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August 18, 2021

James S. Frederick,  
Acting Assistant Secretary of Labor  
Occupational Safety and Health  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC

**Re: Docket No. OSHA–2020–0004-Occupational Exposure to COVID–19; Emergency Temporary Standard**

Dear Acting Assistant Secretary Fredrick:

Since 1982, the National Association for Home Care & Hospice (NAHC) has been the leading association representing the interests of home health, hospice and home care providers across the nation, including the home caregiving staff and the patients and families they serve. Our members are providers of all sizes and types -- from small rural agencies to large national companies -- and including government-based providers, nonprofit organizations, systems-based entities and public corporations.

NAHC supports the efforts by the Occupational Safety and Health Administration to ensure a safe working environment for healthcare employees during this unprecedented pandemic. However, NAHC has concerns with specific aspects of the Emergency Temporary Standards (ETS) as it relates to applicability, the medical removal protection benefits, and issuing permanent COVID-19 standards for healthcare settings.

**Applicability for Home Care Providers**

There is a great deal of confusion among the home care community as to the applicability of the ETS for non-medical home care providers

OSHA uses the term in-home healthcare throughout the ETS. The term “home healthcare” generally refers to skilled healthcare services, which includes hospice care, provided in a patient’s home, usually through a Medicare or Medicaid certified home health or hospice agency. However, it is apparent from several of the sections in the preamble of the ETS that non-medical” home care” providers could be subject to the ETS. For example, the following paragraph on page 32409 in the FR is titled In-Home Healthcare Providers but refers to personal care services and services provided by skilled professionals.

**In-Home Healthcare Providers:**

In-home healthcare workers provide medical or personal care services, like those provided in long-term care facilities, inside the homes of people unable to live independently. Patients receiving in-home care could receive services from different types of healthcare providers (e.g., a nurse administering medical care, a physical therapist assisting with exercise, a personal care services provider assisting with daily functions such as bathing). In addition, a number of workers may provide services to the same patient, while working in shifts over the course of the day. In-home healthcare providers have a high risk of infection from working close to patients and possibly their family members or other caregivers in enclosed spaces (e.g., performing a physical examination, helping the patient bathe),

Conversely, under §1910.502(b) healthcare services are defined as services provided only by professional healthcare practitioners.

Healthcare services mean services that are provided to individuals by professional healthcare practitioners (e.g., doctors, nurses, emergency medical personnel, oral health professionals) for the purpose of promoting, maintaining, monitoring, or restoring health.

In the preamble of the rule, OSHA refers to healthcare professionals as those individuals that generally have either licensure or credentialing requirements; although the terms “licensing and credentialing” are not in the regulatory text for the definition of healthcare services at 1910.502(b).

Furthermore, the OSHA standards division responded to a question submitted by NAHC which states as follows:

“The ETS applies to settings where any employee provides healthcare services or healthcare support services, as those terms are defined in the standard. Housekeeping, meal preparation, and other services that do not facilitate the provision of healthcare services are not covered under the ETS.”

Therefore, due to the various definitions for healthcare services and home healthcare providers, NAHC has concluded that non-medical homecare providers who provide personal care services by home care aides or personal care aides where credentials such as certifications or competency evaluations are required are subject to the requirements of the ETS. Whereas home care providers that do not provide any direct patient care services such as housekeeping and meal preparation are not required to comply with ETS.

**Recommendation:** NAHC requests that OSHA clearly define which home care providers are subject to the ETS, including specific examples of those home care providers that are subject to the requirements of the ETS and those home care providers that are not covered under the ETS.

## **Medical Removal Protection (MRP) Benefits**

### **1. Limit the time frame for the MRP benefit**

§1910.502(l)(5) (A) requires employers to continue to provide the benefits to which the employee is normally entitled and must also pay the employee the same regular pay the employee would have received had the employee not been absent from work, up to \$1,400 per week, until the employee meets the return to work criteria.

§1910.502(l)(5)(B) For employers with fewer than 500 employees, the employer must pay the employee up to the \$1,400 per week cap but, beginning in the third week of an employee's removal, the amount is reduced to only two-thirds of the same regular pay the employee would have received had the employee not been absent from work, up to \$200 per day.

Although there is a limit on the amount smaller employers must pay employees, the time frame for which the MRP payments might need to be paid is limitless for all employers subject to the ETS.

The cost to provide unlimited MRP benefits could be prohibitive for an employer depending on the severity of an individual's COVID-19 related illness and/or the number of employees an employer may have out of work due to COVID-19. This is of particular concern for the home care industry since most home healthcare and home care agencies are categorized as small businesses by the Small Business Administration and have limited resources. Although OSHA references the application of the American Rescue Plan Act of 2021 tax credits to offset costs to employers, these tax credits expire September 30, 2021, with no plans to be renewed.

Based on the Centers for Disease Control and Prevention recommendations and reiterated in the ETS, most employees required to be removed from the workplace can return to work after ten days from their positive test or from when symptoms first appeared. However, individuals with severe illness or immune disorders might be infectious and need to be removed from the workplace for 20 days or more.

Employers are required to remove any employee from the workplace with suspected or confirmed COVID-19 illness, which triggers the MRP benefits, regardless of where the employee contracted the infection. Employers do not have control over the employee's behavior outside of the workplace, therefore, it will be virtually impossible for employers to predict the number of employees that may be eligible for the MRP benefits and/or the number of those with severe illness who will be out of work for a prolonged period.

**Recommendation:** OSHA should establish a standard for a "reasonable" time frame that employers are required to provide the MRP benefits. NAHC recommends limiting the provision of the MRP benefit to three weeks from the time the employee is removed from the workplace.

Three weeks would sufficiently cover the time needed for most employees to recover from a COVID-19 illness, even those with severe illness.

NAHC believes this recommendation is supported by the “reasonable” standard in the ETS for the time frame that an employer must cover lost time from work for COVID-19 vaccination and related side effects.

“Employers may set a cap on the amount of time and paid leave available to employees to receive each dose of the vaccine and to recover from any side effects, but the cap must be reasonable. Accordingly, the amount of reasonable time and paid leave that an employer must make available to employees may vary depending on the circumstances. Generally, OSHA presumes that, if an employer makes available up to four hours of paid leave for each dose of the vaccine, as well as up to 16 additional hours of leave for any side effects of the dose(s) (or 8 hours per dose), the employer would be in compliance with this requirement.”

## **2. Return to work**

The ETS requires the employer to make decisions regarding an employee's return to work after a COVID-19-related workplace removal in accordance with guidance from a licensed healthcare provider or CDC's “Isolation Guidance” and CDC's “Return to Work Healthcare Guidance”

Home Health Agencies (HHAs), hospices and personal care service providers(home health care providers) typically do not have employee or occupational health departments where decisions to return to work could be based on the CDCs return to work criteria by the employer. A return to work determination for most of these providers is based solely on the assessment of the employee’s health by the employee’s health care practitioner. However, access to an employee’s healthcare practitioner and the medical record is at the discretion of the employee.

Without some employer protections around when the MRP benefits are no longer required it is possible for an employee to exploit the MRP benefits by failing or refusing to provide the necessary documentation to support the need for continued absence from the workplace. Additionally, home health care providers have been reluctant to require this documentation from the employee’s health care practitioner for fear of violating the anti-retaliation standard.

**Recommendation:** Clarify that employers may develop policies that require written documentation from the employee’s health care practitioner when a COVID-19 related illness extends beyond the 10-day time frame, that is typical for ending isolation, in order to continue to provide the employee with the MRP benefits.

## **3. “PRN” employees**

The ETS requires that the employees removed from work be paid the regular pay the employee would have received had the employee not been absent from work, up to \$1,400 per week.

Many healthcare organizations employ individuals on a “PRN” (as needed) basis. These employees typically do not have a regular work schedule with the employer. Additionally, the “PRN” employee may not have been scheduled to work during the time period for which it was necessary for the employee to be isolated due to a suspected or confirmed COVID-19 infection. It is unclear how the employer is to calculate the amount of pay under the MRP benefit that a “PRN” employee must receive if unable to work.

#### **Recommendations.**

- Clarify how employers are to calculate the MRP benefit payments for “PRN” employees, for example, calculate the MPR on the average number of hours/visits worked per week in the past quarter.
- Clarify if employers are required to pay “PRN” employees for time removed from the workplace if not scheduled to work during that period.

#### **4. Recordkeeping**

In addition to requiring employers keep a COVID-19 log, OSHA will require employers to enter work-related COVID-19 cases in the OSHA 300 log and outlines the process on how to complete the log in accord with §1904. The requirement for employers to report the COVID-19 case in 2 separate places (OSHA 300 Log and the COVID-19 Log), with 2 very different processes of reporting seems to be redundant and unnecessarily burdensome for employers.

**Recommendation:** Limit the recordkeeping requirements for COVID-19 cases, regardless of whether the infection was work related, to only the COVID-19 log in accord with §1910.502(q).

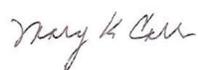
#### **5. The ETS as Permanent Standards**

NAHC has concerns with making the ETS permanent when it is unclear the course for the continued spread of COVID-19 infections. Setting permanent OSHA standards specifically to prevent the spread of COVID-19 could result in employers having to implement practices that may be unnecessary once the pandemic is under control. It is not practical to burden employers with continuing implementation of many of the COVID-19 specific standards in the ETS under ordinary conditions. Additionally, the standards in the ETS that would continue to be applicable outside of a pandemic are standards that are currently part of healthcare providers’ infection control and prevention policies.

**Recommendation:** NAHC does not support OSHA’s proposal to adopt the COVID-19 ETS as permanent standards.

Thank you for the opportunity to submit these comments.

Sincerely,



Mary K. Carr, V.P. for Regulatory Affairs