

CLIENT ALERT

Occupational Safety and Health Administration Issues New Guidance for Employers Responding to the COVID-19 Pandemic

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On June 10, 2021, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) released long-awaited updated guidelines for employers responding to the COVID-19 pandemic. The only mandate OSHA issued was an Emergency Temporary Standard (ETS) for certain healthcare settings; for all other workplaces, OSHA simply updated its previous non-mandatory guidance. Significantly, OSHA's updated guidance concentrates on protection of unvaccinated and at-risk workers, while significantly loosening recommended protective measures for fully vaccinated workers.

Emergency Temporary Standard – Healthcare Settings

OSHA's ETS establishes new requirements in settings where employees provide healthcare or healthcare support services. The aim is to protect workers facing high occupational risk of contracting and spreading COVID-19.

The ETS requires employers in settings where employees provide healthcare or healthcare support services, with some exemptions, to conduct a hazard assessment, to maintain a written mitigation plan, to provide some employees with N95 respirators or other personal protective equipment, and to ensure six feet of distance is maintained between workers. To encourage vaccines, the ETS requires covered employees to provide workers with paid time off to get vaccinated and to recover from any side effects. Additional requirements are outlined for employees who have COVID-19 or may be contagious, including working separately, teleworking, and possible paid time off. The ETS allows fully vaccinated workers to relax masking and distancing requirements in well-defined areas where there is no reasonable expectation that any person will be present with suspected or confirmed COVID-19.

The ETS is effective immediately and covered employers must comply with most provisions within 14-30 days. OSHA will monitor the progress of COVID-19 and update the ETS as needed.

Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

OSHA's new general guidance applies to all other workplaces (except schools which should follow the CDC guidelines) and tracks many of the protocols that employers have been following throughout the pandemic. The updated guidance, however, reveals that OSHA is now focused on employers implementing these measures *only* to protect *unvaccinated and at-risk workers*.

Notably, OSHA aligns with the CDC, stating that fully vaccinated individuals do not need to take all the same precautions as unvaccinated individuals, adopting the relaxed masking and physical distancing for fully vaccinated individuals, and stating that unless otherwise required by law or regulation, "most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure." OSHA does leave room for government bodies and businesses to issue more stringent requirements.

OSHA further lists 11 ways employers can protect unvaccinated and at-risk employees in the workplace.

The ways an employer can protect unvaccinated or at-risk employees include:

1. ***Grant paid time off for employees to get vaccinated.***
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.***
3. ***Implement physical distancing for unvaccinated and otherwise at-risk workers in all communal work areas.***
One way is to maintain six feet of space or limit the number of unvaccinated workers in one place at any given time. If six feet cannot be maintained for unvaccinated workers, then barriers can separate these workers from other people. OSHA also suggests employers can limit the number of on-site workers, stagger start times, and use flexible arrangements, including telework, to achieve physical distancing requirements for unvaccinated and at-risk workers.
4. ***Provide unvaccinated and otherwise at-risk workers with face coverings or surgical masks unless their work task requires a respirator or other PPE. Such masks must be provided at no cost to the employee.***
5. ***Educate and train workers on the employer's COVID-19 policies and procedures using accessible formats and in language they understand.***
6. ***Suggest that unvaccinated customers, visitors, or guests wear face coverings.***
7. ***Maintain ventilation systems.***
8. ***Perform routine cleaning and disinfection.*** This includes following the CDC guidelines if someone has been in the facility within 24 hours and is suspected or confirmed to have COVID-19.
9. ***Record and report COVID-19 infections and deaths.***
10. ***Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards.***
11. ***Follow other applicable mandatory OSHA standards.*** This includes access to records, sanitation, protecting employees from bloodborne pathogens, and other OSHA requirements generally applicable in the workplace.

Finally, the guidance notes that additional mitigation steps may be necessary to protect unvaccinated and at-risk workers at workplaces where there is a heightened risk of exposure to COVID-19. These higher-risk workplaces include manufacturing, food processing, high-volume retail and grocery, group transport, or communal living facilities.

Additional recommendations to protect unvaccinated or at-risk workers in higher-risk workplaces include:

- Stagger break times or develop ways to prevent groups of unvaccinated workers congregating during breaks. Physical distancing for unvaccinated workers should be maintained at all times, including breaks.
- Stagger workers' arrival and departure times to avoid congregations of unvaccinated or otherwise at-risk workers.
- Provide visual cues as a reminder to maintain physical distancing.

- Implement strategies to improve ventilation.
- Maintain proper spacing or use of barriers to protect unvaccinated workers on food processing assembly lines.
- Suggest masks in retail setting for unvaccinated employees and customers.
- Move the electronic payment terminal to increase the distance between customers and unvaccinated workers.
- Shift stocking activities of unvaccinated workers to off-peak or after hours to reduce contact between unvaccinated or otherwise at-risk workers and customers.
- Notify unvaccinated workers of risks while sharing transportation and make sure unvaccinated workers are wearing appropriate face coverings while traveling to and from work.

What are some key takeaways?

OSHA's guidance is signaling confidence in the effectiveness of the vaccine for preventing serious illness from COVID-19. Employers should now confidently focus COVID-19 mitigation efforts on protecting unvaccinated and at-risk workers.

Because OSHA's new guidance leaves room for government bodies and businesses to issue more stringent requirements, it is necessary for employers to keep up to date on state and local requirements concerning employer obligations in the workplace with regard to COVID-19. OSHA's guidance should also be read together with the EEOC's recent workplace [guidance](#).

*For California employers, Cal/OSHA is expected to hold a vote on June 17, 2021 as to whether the current mask-wearing, social distancing, and quarantine requirements should remain in place or be modified.

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