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MEMO COV 6

To: OSH Division
From: Scott Mabry, Assistant Deputy Commissioner *Scott Mabry*
Date: March 30, 2022
Re: Repeal – Healthcare Emergency Temporary Standard on Occupational Exposure to COVID-19

On June 21, 2021, federal Occupational Safety and Health Administration (OSHA) promulgated a Healthcare Emergency Temporary Standard (Healthcare ETS1) to protect workers from COVID-19 in settings where they provide healthcare or healthcare support services [86 FR 32376]. Under the federal Occupational Safety and Health (OSH) Act, an emergency temporary standard (ETS) is effective until superseded by a permanent standard – a process contemplated by the OSH Act to occur within six months of the ETS's promulgation [29 U.S.C. 655(c)]. Specifically, 29 U.S. Code 655(c), *Emergency Temporary Standards*, states that an emergency temporary standard takes effect upon publication and is effective until superseded by a promulgated standard, which shall occur no later than six months after publication of the emergency temporary standard [[Occupational Safety and Health Standards](#) | [Occupational Safety and Health Administration \(osha.gov\)](#)].

As of December 21, 2021, OSHA had not promulgated a permanent healthcare standard; therefore, technically, the Healthcare ETS1 expired in its entirety on December 21, 2021.

On December 27, 2021, federal OSHA announced that it intended to continue to work toward issuing a final standard that would protect healthcare workers from COVID-19 hazards, to be included in a broader infectious disease rule. However, OSHA anticipated that “a final rule cannot be completed in a timeframe approaching the one contemplated by the OSH Act. . . .” In the December 27, 2021, announcement, OSHA stated it was **withdrawing the non-recordkeeping portions of Healthcare ETS1 but would maintain the COVID-19 log and reporting provisions**, 29 CFR 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r). These provisions would remain in effect. Federal OSHA stated that those “provisions were adopted under a separate provision of the OSH Act, section 8”, and they found good cause to forgo notice and comment in light of the grave danger presented by the pandemic [86 FR 32559, [COVID-19 Healthcare ETS | Occupational Safety and Health Administration \(osha.gov\)](#)].

Rulemaking in North Carolina (NC) must follow the North Carolina Administrative Procedures Act (APA), [Chapter 150B](#) of the North Carolina General Statutes (NCGS). Because the initial timelines for the federal rule (6 months) did not match up with the APA timelines for emergency rules (30 days), the NC Department of Labor (NCDOL) OSH Division chose to adopt the Healthcare ETS1 verbatim as a permanent standard. However, since the Healthcare ETS1 technically expired on December 21, 2021, in its entirety, there was no enforceable federal OSHA standard on which the OSH Division had to legally rely for the rule to continue to be enforceable in North Carolina. Although federal OSHA stated that the “provisions were adopted under a separate provision of the OSH Act, section 8,” the COVID-19 log and reporting provisions were still adopted as a part of the Healthcare ETS1, and it had expired.

This situation created a legal conflict between OSHA’s statements regarding the separate COVID-19 log and reporting provisions and how rules are adopted pursuant to the APA in North Carolina. Since the Healthcare ETS1 had previously expired in its entirety, Commissioner of Labor Josh Dobson chose to repeal the prior adoption of the Healthcare ETS1 effective March 4, 2022. Rulemaking action was taken and the entire Healthcare ETS1 was repealed effective March 4, 2022. Internal discussions continued regarding how NCDOL could legally enforce the COVID-19 log and reporting provisions.

On March 16, 2022, a meeting was held with federal OSHA officials, attorneys from the federal Solicitor’s Office, NCDOL OSH management, and the NCDOL General Counsel, to discuss the legal conflict regarding OSHA’s position on the enforcement of the COVID-19 log and reporting provisions of the Healthcare ETS1. Pursuant to that meeting, NCDOL made the decision to move forward with permanent rulemaking only in relation to the COVID-19 log and reporting provisions noted above. Rulemaking action will begin after the completion and approval by Office of State Budget and Management (OSBM) of a fiscal note for the COVID-19 log and reporting provisions. Permanent rulemaking under the APA takes a minimum of six months to adopt a final rule; there are some statutory requirements that may result in the rulemaking process taking longer, to include possible intervening action by the North Carolina General Assembly.

On March 23, 2022, federal OSHA published a notice of the limited reopening of the comment period and noted an “informal hearing on the interim final rule establishing an Emergency Temporary Standard (ETS), Occupational Exposure to COVID-19.” Comments will be accepted until April 22, 2022, and the Informal Public Hearing will be held on April 27, 2022 [87 FR 16426; [Federal Register: Occupational Exposure to COVID-19 in Healthcare Settings](#)].

Action

In accordance with [NCGS 150B-21.5\(c\)](#), the North Carolina Commissioner of Labor Josh Dobson repealed the Healthcare ETS1 with an effective date of March 4, 2022. Prior to either the final promulgation of an OSHA Occupational Exposure to COVID-19 in Healthcare Settings standard or the completion of a state-specific permanent rule under the North Carolina Administrative Code to adopt only the COVID-19 log and reporting provisions of the Healthcare ETS1, the OSH Division will enforce those sections to the best of its ability under 29 CFR 1904, to include reporting requirements associated with work-related COVID-19 hospitalizations and/or fatalities. In addition, OSH Compliance will enforce requirements associated with recording work-related illnesses and fatalities on the OSHA 300 logs. Finally, OSH Compliance will issue citations for any alleged violations of the NC Permanent COVID-19 Healthcare standards that were noted during inspection activities that occurred prior to the March 4, 2022, repeal of ETS1.