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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. OSHA-2020-0004]

RIN 1218-AD36

Occupational Exposure to COVID-19 in Healthcare Settings

AGENCY: Occupational Safety and Health Administration (OSHA), Labor

ACTION: Final rule; termination of rulemaking

SUMMARY: OSHA is terminating its COVID-19 rulemaking.

DATES: *Effective dates:* The termination of the rulemaking is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

Compliance dates: There are no relevant compliance dates.

ADDRESSES: In accordance with 28 U.S.C. 2112(a), the Agency designates Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor, U.S. Department of Labor, to receive petitions for review of this final agency action. Service can be accomplished by email to zzSOLCovid19ruleterm@dol.gov.

Docket: To read or download comments or other material in the docket, go to Docket No. OSHA-2020-0004 at www.regulations.gov index; however, some information (e.g., copyrighted material) is not publicly available to read or download through that website. All comments and submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Documents submitted to the docket by OSHA or stakeholders are assigned document identification numbers (Document ID) for easy identification and retrieval. The full Document ID is the docket number plus a unique four-digit code. For example, the Document ID number for OSHA's COVID-19

Healthcare ETS is OSHA-2020-0004-1033. Some Document ID numbers also include one or more attachments.

When citing exhibits in the docket, OSHA includes the term “Document ID” followed by the last four digits of the Document ID number. For example, document OSHA-2020-0004-1033 would appear as Document ID 1033. Citations also include the attachment number or other attachment identifier, if applicable, page numbers (designated “p.” or “Tr.” for pages from a hearing transcript), and in a limited number of cases a footnote number (designated “Fn.”). In a citation that contains two or more Document ID numbers, the Document ID numbers are separated by semi-colons (e.g., “Document ID 1231, Attachment 1, p. 6; 1383, Attachment 1, p. 2”).

This information can be used to search for a supporting document in the docket at www.regulations.gov. Contact the OSHA Docket Office at (202) 693-2350 (TTY number: 877-889-5627) for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Contact Frank Meilinger, Director, Office of Communications, Occupational Safety and Health Administration, U.S. Department of Labor; telephone (202) 693-1999; email oshacomms@dol.gov.

For general information: Contact Andrew Levinson, Director, Directorate of Standards and Guidance, Occupational Safety and Health Administration, U.S. Department of Labor; telephone (202) 693-1950; email: osha.dsg@dol.gov.

For copies of this Federal Register document: Electronic copies of this Federal Register notice are available at <http://www.regulations.gov>. This notice, as well as news releases and other relevant information, are also available at OSHA’s webpage at www.osha.gov.

SUPPLEMENTARY INFORMATION:

On June 21, 2021, OSHA issued an Emergency Temporary Standard (ETS) to protect workers in healthcare settings, finding that COVID-19 presented a grave danger to those workers and that the ETS was necessary to protect them (86 FR 32376).¹ As of that date, nearly a half million healthcare workers had contracted COVID-19 and more than 1600 of those workers had died. Under the Occupational Safety and Health Act of 1970 (OSH Act or Act) (29 U.S.C. 655(c)(3)), the ETS served as a proposed rule for a rulemaking on occupational exposure to COVID-19 in healthcare settings. OSHA is now terminating the rulemaking via this rule because the public health emergency is over and any ongoing risk by COVID-19 or other coronavirus hazards faced by healthcare workers would be better addressed at this time in a rulemaking addressing infectious diseases more broadly.

Events Leading to This Agency Action Terminating the Rulemaking

OSHA issued the healthcare ETS under section 6(c) of the Act (29 U.S.C. 655(c)) (*Occupational Exposure to COVID-19; Emergency Temporary Standard*, 86 FR 32376 (June 21, 2021), codified at 29 CFR 1910.502, 1910.504-.505, and 1910.509). Pursuant to section 6(c)(3) (29 U.S.C. 655(c)(3)), an ETS initiates rulemaking proceedings under section 6(b) and the ETS “as published shall also serve as a proposed rule for the proceeding.” (*Id.* § 655(c)).

When the COVID-19 pandemic started in 2020, OSHA initially responded to COVID-19 in the workplace by creating guidance documents and using its existing enforcement tools. The agency pursued a two-pronged strategy: 1) enforcing existing standards such as those for Personal Protective Equipment (PPE), Respiratory Protection, and Bloodborne Pathogens, as well as the General Duty Clause of the OSH Act (29

¹ OSHA defined the grave danger as workplace exposure to SARS-CoV-2, the virus that causes the development of COVID-19. COVID-19 is the disease that can occur in people exposed to SARS-CoV-2, and that leads to the health effects that were described in the ETS (see 86 FR 32381, FN 4). As in the ETS, OSHA uses the two terms interchangeably in this notice because it is consistent with common usage in the regulated community.

U.S.C. 654(a)(1)), and 2) working proactively to assist employers by developing guidance documents addressing how to reduce occupational COVID-19 hazards.

On January 21, 2021, President Biden issued Executive Order 13999 directing OSHA to consider whether “any emergency temporary emergency standards on COVID-19” were necessary (86 FR 7211). On June 21, 2021, the agency promulgated the COVID-19 ETS applicable to healthcare.² Because, under the OSH Act, this ETS also served as a proposal for a final standard, OSHA received 481 unique public comments on the ETS during the first open comment period between June 2021 and August 2021 (Docket OSHA-2020-0004).³

Following the issuance of the ETS, OSHA received petitions urging the agency to adopt a permanent standard to protect healthcare workers from COVID-19 from the American Nurses Association, the International Association of Fire Chiefs, the Service Employees International Union (SEIU), and National Nurses United (NNU) (Document ID 1518; 1519; 1521; 1522; 1524; 2175). Over forty unions and organizations supported the NNU petition urging OSHA to adopt a permanent standard for COVID-19 in healthcare establishments and to also issue a separate, broader Infectious Diseases standard.

On December 27, 2021, OSHA announced on its website that it would be unable to finalize a COVID-19 standard for healthcare “in a timeframe approaching the one contemplated by the OSH Act” (see Document ID 2491) and since the end of December 2021, OSHA has not enforced the ETS beyond the recordkeeping and reporting

² In the same June 2021 Federal Register document in which OSHA implemented this ETS, OSHA also promulgated recordkeeping and reporting provisions pursuant to section 8(c)(1)-(3) (29 USC 657(c)(1)-(3)). For these, OSHA invoked an independent exemption from APA notice and comment requirement to make permanent the COVID-19 log and reporting provisions at 29 CFR 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r). OSHA found good cause under 5 U.S.C. 553(b)(3)(B) to forgo notice and comment given the grave danger presented by the pandemic. (See 86 FR 32559). Those requirements are therefore permanent and remain in effect.

³ OSHA extended the original comment period by an additional 30 days to give stakeholders more time to opine on the ETS and a possible permanent standard (86 FR 38232).

requirements in 29 CFR 1910.502(q) and (r). Instead, OSHA has relied on existing standards and the General Duty Clause of the OSH Act (29 U.S.C. 654(a)) to protect workers in workplaces that were previously covered by the ETS. OSHA emphasized in the website announcement that the agency “continues to work expeditiously to issue a final standard that will protect healthcare workers from COVID-19 hazards and will do so as it also considers its broader infectious disease rulemaking.”

On January 5, 2022, several labor organizations, including NNU, filed a petition with the United States Court of Appeals for the District of Columbia Circuit seeking a writ of mandamus compelling OSHA to issue a permanent COVID-19 standard for healthcare within 30 days and to continue enforcement of the ETS in the meantime. On August 26, 2022, the court issued a decision denying NNU’s petition in part and dismissing it in part for lack of jurisdiction, while also noting that the ETS would continue to serve as a proposed rule for the rulemaking proceedings (*In re National Nurses United*, 47 F.4th 746, 754 (D.C. Cir. 2022)). The court determined that while the OSH Act created an obligation for OSHA to follow the issuance of an ETS with a notice and comment rulemaking process, “that process may result in a determination that no permanent standard is necessary.” (Id.)

While the NNU case was ongoing, OSHA continued its efforts to finalize a permanent COVID-19 standard for healthcare. However, after the ETS comment period closed on August 20, 2021, the available COVID-19 scientific literature, approaches to controls, and CDC guidance evolved significantly, based in part on the emergence of the Delta and Omicron variants. OSHA determined that it needed to reopen the record to ensure that the agency relied on the best available evidence and that the public had an opportunity to provide and comment on new data and information. On March 23, 2022, OSHA published a *Federal Register* notice announcing a limited re-opening of the

comment period for 30 days (until April 22, 2022) and announcing public hearings beginning on April 27, 2022 (87 FR 16426, March 23, 2022).

The reopening of the comment period and the hearing and post-hearing comment period allowed OSHA to revise and provide notice of potential changes to policy options and regulatory provisions to reflect up-to-date science, control approaches, and perspectives, as well as supporting analyses required for a final standard. At the closing of the comment period on April 22, 2022, OSHA had received approximately 250 additional comments.

The public hearings were held April 27-29 and May 2, 2022. Participating stakeholders included labor organizations, workers, employers, industry/trade groups, professional associations, public health experts, and concerned individuals, with some 39 organizations or individuals presenting their perspectives in the hearings (Document ID 2153; 2156; 2168; 2171). The presiding Administrative Law Judge permitted stakeholders to submit post-hearing comments and briefs until May 23, 2022. OSHA received nearly 150 additional comments from stakeholders during the post-hearing comment period. In total, over the three different comment periods, OSHA received 873 timely public comments on this rulemaking.

OSHA submitted a draft final COVID-19 rule to the White House Office of Management and Budget (OMB) on December 7, 2022. On April 10, 2023, President Biden signed into law House Joint Resolution 7, which terminated the national emergency related to the COVID-19 pandemic. While the COVID-19 draft remained under review at OMB, OSHA pushed ahead with development of an Infectious Diseases standard for healthcare workers.

Basis for Terminating the Rulemaking

OSHA always intended for an Infectious Diseases standard for healthcare workers to supplant any COVID-19 healthcare standard, and that a COVID-19 standard would be

an interim measure pending the completion of the Infectious Diseases healthcare standard. OSHA concludes that the most effective and efficient use of agency resources to protect healthcare workers from occupational exposure to COVID-19, as well as a host of other infectious diseases, is to focus its resources on the completion of an Infectious Diseases rulemaking for healthcare rather than a disease-specific standard.

In addition, even if OSHA were to finalize a separate COVID-19 standard at this time, the agency would need to conduct an additional review and possibly supplement the record again before it could issue a final rule to ensure the rule reflects the most current science. For example, guidance from the Centers for Disease Control and Prevention and other experts has changed since OSHA submitted its draft rule to OMB. Moreover, focusing on a separate COVID-19 standard would likely consume agency staff time and other agency resources in a way that would inhibit the promulgation of a more broadly protective Infectious Diseases healthcare standard. For these independently sufficient reasons, OSHA is terminating this rulemaking. In sum, the agency will have a greater impact at this time by adopting a standard that would provide protections to healthcare workers from occupational exposure to many different infectious diseases, including COVID-19 and future variants.

List of Subjects

29 CFR Part 1910

COVID-19, Disease, Health facilities, Health, Health care, Incorporation by reference, Occupational health and safety, Public health, Quarantine, Reporting and recordkeeping requirements, Respirators, SARS-CoV-2, Telework, Vaccines, Viruses.

Authority and Signature

Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this document under the authority granted by sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653,

655, 657); 5 U.S.C. 553, Secretary of Labor's Order No. 8-2020 (85 FR 58393), and 29 CFR part 1911.

Signed at Washington, DC.

Douglas L. Parker,
Assistant Secretary of Labor for Occupational Safety and Health.

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