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OSHA Jurisdiction Over Public Schools and Other State and Local Government Entities: COVID-19 Issues

As states and their public school systems consider how to provide education to students during the ongoing Coronavirus Disease 2019 (COVID-19) pandemic, they face 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 *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. 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. Five states and the U.S. Virgin Islands have state plans that cover only *state 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 1. 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	

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; sanitation; and the recording and reporting of occupational injuries, illnesses, and deaths, which may be applicable to COVID-19. Legislation in the 116th Congress—including a provision in H.R. 6800, the Heroes Act, and H.R. 925, the revised Heroes Act, as passed by the House—would have required OSHA to promulgate an emergency temporary standard (ETS) to cover COVID-19. Under H.R. 6800 and H.R. 925, state plans would have had to adopt the ETS or a comparable standard, and state and local government employers not covered by a state plan would have to have been covered by the COVID-19 ETS.

General Duty Clause

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. As of January 14, 2021, OSHA has issued three citations for violations of the general duty clause related to COVID-19. OSHA has not issued any specific guidance on preventing COVID-19 in schools.

Executive Order on Protecting Worker Health and Safety

On January 21, 2021, President Joe Biden issued an executive order concerning COVID-19 in the workplace. This executive order requires OSHA to determine the necessity of a COVID-19 ETS and, if necessary, issue an ETS by March 15, 2021. In addition, the executive order requires OSHA to coordinate with state plans to ensure that workers covered by such plans are adequately protected from COVID-19, consistent with any OSHA guidance or ETS, and consult with states that do not operate state plans to improve protections for state and government employees.

State Plan Actions to 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.

Cal/OSHA has also promulgated an ETS to address COVID-19 in the workplace. Unlike the ATD standard, this ETS applies to all covered workplaces. The ETS requires all employers to develop and implement written COVID-19 prevention plans that include provisions for physical

distancing, face coverings, and the removal (without penalty to the worker) of employees with COVID-19 or who were exposed to COVID-19. Additional requirements, including the testing of all employees at regular intervals, apply when a worksite has multiple cases of COVID-19. The Cal/OSHA ETS also includes provisions that apply to housing and transportation provided by the employer.

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. This ETS was superseded by a permanent standard that went into effect on January 27, 2021.

Unlike the Cal/OSHA ATD standard, the VOSH permanent standard applies to all covered employers in Virginia, regardless of industry. As part of a state plan, the VOSH permanent standard applies to state and local government entities, such as public schools, as employers.

Michigan

On October 14, 2020, the director of the Michigan Department of Labor and Economic Opportunity, which operates Michigan’s state occupational safety and health plan, promulgated emergency rules to address workplace exposure to COVID-19. The Michigan emergency rules apply to all covered employers in the state, including state and local government entities such as LEAs. These rules went into immediate effect and will remain in effect for six months. In addition to rules that apply to all covered employers, the emergency rules include provisions that apply to certain specific industries.

Oregon

On November 6, 2020, the Oregon Department of Consumer and Business Services, which operates Oregon’s state plan (Oregon OSHA), adopted temporary administrative rules that expire on May 4, 2021, to specifically address COVID-19 exposures in the workplace. In addition to rules that apply to all employers, the appendices to the Oregon OSHA rules also include mandatory guidance that applies to certain specific industries and employers including public and private K-12 educational institutions.

Legislation to Cover State and Local Employers

In the 116th Congress, H.R. 1074, the Protecting America’s Workers Act, would have amended the OSH 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.

CRS Report R46540, *COVID-19 Liability: Tort, Workplace Safety, and Securities Law*, by Kevin M. Lewis et al.

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