



August 13, 2020

OSHA Jurisdiction Over Public Schools and Other State and Local Government Entities

As states and their public school systems consider how to provide education to students during the ongoing Coronavirus Disease 2019 (COVID-19) pandemic, they must consider the safety and health of their students and the potential occupational exposure of their teachers and other employees, including support staff and transportation providers, to the SARS-CoV-2 virus, the virus that causes COVID-19. In 24 states and the District of Columbia, local educational agencies (LEAs), such as public school districts, and other state and local government entities are not subject to federal regulation, inspection, or enforcement by the Occupational Safety and Health Administration (OSHA) or state regulation under the Occupational Safety and Health Act of 1970 (OSH Act). LEAs in these states may be covered by OSHA-approved state occupational safety and health plans (state plans) or other state laws.

OSH Act Jurisdiction Over State and Local Government Employers

Section 3(5) of the OSH Act (29 U.S.C. §652(5)) defines an *employer* for the purposes of federal jurisdiction of OSHA as follows:

The term “employer” means a person engaged in a business affecting commerce who has employees, but does not include ... any State or political subdivision of a State.

Therefore, state and local government entities, including LEAs, are not considered employers under the OSH Act and thus are not subject to OSHA’s *federal* regulation, inspection, or enforcement. However, they may be covered by OSHA-approved state plans. Private schools are considered employers under the act and are subject to federal OSHA jurisdiction, as are some charter schools, depending on their administrative structure and governance.

OSHA State Plans

Section 18 of the OSH Act (29 U.S.C. §667) authorizes states to establish their own state plans and preempt federal OSHA standards and enforcement. OSHA must approve state plans if they are “at least as effective” as OSHA’s standards and enforcement. In addition, state plans must provide coverage for state and local government entities as employers. OSHA may provide matching grants to states to cover up to one-half of their state plan operating costs.

Currently, 21 states and Puerto Rico have OSHA-approved state plans that cover *all* employers in the state, including state and local government entities, and five states and the U.S. Virgin Islands have state plans that cover only *state and local and local government employers*, including

LEAs. OSHA estimates that state plans cover approximately 40% of workers in the United States.

State plans may incorporate OSHA standards by reference, or establish their own standards that meet the “at least as effective” test required for OSHA approval. OSHA can terminate state plans that fail to remain at least as effective as the federal system.

Table I. OSHA-Approved State Plans

Covers All Employers		Covers State and Local Government Employers Only
Alaska	New Mexico	Connecticut
Arizona	North Carolina	Illinois
California	Oregon	Maine
Hawaii	South Carolina	New Jersey
Indiana	Tennessee	New York
Iowa	Utah	U.S. Virgin Islands
Kentucky	Vermont	
Maryland	Virginia	
Michigan	Washington	
Minnesota	Wyoming	
Nevada	Puerto Rico	

Source: Congressional Research Service (CRS) table with data from the Occupational Safety and Health Administration (OSHA).

States that do not have OSHA-approved state plans may have their own occupational safety and health laws that cover some or all state and local government entities, including LEAs. However, these laws are not required to be at least as effective as OSHA standards or enforcement, are not in any way regulated by OSHA or the federal government, and are not eligible for OSHA grants.

Rationale

The exemption for state and local government entities was part of the original 1970 OSH Act. At the time, numerous states had their own occupational safety and health laws, and there was concern in Congress about having the federal government usurp these state authorities. Concerns about the OSH Act’s lack of federal jurisdiction over state and local government employers were addressed by the Section 18 provisions requiring states with state plans to cover such

employers and the use of federal grants as an incentive for states to establish their own plans and thus cover state and local government employers.

OSHA and COVID-19

OSHA does not currently have any standards that directly address the airborne transmission of diseases such as COVID-19. However, OSHA does have existing standards that cover personal protective equipment (PPE), sanitation, and the recording and reporting of occupational injuries, illnesses, and deaths, which may be applicable to COVID-19. Legislation, including a provision in H.R. 6800, the Heroes Act as passed by the House, has been introduced in the 116th Congress that would require OSHA to promulgate an emergency temporary standard (ETS) to cover COVID-19. Under H.R. 6800, state plans would have to adopt the ETS or a comparable standard, and state and local government employers not covered by a state plan would be covered by the COVID-19 ETS.

The “general duty clause” provided in Section 5(a)(1) of the OSH Act (29 U.S.C. §654(a)(1)) requires that each covered employer provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to its employees. OSHA has also issued guidance on preventing COVID-19 in a variety of workplace settings. OSHA has not, however, issued any specific guidance on preventing COVID-19 in schools.

Two states, California and Virginia, have state standards as part of their OSHA-approved state plans that directly address COVID-19.

California

The California Division of Occupational Safety and Health (Cal/OSHA), under its state plan, promulgated its aerosol transmissible disease (ATD) standard in 2009. The ATD standard covers most health care workers, including school nurses, and workers in laboratories, correctional facilities, homeless shelters, and drug treatment programs. Pursuant to Appendix A of the ATD standard and an announcement made in February 2020 by Cal/OSHA, SARS-CoV-2, as a novel pathogen, is classified as a disease or pathogen requiring airborne isolation. This classification subjects the virus to stricter control standards than diseases requiring only droplet precautions, such as seasonal influenza. The ATD standard’s key requirements include

- written ATD exposure control plan and procedures;
- employee training on COVID-19 exposure, use of PPE, and procedures if exposed to COVID-19;
- engineering and work practice controls to address COVID-19 exposure, including the use of airborne isolation rooms;
- employee availability to medical services and removal from workplace of exposed employees;
- specific requirements for laboratory workers; and

- PPE requirements, including employer-provided PPE.

Virginia

On July 15, 2020, the Virginia Safety and Health Codes Board adopted an ETS under Virginia’s state plan (VOSH) to specifically protect employees from exposure to SARS-CoV-2. As an ETS, the VOSH standard expires either within six months of its effective date, upon expiration of the governor’s state of emergency, when superseded by a permanent standard, or when repealed by the board, whichever comes first. The ETS can be extended only through the normal state rulemaking process.

Unlike the Cal/OSHA ATD standard, the VOSH ETS applies to all employers in the state. As part of a state plan, the VOSH ETS applies to state and local government entities, such as public schools, as employers. All employers in Virginia must comply with the following ETS requirements

- exposure assessment and determination, notification of suspected cases and contacts with those cases, and employee access to their own exposure and medical records;
- allowance for employees to return to work after known or suspected to have COVID-19 based on a duration of time since last symptoms or negative COVID-19 tests;
- maintenance of physical distancing between employees while working and on paid breaks at the worksite, including restricted access to the worksite and common areas and break rooms;
- compliance with applicable existing PPE and respiratory protection standards when physical distancing between employees and others is not possible; and
- sanitation and disinfection requirements.

If engineering, administrative, or work practice controls are not feasible or do not provide sufficient protection from SARS-CoV-2 transmission, then all employers must provide PPE, including respiratory PPE such as respirators, to their employees.

Legislation to Cover State and Local Employers

In the 116th Congress, H.R. 1074, the Protecting America’s Workers Act, would amend the Occupational Safety and Health Act to cover state and local government entities as employers. Similar legislation was introduced in previous Congresses.

For Additional Information

CRS Report R46288, *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*, by Scott D. Szymendera.

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