

OSHA Issues New Workplace Guidance In Response to Rising Numbers of COVID-19 Cases

AUGUST 19, 2021

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On August 13, 2021, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") issued updated guidance on mitigating and preventing the spread of COVID-19 in the workplace. OSHA's latest guidance is in response to rising COVID-19 cases. It also reflects the most recent guidance from the Centers for Disease Control and Prevention (the "CDC") relating to masking and testing for the fully vaccinated, which we discussed in our August 2, 2021 client bulletin, which you can find [here](#).

OSHA often provides "guidance" to employers as recommendations to use in protecting their workers and to help those workers protect themselves. In contrast, OSHA mandates, which are codified in Title 29 of the Code of Federal Regulations (CFR), represent legal obligations that employers must follow. Nevertheless, employers should recognize that many states and localities continue to develop and implement their own rules as the pandemic endures.

OSHA's updated guidance recommends the following:

1. Facilitate employee vaccinations.

Employers should grant paid time off for employees to get vaccinated and recover from any side effects. OSHA also recommends that employers should consider working with local public health authorities to provide vaccinations in the workplace for unvaccinated workers. OSHA also suggests that employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing - in addition to mask wearing and physical distancing - if they remain unvaccinated.

2. Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for COVID-19, and all workers with COVID-19 symptoms to stay home from work.

OSHA's guidance includes a reminder that businesses with fewer than 500 employees may be eligible for refundable tax credits under the ARP Act if they provide paid time off for sick and family leave to their employees due to COVID-19-related reasons. More information on the availability of refundable tax credits is [available from the IRS](#).

3. Implement physical distancing in all communal work areas for unvaccinated and otherwise at-risk workers.

OSHA suggests that employers limit the number of unvaccinated or otherwise at-risk workers in one place at any one time as a key way to protect workers from transmission of the virus. For those

working at fixed workstations and who may come into regular contact with other workers (receptionists, administrative assistants, etc.), transparent shields or other solid barriers should be considered as a way to prevent direct transmission of the virus.

4. Provide workers with face coverings or surgical masks, as appropriate, unless their work task requires a respirator or other personal protective equipment (PPE).

OSHA's guidance acknowledges that the CDC's most updated guidance recommends that even vaccinated people wear masks in public indoor settings in [areas of substantial or high transmission](#) of COVID-19. As such, OSHA also recommends that employers provide face coverings to workers who request them at no cost. Unless otherwise provided by federal, state, or local requirements, workers who are outdoors may opt not to wear face coverings unless they are at risk. Regardless, OSHA's guidance states that all workers should be supported in continuing to wear a face covering if they choose, especially to safely work closely with other people.

Additionally, OSHA's guidance provides that when an employer determines that PPE is necessary to protect unvaccinated and otherwise at-risk workers from exposure to COVID-19, the employer must provide PPE in accordance with relevant mandatory OSHA standards and should consider providing PPE in accordance with other industry-specific guidance.

5. Educate and train workers on COVID-19 policies and procedures using accessible formats and in languages they understand.

OSHA encourages employers to set up an anonymous process for workers to voice concerns about COVID-19-related hazards and to implement policies to protect against retaliation for reporting issues relating to COVID-19 in the workplace.

6. Suggest or require that unvaccinated customers, visitors, or guests wear face coverings in public-facing workplaces such as retail establishments, and that all customers, visitors, or guests wear face coverings in public, indoor settings in areas of substantial or high transmission.

Although OSHA provides this guidance, certain states may prohibit employers from imposing such requirements.

7. Maintain ventilation systems.

OSHA specifies that key measures for maintaining ventilation include ensuring heating, ventilation, and air conditioning (HVAC) systems are operating in accordance with the manufacturer's instructions and design specifications; conducting all regularly scheduled inspections and maintenance procedures; maximizing the amount of outside air supplied; installing air filters with a Minimum Efficiency Reporting Value (MERV) 13 or higher where feasible; maximizing natural ventilation in buildings without HVAC systems by opening windows or doors, when conditions allow (if that does not pose a safety risk); and considering the use of portable air cleaners with High Efficiency Particulate Air (HEPA) filters in spaces with high occupancy or limited ventilation.

8. Perform routine cleaning and disinfection.

Follow requirements in mandatory OSHA standards 29 CFR 1910.1200 and 1910.132, 133, and 138 for hazard communication and PPE appropriate for exposure to cleaning chemicals.

9. Record and report COVID-19 infections and deaths.

Under mandatory OSHA rules in 29 CFR part 1904, employers are required to record work-related cases of COVID-19 illness on OSHA's Form 300 logs if the following requirements are met: (1) the case is a confirmed case of COVID-19; (2) the case is work-related (as defined by 29 CFR 1904.5); and (3) the case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7) (e.g., medical treatment, days away from work). Employers must follow the requirements in 29 CFR part 1904 when reporting COVID-19 fatalities and hospitalizations to OSHA.

10. Continue to follow other applicable mandatory OSHA standards.

Measures Appropriate for Higher-Risk Workplaces with Mixed-Vaccination Status Workers.

In "higher-risk" workplaces with mixed vaccination status workers, OSHA recommends taking additional steps to mitigate the spread of COVID-19 among unvaccinated and otherwise at-risk workers. These "higher-risk" workplaces include workplaces (1) where workers work close to one another, e.g. on production or assembly lines or in busy retail settings; (2) where workers have prolonged closeness to their coworkers (6-12 hours per shift); (3) with poor ventilation or in work places with shared closed spaces such as break rooms, locker rooms, and interior hallways; and (4) with employer-provided transportation such as ride-share vans or shuttle vehicles, where work requires frequent contact with other individuals in community settings (e.g. sales representatives who regularly visit client businesses), or where the nature of the work requires communal housing or living quarters.

For these "higher-risk" workplaces, OSHA recommends that employers consider:

- staggering break times or providing temporary break areas and restrooms to avoid encouraging large groups of employees to congregate;
- staggering starting/quitting times to avoid congestion at time clocks;
- providing visual cues, e.g. signs and floor markings, as a reminder to maintain social distancing;
- requiring all employees in areas of substantial or high community transmission to wear masks whenever possible and encouraging visitors and customers to do the same;
- implementing strategies for improving ventilation in the workplace.

In high volume retail workplaces or well-defined areas within retail workplaces, OSHA recommends that employers should ask customers and visitors to wear masks, promote social distancing amongst employees, move payment terminals/credit card readers to create distance between workers and customers, and adjust stocking activities to limit contact between unvaccinated and otherwise at risk-workers and customers.

In meat, poultry, and seafood processing settings, manufacturing facilities, and assembly line operations (including in agriculture), OSHA recommends all of the measures outlined above and also the use, where possible, of barriers made of solid, impermeable material, like plastic or acrylic, where social distancing cannot be maintained.

As mentioned above, employers should be aware that OSHA's updated guidance is largely a recommendation while also being aware that many state and local governments are forming and enacting their own regulations in this regard. And, while OSHA's guidance is advisory in nature, employers should be aware that under the Biden Administration, OSHA has been more frequently citing employers under its General Duty Clause for COVID-19-related hazards not covered by an existing OSHA standard.

If you have any questions, we encourage you to reach out to your Benesch contact or one of the attorneys below to discuss.

For more information on this topic, contact a member of the firm's Labor & Employment practice group.

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