Questions of Charitable Nonprofit Employers
To OSHA’s Emergency Temporary Standard

November 18, 2021

The Occupational Safety and Health Administration’s COVID-19 Vaccination and Testing Emergency Temporary Standard ("ETS"), published on November 5, 2021 (86 Fed. Reg. 61402), provides clarity on several, but not all, of the questions raised by charitable nonprofits in October, and more questions have arisen from the standard. We ask that future guidance issued by OSHA provide answers to the following questions.

Questions

Volunteers
We ask that OSHA directly address questions related to volunteers, a category of individuals in the nonprofit setting that is not present in for-profit workplaces. It is common for uncompensated persons regularly to perform services that advance the missions of charitable organizations. Examples include professionals providing pro-bono services such as in-person trainings and eye exams, docents at museums, and ushers at cultural events, to name only a very few.

1. To what extent does the emergency temporary standard apply to volunteers serving the organization? Stated another way, are there instances in which volunteers would be deemed “employees” under the ETS and counted toward the employee threshold or be included in employer reporting and other obligations?

2. Are unpaid members of a charitable organization’s board of directors or board of trustees excluded from the headcount?

Guests
The COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Safer Federal Workforce Task Force, Sept. 24, 2021) indicates that masking and social distance protocols must be required for guests and others at a federal contractor’s workplace.

3. Does the ETS apply to “guests?” Specifically, we seek clarification as to whether there are instances in which parishioners attending a house of worship, students attending a nonprofit school, and similar situations when people at a nonprofit’s facilities will be considered within or outside the definitions and coverage obligations.

Trainees
Some nonprofits operate pursuant to federal grants (not contracts) where participants receive payment from the nonprofit as a trainee while working for a host agency.
4. Are individual trainees counted and covered by the nonprofit operating the grant, the employer host agency, or exempt from the OSHA ETS?

Overlapping Standards, Rules, and Orders

5. The ETS exempts employees who are covered by other vaccination rules and orders. Are employees exempted from the ETS because they fall under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or the CMS Rule also excluded from the 100 employee threshold for triggering application of the ETS? In other words, if an employer has multiple workplaces, some of which are covered contract sites and others that are not, do the covered contract employees count toward the threshold?

6. Which standards, rules, or orders apply when nonprofits operate on public school or governmental properties, such as by providing childcare and after-school enrichment programming?

Vaccination Roster

7. In compiling an employee roster identifying the vaccination status of employees, is the employer required to include on the roster the names and vaccination status of employees who are excluded or exempted from the ETS because they work remotely or exclusively outdoors?

Changing CDC Guidance

8. Once an employer determines that an employee is properly vaccinated, will the employer be under a continuing obligation to determine whether the employee should get or has gotten a booster shot?