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OSHA's New ETS: Are Public Hospitals Covered?

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OSHA's new healthcare emergency temporary standard (ETS) does not specifically exclude state and local healthcare systems, such as county hospitals. However, pursuant to Section 3(5) of the OSH Act, "any State or political subdivision of a State" is not an "employer" for purposes of the Act, and is therefore excluded from its coverage, including standards promulgated thereunder. 29 U.S.C. § 652(5); *StarTran, Inc. v. OSHRC*, 608 F.3d 312, 313-314 (5th Cir. 2010).

Accordingly, if a healthcare system is a state or political subdivision, it should be exempted from OSHA's new ETS. This is supported by footnote 129 to the preamble to the ETS, which states, "the ETS does not apply to state and local government employers in states without State Plans." 86 Fed. Reg. 32376 at 32652 (Jun. 21, 2021). In other words, for "federal OSHA" states, such as Colorado and Idaho, the ETS should not apply to state and local government employers.[1]

Defining "State or political subdivision of a State"

To determine whether an entity is a "State or political subdivision of a State," a two-part test is employed. Under this test, any entity "(1) created directly by the State, so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate" is not subject to the OSH Act and its standards. 29 C.F.R. § 1975.5(b). The following factors are considered in determining whether an entity meets this two-part test:

- Are the individuals who administer the entity appointed by a public official or elected by the general electorate?
- What are the terms and conditions of the appointment?
- Who may dismiss such individuals and under what procedures?
- What is the financial source of the salary of these individuals?
- Does the entity earn a profit? Are such profits treated as revenue?
- How are the entity's functions financed? What are the powers of the entity and are they usually characteristic of a government rather than a private instrumentality like the power of eminent domain?
- How is the entity regarded under State and local law as well as under other Federal laws?
- Is the entity exempted from State and local tax laws?
- Are the entity's bonds, if any, tax-exempt? As to the entity's

employees, are they regarded like employees of other State and political subdivisions?

- What is the financial source of the employee-payroll?
- How do employee fringe benefits, rights, obligations, and restrictions of the entity's employees compare to those of the employees of other State and local departments and agencies?

29 C.F.R. § 1975.5(c).

Employers with healthcare settings should carefully analyze the two-part test and related factors before determining whether the ETS does not apply. If an employer chooses not to follow the ETS based on an incorrect interpretation, it could be subject to significant OSHA penalties. Moreover, even if the ETS does not apply, we recommend employers review and implement relevant CDC guidance, as feasible.

State Plans

The analysis above only applies to states without OSHA-approved state plans. In states with state plans, such as Nevada, Utah, and Wyoming, state and local employees are covered by the state plan. Thus, the exemption for "states and political subsidiaries" does not apply.

While the OSHA ETS does not specifically apply to state plans, state plans are required to amend their standards to be identical or "at least as effective" as the ETS. 86 Fed. Reg. 32376 at 32560. Adoption by states with state plans is required within 30 days of the ETS. *Id.* Employers with healthcare settings in state-plan states should monitor their state OSHA office for updates and new requirements.

[1] Note that some "federal OSHA" states, such as Montana, may have a separate state-level department that covers state and local government employers. Public employers should review state requirements and jurisdiction when assessing application of the ETS.

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