COVID-19: UPDATED OSHA GUIDANCE FOR COVID-19 AND WHAT IT MEANS FOR YOUR WORKPLACE

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Labor, Employment, and Workplace Safety Alert

By: M. Claire Healy

On 10 June 2021, the Occupational Safety and Health and Administration (OSHA) issued updated Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace for non-healthcare employers and workers (the Guidance). As discussed in K&L Gates' alert on OSHA's 10 June 2021 COVID-19 Healthcare Emergency Temporary Standard (available here), many believed that OSHA would issue mandatory COVID-19 workplace safety rules for all industries. Instead, however, OSHA limited its compulsory workplace safety *rules* to certain healthcare settings and elected merely to update its previously issued COVID-19 *guidance* for all other workplaces.

Although OSHA's Guidance does not establish any legal requirements, it is best practice to follow OSHA's recommendations as if they are compulsory, whenever possible and appropriate. Complying with this Guidance and OSHA's other recommendations helps protect workers and lessen an employer's potential exposure to liability.

THE GUIDANCE — ALL WORKPLACES

At a high level, OSHA's Guidance:

1. Focuses on protections for unvaccinated and otherwise at-risk workers;
2. Encourages COVID-19 vaccinations;
3. Provides links to other agency guidance; and
4. Highlights OSHA's mandatory health and safety standards that are relevant to mitigating and preventing the spread of COVID-19 in the workplace.

Consistent with the Centers for Disease Control and Prevention's recent recommendations for fully vaccinated people, the Guidance provides that “unless otherwise required by federal, state, local, tribal, or territorial laws, rules, and regulations, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure.”

For unvaccinated and other “at-risk” workers, such as people with conditions that may affect their ability to have a full immune response to vaccination, the Guidance **recommends** that **these workers**:

5. Get vaccinated;
6. Wear face coverings;
7. Socially distance from others;

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8. Participate in workplace training about COVID-19 safety protocols; and
9. Practice good personal hygiene.

The Guidance also **recommends** that **all employers** take steps to protect unvaccinated or otherwise at-risk workers and mitigate the spread of COVID-19 in the workplace, including by:

10. Giving paid time off to employees to get vaccinated;
11. Making sure infected people, people with COVID-19 symptoms, and unvaccinated people who have been in close contact with someone with COVID-19 are excluded from the workplace;
12. Implementing physical distancing for unvaccinated and at-risk workers;
13. Limiting the number of unvaccinated and at-risk workers in one place at a given time (e.g., flexible schedules, staggered schedules, remote work or meetings, flexible meeting and travel options);
14. Keeping physical barriers up where unvaccinated or at-risk workers cannot maintain at least six feet of distance;
15. Instructing employees to use face coverings or personal protective equipment ("PPE") when appropriate (taking into account any relevant provisions of the Americans with Disabilities Act and Title VII) and providing face coverings and PPE at no cost to employees[1];
16. Ensuring absence policies are non-punitive and employees are not encouraged (or required) to come to work sick; and
17. Educating and training workers on COVID-19 policies and basic facts about COVID-19 transmission and safety.

In addition, the Guidance reminds employers that they **must** follow applicable mandatory OSHA standards, including those that require employers to:

18. Record work-related COVID-19 cases and report COVID-19 fatalities and hospitalizations to OSHA (in accordance with OSHA's 19 May 2020 Revised Enforcement Guidance for Recording Cases of COVID-19);
19. Ensure there are prohibitions against retaliation for raising workplace safety and health concerns or engaging in other protected activity (in accordance with Section 11(c) of the OSH Act); and
20. Follow OSHA's rules aimed at protecting workers from infection, including requirements for PPE, respiratory protection, sanitation, protection from bloodborne pathogens, and employee access to medical and exposure records.

THE GUIDANCE — HIGHER-RISK WORKPLACES

Finally, the Guidance sets forth additional recommendations for "**higher-risk workplaces**."

Higher-risk workplaces include manufacturing, meat, poultry, and seafood processing, high-volume retail, and other places where unvaccinated or other at-risk workers (i) are in close or prolonged contact with each other, (ii) may be exposed to respiratory droplets in the air or on contaminated services, (iii) share employer-provided

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transportation, (iv) are in frequent contact with other unvaccinated or other at-risk workers in community settings where there is elevated community transmission, or (v) live with other unvaccinated or otherwise at-risk individuals in communal housing or on vessels.

Under the Guidance, in addition to the steps that all workplaces should or must take, "**higher-risk workplaces**" **should**:

21. Stagger break times and arrival/departure times to avoid groups of unvaccinated/at-risk workers congregating during breaks;
22. Continue to maintain social distancing for unvaccinated/at-risk workers and provide reminders about distancing (e.g., announcements, signs, floor markers); and
23. Suggest masks for unvaccinated (or unknown-status) customers and visitors.

Further, maintaining appropriate physical distancing and the use of physical barriers between employees, and between employees and customers, where applicable, is especially necessary in manufacturing and retail workplaces for unvaccinated and at-risk employees.

WHAT DOES THIS MEAN FOR EMPLOYERS AND WORKERS?

Much of OSHA's Guidance reiterates the health and safety measures that have become commonplace for many during the COVID-19 pandemic, such as mask wearing, social distancing, hand washing, and staying home when sick. However, as many states start to reduce or eliminate their COVID-19 restrictions, OSHA's Guidance serves as a helpful reminder of the importance of continuing to employ these basic and simple measures in certain settings and under certain circumstances to reduce the risk of spreading COVID-19.

Implementing OSHA's recommendations or continuing current health and safety measures for unvaccinated and at-risk workers can help protect workers' health and safety and assuage employee concerns about returning to work. Practically, for essential workers who have continued working in-person throughout the pandemic, following these recommendations may have little impact on the day-to-day working environment that most essential workers have experienced since March 2020, while continuing to keep employees and the public safe.

FOOTNOTES

[1] Note that under OSHA's mandatory standards, employers *must* provide PPE, such as face shields, to employees if the employer deems them necessary.

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KEY CONTACTS



M. CLAIRE HEALY
ASSOCIATE

RALEIGH, CHARLESTON
+1.919.743.7303
CLAIRE.HEALY@KLGATES.COM

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