

August 20, 2021
HCP Memo #9

MEMORANDUM COMMENTING

on

OSHA ETS Regulation 29 CFR 1910, Subpart U COVID-19

The New York State Association of Health Care Providers, Inc. (HCP), which represents the spectrum of home care providers across New York State submits these comments in reference to OSHA's publication: Emergency Temporary Standard (ETS) Regulation (29 CFR 1910, Subpart U) COVID-19.

It is our understanding that due to the credentialing of home care workers in New York State, the ETS applies to these employees under the definition of the provision of health care services laid out in the ETS. I respectfully urge you to consider these comments on the viability of the ETS' application, as well as the discrepancies that might exist for home care workers in NY when compared to other states across the nation.

Compliance Barriers

Home care is exempt from following the ETS only under the following circumstance according to 1910.502(a)(2)(v): "...where all employees are fully vaccinated *and all non-employees are screened prior to entry* and people with suspected or confirmed COVID-19 are not present" (emphasis added). Unlike in a facility, in the home care setting, the environment and whether others are present are factors beyond the control of the employer. Family members, delivery persons, and even other health care providers may enter and leave the dwelling without the home care employer's knowledge or oversight.

The home care patient alone has control over who enters the dwelling, not the home care employer. Visitors may be unwilling to be screened, and indeed the responsibility to screen each and every visitor, expected or not, is overly burdensome.

Home care services are scheduled and reimbursed based on the care provided. There is simply no time built in to tend to visitor screening activities that are entirely unpredictable and beyond the control of the employer. Time taken by this essential workforce to screen multiple visitors is time taken from patient care. Additionally, visitor screening on-site, beyond the control of the employer

The New York State Association of Health Care Providers, Inc. (HCP) is a statewide trade association representing home and community-based care providers through information, advocacy, and education. HCP represents approximately 350 offices of licensed home care services agencies, certified home health agencies, hospices, fiscal intermediaries and related health organizations.

effectively puts the onus of ETS compliance on the workers. HCP presumes this is not OSHA's intention.

A possible alternative to screening is to bar visitors during a home care worker's shift. This is an invalid solution and beyond the authority of the employer. It is unreasonable, untenable and ill-advised to prevent home care recipients from receiving visitors in their own homes, especially if care is provided 24-hours a day.

Much of the work provided by a home care worker may fall under the ETS definition of "healthcare support services", not "direct patient care". Does this mean when a worker is preparing a meal in the kitchen or switching laundry in the basement, the ETS would not apply? What is the expectation if the care recipient then enters the space? Does that space now become the "health care setting"? Is it a health care setting if a visitor enters a space occupied by the worker, but not occupied by the care recipient?

These are merely a few examples of the nuances involved in the home care setting which preclude strict, consistent compliance with the OSHA ETS for home care providers.

Applicability Discrepancies

Training for personal care aides (PCAs) is not governed by any federal standards, unlike training for home health aides and nursing assistants. According to PHI, a nationally recognized health care data collector, NY is one of only 14 states having consistent training requirements for all agency-employed PCAs. 29 states and the District of Columbia have varying requirements for agency-employed PCAs, depending on whether they work in specific Medicaid programs or for private-pay home care agencies. In contrast, seven states *do not regulate training for PCAs at all*. Therefore, not all home care workers in the nation are subject to the terms of the ETS.

Due to this inconsistency, it is unclear how such a standard can be applied in a fair and uniform way across the country.

Additionally, many home care workers are employed via a Self-Directed Care program called the Consumer Directed Personal Assistance Program (CDPAP) in New York. In this program, the agencies serving as Fiscal Intermediaries have little to no control over scheduling and patient interactions, and even less control over the workplace, which is the patient's home or a community setting. The consumer, then, as the employer, would be responsible for compliance with the OSHA ETS. HCP posits that such an interpretation is strained and seeks clarification to understand the applicability of the ETS to CDPAP.

Conclusion

HCP is grateful for the opportunity to provide comments on the OSHA ETS for worker protections from COVID-19. We fully understand the need for these protections. Our comments reflect the concern regarding applicability of the ETS to the home care workplace as one that is clearly beyond the control of the employer.