

The Issue

The House of Representatives approved the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act (H.R. 6800) on May 15, 2020, and an updated version on Sept. 29. Both bills included the COVID-19 Every Worker First Protection Act of 2020, which would require new Occupational Safety and Health Administration (OSHA) standards. Provisions similar to those found in these bills are now being considered as part of negotiations on the next COVID-19 relief measure.

The Proposal

The House bills would require that OSHA issue within seven days an Emergency Temporary Standard (ETS) requiring employers to develop and implement a comprehensive infectious disease exposure control plan. The ETS may not be less protective than any OSHA state plan, meaning every state would need a standard at least as restrictive as the state of California's OSHA rules. The bill also would require the issuance of a permanent standard within two years. The version of the legislation (H.R. 6559, introduced April 21, 2020) included in the HEROES Act had been updated from previous bills by including a requirement for recording and reporting infections and deaths, as well as an anti-retaliation provision.

Key Points to Make

- Hospitals are working every day to protect their health care workers and to be good stewards of personal protective equipment (PPE) and other scarce resources.
- This initiative would add for hospitals and health systems a new layer of conflicting and unnecessary regulatory burden at precisely the wrong time.
- The legislation is intended to address protections for health care workers, including setting new standards for PPE, but it fails to acknowledge ongoing virus surges and flu season demands that could affect the supply of PPE. Enacting these new standards could force hospitals and their staffs into a nearly impossible decision – to either not comply with the standards to treat all of the patients who need help or comply with the standards and stop treating patients when supplies of OSHA-required equipment are exhausted.
- Hospitals already adhere to science-based guidance from the Centers for Disease Control and Prevention (CDC) and Centers for Medicare & Medicaid Services (CMS). CDC closely tracks any developments and updates its standards accordingly as more becomes known about emerging pathogens.
- Hospitals already establish and support robust infection control programs and invest significant resources to assess and improve those programs. Hospitals, in order to participate in the Medicare and Medicaid programs, must meet specific infection control requirements as set by the programs' conditions of participation (CoP).
- Hospitals remain concerned about the adequacy of supplies of N95 respirators and surgical masks as the virus continues its surge across the country and the flu season begins. Currently, N95 masks must be reserved only for those procedures in which they are absolutely needed, such as those that generate aerosol. For other care tasks, the CDC and World Health Organization (WHO) recommend facemasks be used.
- The legislation allows OSHA to exercise enforcement discretion if employers' compliance is not feasible and they make good-faith efforts to implement alternative measures to protect employees. This provision would add to the process another layer of decision-making when timely government action is critical. It could produce dangerous

conflicts as hospitals work to adhere to appropriate CDC guidance. Furthermore, unions have reported filing numerous OSHA complaints against hospitals; such actions could force hospitals to dramatically reduce their inpatient capacity rather than potentially expose themselves to very large fines.

- Both the CDC and WHO hold that COVID-19 is droplet spread except possibly when doing certain aerosolizing procedures. The CDC has recently acknowledged some specific circumstances outside of the hospital setting can generate COVID-19's spread through aerosols. For health care workers, CDC continues to recommend as appropriate the use of facemasks unless workers are performing aerosolizing procedures or procedures that require very close contact with patients. Hospitals continue to follow the standards established by CDC, which are science- and evidence-based.