§ 129.3 [Amended]

45. In § 129.3, in paragraph (d), remove the phrase “§ 120.40” and add in its place “§ 120.66”.

§ 129.4 [Amended]

46. In § 129.4, in paragraph (a)(1), remove the phrase “§ 120.44” and add in its place “§ 120.39”.

§ 129.5 [Amended]

47. In § 129.5:

a. In paragraph (b), remove the phrase “§ 120.44” and add in its place “§ 120.39”; and

b. In paragraph (c)(2), remove the reference “§ 120.11(c)(2)” and add in its place “§ 120.16(c)”.

§ 129.6 [Amended]

48. In § 129.6, in paragraphs (a)(2)(i) and (iii), remove the reference “§ 120.27” and add in its place “§ 120.6”.

§ 129.8 [Amended]

49. In § 129.8:

a. In paragraph (a), remove the phrase “§ 120.40” and add in its place “§ 120.66”;

b. In paragraph (c)(1)(i), remove the reference “§ 120.27” and add in its place “§ 120.6”; and

c. In paragraph (c)(2), remove the phrase “§ 120.37” and add in its place “§ 120.65”; and

d. In paragraph (d)(1), remove “§ 120.27” and “government” and add in their places “§ 120.6” and “Government,” respectively.

PART 130—POLITICAL CONTRIBUTIONS, FEES AND COMMISSIONS

50. The authority citation for part 130 continues to read as follows:

OSHA is seeking public comment on certain specific topics and questions for the development of a final standard. Accordingly, the agency is partially reissuing the comment period for the ETS to allow for additional comment on the topics identified below. OSHA encourages commenters to explain why they prefer or disfavor particular policy choices, and include any relevant studies, experiences, anecdotes, or other information that may help support the comment. OSHA seeks comments on the following topics:

A. Potential Changes From the ETS

The following is a list of potential rulemaking outcomes that would depart from the provisions of the ETS such that OSHA has decided to provide this additional notice and an opportunity to comment. OSHA has not made any decisions about these potential provisions or approaches, nor is this intended to list all of the potential changes from the ETS. Other changes may result after due consideration of all comments and hearing testimony.

A.1—Alignment with CDC Recommendations for Healthcare Infection Control Practices: Evolving CDC recommendations have resulted in inconsistencies and to provide a list of those recommendations and some of the Healthcare ETS provisions (e.g., isolation and return-to-work guidance). A number of commenters requested that OSHA align its ETS more closely with various CDC recommendations. OSHA is considering doing so, but notes that, in some cases, CDC recommendations have continued to evolve even after the close of the comment period. OSHA is considering whether it is appropriate to align its final rule with some or all of the CDC recommendations that have changed between the close of the original comment period for this rule and the close of this comment period. OSHA seeks comment on this approach.

A.2—Additional Flexibility for Employers: Some employers expressed concern that the provisions of the Healthcare ETS were overly prescriptive. The ETS, while rooted in a programmatic approach (e.g., COVID–19 plan, hazard assessment, policies and procedures to minimize the risk of transmission of COVID–19), also specified how employers were required to implement particular policies and procedures (e.g., criteria for medical removal and return to work, cleaning, ventilation, barriers, aerosol-generating procedures). OSHA is considering restating various provisions as broader requirements without the level of detail included in the Healthcare ETS and providing a “safe harbor” enforcement policy for employers who are in compliance with CDC guidance applicable during the period at issue. OSHA seeks comment on this approach.

A.3—Removal of Scope Exemptions (e.g., ambulatory care facilities where COVID–19 patients are screened out; home healthcare): A final standard will be adopted under Section 6(b) of the OSH Act, which requires a finding of significant risk from exposure to COVID–19, rather than the finding of grave danger OSHA made in issuing the Healthcare ETS under Section 6(c) of the OSH Act. Section 6(b) requires that the standard substantially reduce or eliminate significant risk of material impairment of health to the extent feasible. In view of this different risk finding, OSHA is considering whether the scope of the final standard should cover employers regardless of screening procedures for non-employees and/or vaccination status of employees to ensure that all workers are protected to the extent there is a significant risk. OSHA seeks comment on this approach.

A.4—Tailoring Controls to Address Interactions with People with Suspected or Confirmed COVID–19: OSHA is considering the need for COVID–19-specific infection control measures in areas where healthcare employees are not reasonably expected to encounter people with suspected or confirmed COVID–19. This could include eliminating certain requirements that were included in the Healthcare ETS and that applied to all areas of covered healthcare settings. For example, OSHA could consider imposing cleaning requirements or medical removal provisions only with respect to staff exposed to COVID–19 patients or eliminating face mask requirements for staff not exposed to COVID–19 patients. If OSHA did restrict infection control requirements to particular areas of a facility or particular staff, it could consider balancing that narrower scope with a new “outbreak provision” to ensure that healthcare employers would still have a duty to address an outbreak quickly if an outbreak occurs among staff in the areas normally subject to fewer requirements. For example, an outbreak could trigger a broad performance requirement for the employer to implement additional infection control measures to stop the outbreak, or it could trigger more specific requirements, such as employer-provided testing and/or medical removal of staff with COVID–19 even if they do not interact with COVID–19 patients. OSHA seeks comment on these approaches, including comment on how OSHA should define an “outbreak” if it were to implement that approach (the CDC discusses “outbreaks” at https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/outbreaks.html).
A.5—Vaccination

A.5.1—Boosters: In the ETS, certain requirements take account of whether individuals are “fully vaccinated,” which is defined in paragraph (b) of the ETS as meaning “2 weeks or more following the final dose of a COVID–19 vaccine.” Subsequent to the publication of the ETS, the Advisory Committee on Immunization Practices (ACIP) has recommended additional doses and booster doses. CDC has also adopted the concept of “up to date” to describe vaccination recommendations beyond the primary vaccination series. OSHA is considering how these ACIP and CDC recommendations might impact the requirements in the ETS that take account of individuals’ vaccination status (e.g., fully vaccinated, up to date) and seeks comment on this issue.

A.5.2.1—Support of Employee Vaccination: OSHA is not considering at this time requiring mandatory vaccination for employees covered by this standard.

o The Healthcare ETS included a provision requiring employers to inform employees about the safety, efficacy, and benefits of vaccination and provide reasonable time and paid leave to each employee for vaccination and side effects experienced following vaccination. OSHA is considering an adjustment to the requirement that would include paid time up to 4 hours, including travel time, for employees to receive a vaccine and paid sick leave to recover from side effects and seeks comment on the approach.

o OSHA is considering requiring employer support for employees who wish to stay up to date on vaccination and boosters in accordance with ACIP and CDC recommendations. OSHA seeks comment on the approach.

o OSHA is considering whether to limit the provisions that provide support for vaccination to employees not covered by the Centers for Medicare & Medicaid Services (CMS) vaccination rule (86 FR 61555) and seeks comment on this approach. The CMS vaccination rule requires healthcare staff in facilities regulated by CMS to be vaccinated. The majority of healthcare employees covered by this final rule work in facilities covered by the CMS vaccination rule and are subject to the CMS requirements.

A.5.3—Requirements for Vaccinated Workers: During the initial comment period, stakeholders raised questions about whether the Healthcare ETS requirements should be relaxed or eliminated based on the vaccination status of the individual worker involved, the general vaccination rate of the entire staff, and/or the general vaccination rate of the community. OSHA is considering suggestions that requirements be relaxed:

- For masking, barriers, or physical distancing for vaccinated workers in all areas of healthcare settings, not just where there is no reasonable expectation that someone with suspected or confirmed COVID–19 will be present
- In healthcare settings where a high percentage of staff is vaccinated (OSHA also is accepting comment on what that percentage should be)
- For exposure notification for vaccinated employees

OSHA seeks comment on these approaches.

A.6—Limited Coverage of Construction Activities in Healthcare Settings: OSHA did not expressly include employers that engage in construction work in hospitals, long-term care facilities and other settings that are covered by the ETS. The construction industry was not included in OSHA’s industrial profile for the rule. OSHA is considering clarifying this coverage and seeks comment on this approach. For example, OSHA is considering the same coverage for workers engaged in construction work inside a hospital (e.g., installing new ventilation or new equipment or adding a new wall) as for workers engaged in maintenance work or custodial tasks in the same facility. OSHA could consider exceptions for construction work in isolated wings or other spaces where construction employees would not be exposed to patients or other staff.

A.7—Recordkeeping and Reporting: New Cap for COVID–19 Log Retention Period: The COVID–19 log and reporting provisions, 29 CFR 1910.502(q)(2)(ii), (q)(3)(iii)–(iv), and (r), have remained in effect because OSHA found good cause to forgo notice and comment in light of the grave danger presented by the pandemic. See 86 FR 32559. Now that OSHA is re-opening the comment period for the final rule, the agency also seeks additional comment on 1910.502(q) and (r). In general, OSHA is focused on whether any adjustments to those paragraphs should be made in light of experiences involving the Delta or Omicron variants. In addition, the agency proposes to cap the record retention period for the COVID–19 log at one year from the date of the last entry in the log, rather than the current approach in which that retention period is tied to the duration of the standard (see 29 CFR 1910.502(q)(3)(iii)(C)).

A.8—Triggering Requirements Based on the Level of Community Transmission: When employees are treating people with suspected or confirmed COVID–19, the ETS requires certain control strategies (e.g., PPE) regardless of community transmission levels. Under the CDC’s current guidance for healthcare workers,3 many requirements for those workers are triggered based on the level of community transmission of COVID–19 (e.g., controls needed in areas of substantial or high transmission, controls not needed in areas of low or moderate transmission). OSHA is considering linking regulatory requirements to measures of local risk, such as CDC’s community transmission used in CDC’s guidance for healthcare settings or the CDC’s COVID–19 Community Levels used in CDC’s guidance for prevention measures in community settings.2 OSHA is seeking comment on that approach, including impacts of such an approach on compliance and enforcement.

A.9—Evolution of SARS–CoV–2 into a Second Novel Strain: It is possible that a future variant of SARS–CoV–2 will have sufficient genetic drift to be designated another novel coronavirus strain but still results in a disease that is similar to the current illness (e.g., a hypothetical “COVID–22”). OSHA is considering specifying that this final standard would apply not only to COVID–19, but also to subsequent related strains of the virus that are transmitted through aerosols and pose similar risks and health effects. OSHA seeks comment on this approach and alternatives to addressing the potential for new strains related to SARS–CoV–2.

B. Additional Information/Data Requested

OSHA recognizes that the majority of the comment period occurred prior to when the Delta and Omicron variants became prevalent in the United States. OSHA requests new studies or data related to the Delta and Omicron variants since the close of the initial comment period in August 2021, particularly with respect to:

B.1: The average number of days healthcare workers have taken away from work resulting from a COVID–19

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19 infection or quarantine and the percentage of healthcare workers who have taken days away from work due to a COVID–19 infection or quarantine.

B.2: The health effects for fully vaccinated employees, and fully vaccinated and boosted employees, who test positive for COVID–19, including data on days away from work, hospitalizations, long COVID, and fatalities.

B.3: The percentage of healthcare workers who are at elevated risk of severe COVID–19 infections (e.g., resulting in hospitalization or extended days away from work), including for related or immunocompromised reasons (not based solely on vaccination status).

B.4: The rate of infection, long COVID, hospitalization, and death among healthcare workers compared to those rates among the general adult population.

B.5: The health effects and transmission rate of new and emerging variants and sub-lineages of variants, including Omicron BA.2.

Additionally, OSHA requests data and information on:

B.6: The vaccination rate among healthcare workers, including the rate of healthcare workers who are fully vaccinated and boosted.

B.7: The clinical indicators that will reliably predict the degree of protection afforded by prior infection (i.e., infection-acquired immunity), and how long such protection lasts.

B.8: Vaccine efficacy and how such efficacy decreases over time.

B.9: The appropriate periodicity of additional vaccine doses and booster doses.

B.10: Unintended consequences, such as decreases in staffing retention, or other impacts, such as increases in staffing retention, due to the potential alternatives raised in this notice.

C. Information for Economic Analysis

C.1 Industry Profile: For the Healthcare ETS Industry Profile, OSHA based the number of Affected Employees for Affected Industries on whether employees performed healthcare services or healthcare support services under the ETS. If employees did not perform healthcare services or healthcare support services, OSHA did not consider them Affected Employees. See 86 FR 32485. While this approach covered the appropriate North American Industry Classification System (NAICS), the approach may have resulted in an underestimate of Affected Employees. As stated in 29 CFR 1910.502(a), “this section applies to all settings where any employee provides healthcare services or healthcare support services.” To address this potential underestimate for the final rule, OSHA is considering revising its approach to base the number of Affected Employees on setting, rather than occupation. OSHA seeks comment on this potential approach.

C.1.1—Covered Industries

C.1.1A: OSHA acknowledged in the Healthcare ETS that it did not “determine[ ] how many non-hospital ambulatory care providers will screen patients for COVID–19 infections and symptoms, and therefore might be fully exempt from the standard under paragraph [a][2][iii]” of the ETS (86 FR at 32485). While OSHA included in the Healthcare ETS Industry Profile several NAICS outside of healthcare where embedded clinics are prevalent, such as schools, OSHA did not include a number of industries that may have settings with embedded clinics (e.g., embedded clinics in manufacturing facilities) in the industry profile. The Healthcare ETS applies to these embedded clinics, as OSHA made clear both in the regulatory text and the Summary and Explanation for the ETS. See 29 CFR 1910.502(a)[3][i]; 86 FR at 32563. To address this, OSHA is considering including these industries in the final rule’s industry profile. OSHA notes that compliance with the final rule for these industries would most likely result in minimal costs or no costs because, under the Healthcare ETS, OSHA anticipated that many embedded clinics will be fully exempt under the non-hospital ambulatory care exception; and, if the rule applies, it will apply only with respect to embedded clinics and not the entire facility. OSHA seeks comment on this potential approach.

C.1.1B: As discussed above, OSHA noted in the Healthcare ETS that it did not determine “how many non-hospital ambulatory care providers will screen patients for COVID–19 infections and symptoms, and therefore be fully exempt from this rule under paragraph [a][2][iii]” (86 FR at 32485). OSHA also noted that “[t]o the extent that providers meet these exemption criteria, they will incur no costs for compliance with respect to these settings,” and that “[t]herefore, for this subset of establishments, the costs presented in OSHA’s analysis will be dramatic overestimates. OSHA assumes full costs where costs should be zero.” (Id.) For the final rule, OSHA is considering estimating the number of employers subject to this exemption, if it remains in the standard, but seeks information and data to support such an estimate.

C.1.2 Telework Employees: In the Healthcare ETS, OSHA accounted for reduced employee exposure due to telework for benefits, but did not explicitly account for telework in the number of employees affected by the final rule in the Industry Profile. This may have resulted in an overestimate of several employee-based costs, like the costs of respirators and personal protective equipment, because OSHA may have overestimated the number of employees affected by the final rule. In the Vaccination and Testing ETS, OSHA adjusted its telework estimates to reflect then-current teleworking conditions (see 86 FR 61462–61467). OSHA is considering making similar adjustments to the final Healthcare rule to estimate the current number of employees who telework. OSHA seeks comment on this potential approach.

C.2 Costs

C.2.1—One-time costs: OSHA requests comments on the extent to which some costs (e.g., costs associated with initial training, upgrading ventilation, rule familiarization, COVID–19 Plan development, respiratory protection program development) have already been incurred to comply with the ETS. OSHA further requests comments on the extent to which employers and other entities will bear ongoing costs (e.g., ongoing costs associated with training, PPE, respirators and the respiratory protection program, medical removal protection, COVID–19 plan monitoring and modification, and ventilation maintenance) under a final rule.

C.2.2—Age Group 65–74

C.2.2A: OSHA had not included employees in the age group 65–74 in the economic analysis of the Healthcare ETS out of concern that the population-wide average of workers in this age bracket would overcount the number of such workers in this sector. See 86 FR at 61470 n. 32. OSHA is rethinking this approach for the Healthcare final rule and seeks comment on including this age group in the analysis of both costs and benefits.

C.2.2B: OSHA will likely update its estimates to reflect the current baseline of vaccinated employees (for example, to incorporate the effects of the CMS vaccine-mandate rule on vaccination rates). OSHA will likely rely on the most recent CDC COVID–19 data tracker, as it did for the Healthcare ETS and the Vaccination and Testing ETS,
OSHA is considering using all sources of data on which it relied in the Healthcare ETS and the Vaccination and Testing ETS, as well some new data sources it did not rely on, including, for example:

- CDC Daily Tracker: Daily Tracker Home,5
- Demographic Trends of COVID–19 cases and deaths in the US reported to CDC,6,7,8
- Rates of COVID–19 Cases and Deaths by Vaccination Status,9
- Rates of laboratory-confirmed COVID–19 hospitalizations by vaccination status,10
- United States COVID–19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction,11
- Nationwide COVID–19 Infection-Induced Antibody Seroprevalence,12,13
- Kaiser Health News/UK Guardian,14
- The National Panel Study of COVID–19 (NPSC19),16,17

OSHA is considering vaccine efficacy in its benefits analysis. CDC Data Tracker, which was the same source for determining vaccine efficacy. OSHA seeks comment on this potential approach and data on which to update its estimates.

C.5.2 Frequency, Severity, and Distribution of Infections: There was “still some uncertainty surrounding the frequency and severity of COVID–19 infections and their distribution” when the Healthcare ETS was issued (86 FR 32545), so OSHA focused that economic analysis on hospitalizations and fatalities. More time and data have brought more certainty regarding other outcomes, so for the final rule OSHA is considering also accounting in its economic analysis for COVID–19-related long-term effects (i.e., long COVID), hospitalization, and shorter illness (due to variants, increased vaccinations, and improved treatments). Additionally, OSHA is considering using an approach similar to that in the Vaccination and Testing ETS, where OSHA took account of breakthrough cases and fatalities in vaccinated employees when it assessed the health impacts. OSHA seeks comment and data on these potential modifications.

II. Informal Public Hearing—Purpose, Rules, and Procedures

One commenter requested that OSHA hold a public hearing on the

6 Trends in COVID–19 Cases and Deaths in the United States, by County-level Population Factors:
Maps, charts, and data provided by CDC: https://covid.cdc.gov/covid-data-tracker/#pop-factors-7daynewcases.
14 Rates of COVID–19 Cases and Deaths by Vaccination Status. OSHA seeks comment on this potential approach and data on which to update its estimates.
rulemaking. See OSHA–2020–0004–1034. Attachment 1. OSHA has agreed to do so. OSHA invites interested persons to participate in this rulemaking by providing oral testimony and documentary evidence at the informal public hearing to provide the agency with the best available evidence to use in developing the final rule.

Pursuant to 29 CFR 1911.15(a) and 5 U.S.C. 553(c), members of the public have an opportunity at the informal public hearing to provide oral testimony and evidence on issues raised by the proposal. An administrative law judge (ALJ) presides over each OSHA hearing and will resolve any procedural matters relating to the hearing.

OSHA’s regulation governing public hearings (29 CFR 1911.15) establishes the purpose and procedures of informal public hearings. Although the presiding officer of the hearing is an ALJ and questioning of witnesses may be allowed on crucial issues, the proceeding is largely informal and essentially legislative in purpose. Therefore, the hearing provides interested persons with an opportunity to make oral presentations in the absence of rigid procedures that could impede or protract the rulemaking process. The hearing is not an adjudicative proceeding subject to the Federal Rules of Evidence. Instead, it is an informal administrative proceeding convened for the purpose of gathering and clarifying information. Accordingly, questions of relevance, procedure, and participation generally will be resolved in favor of developing a clear, accurate, and complete record within the available time frame.

The available time frame for this rulemaking is short as the agency hopes to complete the rulemaking as quickly as possible. OSHA remains aware of the dangers to healthcare workers exposed to COVID–19, as well as the potential for new variants and the surges of patients with COVID–19 that could follow in healthcare. Pursuant to 29 CFR 1911.4, the Assistant Secretary may, on reasonable notice, issue additional or alternative procedures to expedite the proceedings.

Although the ALJ presiding over the hearing makes no decision or recommendation on the merits of the proposal, the ALJ has the responsibility and authority necessary to ensure that the hearing progresses at a reasonable pace and in an orderly manner. To ensure a full and fair hearing, the ALJ has the power to regulate the course of the proceedings; dispose of procedural requests; and confine presentations to matters pertinent to the issues the proposed rule raises; use appropriate means to regulate the conduct of persons present at the hearing; question witnesses and permit others to do so; limit such questioning; and leave the record open for a reasonable time after the hearing for the submission of additional data, evidence, comments, and arguments from those who participated in the hearing (29 CFR 1911.16).

At the close of the hearing, there will be a post-hearing comment period during which stakeholders may submit final briefs, arguments, summations, and additional data and information to OSHA.

III. Notice of Intention To Appear at the Hearing

Interested persons who intend to provide oral testimony or documentary evidence at the hearing must file a written NOITA prior to the hearing and in accordance with the instructions in the ADDRESSES section earlier in this document. To testify at the hearing, interested persons must electronically submit their NOITA on or before April 6, 2022. The NOITA must provide the following information:

1. Name, address, email address, and telephone number of each individual who will give oral testimony;
2. Name of the establishment or organization each individual represents, if any;
3. Occupational title and position of each individual testifying; and
4. A brief statement of the position each individual will take with respect to the issues raised by the ETS (e.g., “I generally support/oppose the whole standard,” “the requirement for [specific provision] should be removed,” “the scope of the rule should be changed to include/exclude . . .”).

The agency will consider the information in each submission when setting the hearing schedule. Before the hearing, OSHA will make the hearing procedures and hearing schedule available at https://www.osha.gov/coronavirus/healthcare/rulemaking and in the dockets. OSHA emphasizes that the hearing is open to the public; however, only individuals who file a NOITA may testify at the hearing.

IV. Certification of the Hearing Record and Agency Final Determination

Following the close of the hearing and the post-hearing comment period, the ALJ will certify the record to the Assistant Secretary of Labor for Occupational Safety and Health. The record will consist of all of the written comments, oral testimony, and documentary evidence received during the proceeding. The ALJ, however, will not make or recommend any decisions as to the content of the final standard. Following certification of the record, OSHA will review all the evidence received into the record and will issue the final rule based on the record as a whole.

Authority and Signature

This document was prepared under the direction of Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. It is issued under the authority of sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor’s Order No. 8–2020 (85 FR 58393 (Sept. 18, 2020)); 29 CFR part 1911; and 5 U.S.C. 553.

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

[FR Doc. 2022–06080 Filed 3–22–22; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2022–0180]

Safety Zone; March Madness Fireworks Display, New Orleans, LA

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a temporary safety zone for a fireworks display located on the navigable waters of the Lower Mississippi River between Mile Marker (MM) 94.5 to 95.5. This action is needed to provide for the safety of life on these navigable waterways during the event. During the enforcement periods, the operator of any vessel in the regulated area must comply with directions from the Captain of the Port or designated representative.

DATES: The regulations in 33 CFR 165.845 will be enforced from 9:30 p.m. to 11 p.m. on April 3, 2022.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Lieutenant Commander William Stewart, Sector New Orleans, U.S. Coast Guard; telephone 504–365–2246, email William.A.Stewart@uscg.mil.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce safety zone located