



Comments of the World Privacy Forum

To: Occupational Safety and Health Administration (OSHA), Department of Labor

**Regarding: *COVID-19 Vaccination and Testing: Emergency Temporary Standard (ETS)*,
Docket No. OSHA-2021-0007**

Via [regulations.gov](https://www.regulations.gov) and via email to ETS@DOL.gov

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Thank you for the opportunity to comment on the *COVID-19 Vaccination and Testing: Emergency Temporary Standard*, 86 FR 68560, from December 3, 2021. The World Privacy Forum (WPF) is a nonprofit, non-partisan 501(c)(3) public interest research group. WPF focuses on multiple aspects of privacy, with health privacy being among our key areas of work. We publish a large body of health privacy information, including guides to HIPAA; reports and FAQs for victims of medical identity theft; and materials on genetic privacy, precision medicine, electronic health records, and more.¹ We testify before Congress and federal agencies, and we regularly submit comments on HIPAA and related regulations. You can find out more about our work and see our reports, data visualizations, testimony, consumer guides, and comments at <http://www.worldprivacyforum.org>.

We write with a brief but important comment. We are particularly interested in the ETS definition of medical record; our analysis of the ETS proposal indicates a significant inconsistency in the definition of medical record, which we discuss, and we also propose a straightforward remedy.

¹ See World Privacy Forum, A Patient's Guide to HIPAA, <https://www.worldprivacyforum.org/2019/03/hipaa/>; see also our Health Category page for additional materials <https://www.worldprivacyforum.org/category/health-privacy/>.

I. Support for proposed treatment of COVID-19-related employee records

WPF generally supports the ETS' proposed treatment of COVID-19 records pursuant to 29 CFR 1910.1020. Should this rule go into effect, all COVID-19 records will be considered an **employee medical record**, and will therefore be held with the protective guardrails described in 29 CFR 1910.1020.

Determining that COVID-19 related employee vaccination data is an employee medical record will allow for greater employee trust in the process, and will clarify to employers that the data must be held as highly sensitive employee medical information.

II. Request for clarification in proposed definition of employee medical records

We are requesting a change to the proposed ETS definition of employee medical records. Our analysis finds that the proposed language inadvertently introduces a significant definitional conflict. However, there is a fairly simple remedy, which we propose below.

The existing OSHA rule defines an “*employee medical record*” as follows:

(current) 29 CFR 1910.1020(c)(6)(i)

“Employee medical record means a record concerning the health status of an employee which is made or maintained by a physician, nurse, or other health care personnel or technician, including:”

Here's what the proposed 2021 OSHA ETS says regarding employee medical records:

(proposed) § 1910.501

“(e)(4) The employer must maintain a record of each employee’s vaccination status and must preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated. The employer must maintain a roster of each employee’s vaccination status. These records and roster are considered to be **employee medical records** and must be maintained as such records in accordance with **§1910.1020** and must not be disclosed except as required or authorized by this section or other federal law. These records and roster are not subject to the retention requirements of §1910.1020(d)(1)(i) but must be maintained and preserved while this section remains in effect.”

At issue is the proposed language “*employee medical records*” that refers back to the original 29 CFR 1910.1020(c)(6)(i). If the records and roster described in the new proposal are not **made or maintained** by a **physician, nurse, or other health care personnel or technician** (etc.), then are they really medical records per the 29 CFR 1910.1020(c)(6)(i) definition? The answer here is

likely no, and this could become quite problematic due to the way some pandemic-related records are being held and created.

We agree that the pandemic has created a novel situation where public health records such as vaccination records have been made in some cases by non-HIPAA covered entities, and may be thereafter be maintained by a wide variety of businesses, apps, mobile devices, etc. Because these pandemic-induced changes in health data ecosystems were not relevant in the pre-pandemic circumstances of the existing rule in 29 CFR 1910.1020(c)(6)(i), our proposal to remedy this potential conflict is to revise the language to say the following:

"These records and roster are considered to be employee medical records whether or not they are made or maintained by a physician, nurse, or other health care personnel or technician and must be maintained as such records in accordance with §1910.1020 and must not be disclosed except as required or authorized by this section or other federal law."

The changes we propose here are small, but important, and could become more important over time. We understand that the circumstances the pandemic has introduced are novel. It is important that everyone agrees on what an employee medical record is in this new context.

Thank you for a thoughtful and thorough ETS proposal. Please let us know if we can answer any questions regarding the definition.

Respectfully submitted,

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