearing focused on broad range of topics including necessity of a permanent standard, use of CDC's COVID-19 guidelines, and importance of ventilation/HVAC
- / All employers, not just healthcare employers, should begin to think about how Fed/OSHA COVID-19 policy shifts may impact their workplace
- / Employers should stay updated on the latest from Fed/OSHA, as well as any state and local requirements and guidance

Recently, Fed/OSHA wrapped-up a four-day public hearing on a permanent standard for COVID-19 protections in healthcare settings. The hearing took place simultaneously with Fed/OSHA's three-month COVID-19 focused inspection initiative for healthcare. The emphasis program, which ends today, prompted a significant increase in inspection activity throughout the industry.

While the hearing revealed how Fed/OSHA many structure a permanent healthcare COVID-19 regulation, it also gave insights into how Fed/OSHA is currently viewing COVID-19 generally—potentially foretelling what employers may expect in its long-awaited updated COVID-19 guidance (which hasn't been updated since June 2021) for general industry.

Regarding the COVID-19 healthcare permanent standard, the following topics were discussed by public commenters and Fed/OSHA representatives at the hearing:

### Is a permanent standard necessary?

Fed/OSHA questioned participants on whether employers rolled back protections after the healthcare COVID-19 emergency temporary standard (ETS)—29 CFR [1910.502](#)—was no longer enforced and whether a permanent standard may help stop the exodus of healthcare workers from the industry.

### Respiratory protection for more workers?

The hearing examined the application of the current respiratory protection standard (29 CFR 1910.134) and how the mini-respiratory protection standard (29 CFR 1910.504) worked (or didn't work).

Discussions also explored whether respiratory protections should be required for more workers (outside of those treating COVID-19 cases or suspected cases).

### Increased focus on engineering controls

Comments were raised about whether the permanent standard should focus more heavily on engineering controls, such as ventilation, as the most effective precaution against COVID. Moving away from engineering controls like barriers was also raised by several commenters.

/ These commenters pointed out that barriers may inadvertently increase exposure either by trapping the virus behind the barrier or because people try to avoid barriers (especially when personal medical information needs to be communicated).

Re-focusing on the hierarchy of controls, the importance of risk assessment and response, and the need to work to alleviate human error that occurs with administrative controls and personal protective equipment were also discussed.

### Are screening procedures effective?

During several presentations by commenters, the effectiveness of screening procedures and whether testing should be a part of this protocol were explored.

### Less reliance on CDC guidance?

Several commenters questioned whether Fed/OSHA should rely less on CDC guidance.

/ Some people had questions about whether CDC takes into account unique issues in the

workplace as opposed to the more general issues it presents in the general population.

- / Those who favored following CDC guidance cited that medical professionals and scientists advise CDC, NIH, and WHO and assist in making decisions on guidance and providing best advice/practices.

Many commenters discussed that Fed/OSHA needs to be flexible due to changes in public health guidance and also as new information on the virus is learned and for unique workplace factors that may impact application of the standard.

### Permanent standard scope will likely be extended

The standard will likely apply to a wider range of settings, including smaller ambulatory care settings in addition to large hospital systems.

### Potential outbreaks provisions

Fed/OSHA also indicated that it is looking at what constitutes an outbreak and whether that differs based on whether an employer is a “small” or “large” employer.

Additional requirements for outbreak situations are being considered.

### Potential revisions to the close contact analysis

Some commenters, as well as some Fed/OSHA representatives, questioned whether duration of exposure was still a factor to consider for close contacts and what factors that analysis should focus on moving forward.

While the hearing covered these topics in the context of healthcare, the discussion gives some potential insights into how Fed/OSHA may be viewing COVID-19 generally. Specifically, some of the following could be applied to general industry:

- / More emphasis on engineering controls like ventilation and less emphasis on barriers
- / Potential deviation from reliance on CDC guidance
- / Review of effectiveness of screening requirements and potential enhancement with testing components
- / Exploring outbreak triggers and the context of those in different categories of workplaces
- / Potential changes to the close contact analysis

Both healthcare and general industry employers alike should take note of the above-discussions and begin to think about how such potential COVID-19 policy shifts may impact their workplace. Although Fed/OSHA's COVID-19-focused inspection initiative in healthcare comes to a close today, Fed/OSHA continues to focus on COVID-19 policy and enforcement. Accordingly, employers should stay updated on the latest from Fed/OSHA, as well as any state and local requirements and guidance. As part of its COVID-19 coverage, Nixon Peabody will continue to provide updates on these and other issues facing employers.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

**[Rachel L. Conn](#)**

415.984.8216

[rconn@nixonpeabody.com](mailto:rconn@nixonpeabody.com)

**[Shelagh C.N. Michaud](#)**

401.454.1133

[smichaud@nixonpeabody.com](mailto:smichaud@nixonpeabody.com)

---