

INSIGHTS

OSHA's Revised COVID-19 Guidance Highlights Employer Duties for Unvaccinated and At-Risk Workers

June 11, 2021

By: [Amy Karff Halevy](#) and [Robert S. Nichols](#)

On June 10, 2021, shortly after issuing its Emergency Temporary Standard (“ETS”) for healthcare settings, OSHA updated its Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace (“Updated OSHA Guidance”), which is applicable to all employers not covered by the ETS. Citing the CDC’s Interim Public Health Recommendations for Fully Vaccinated People (“CDC Guidance”), OSHA advises that fully vaccinated people need not take all the precautions that unvaccinated people should take. Practically that means that fully vaccinated employees can resume activities “without wearing masks or physically distancing.”

The Updated OSHA Guidance primarily focuses on an employer’s duties with respect to its unvaccinated workers and individuals who are otherwise at risk. OSHA explains that “at-risk workers” are those vaccinated employees who due to a medical condition or medication may not have a full immune response to vaccination. Therefore, employers should take steps to protect these at-risk workers as they would unvaccinated workers, regardless of their vaccination status.

Although the Updated OSHA Guidance is not a mandate, and creates “no new legal obligations,” OSHA reminds employers of their obligations under the General Duty Clause to provide a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm. In that regard, OSHA states that “[e]mployers should still take steps to protect unvaccinated or otherwise at-risk workers in their workplaces...” OSHA provides specific examples of some of the “multi-layered interventions” employers can take to protect unvaccinated or otherwise at-risk workers and mitigate the spread of COVID-19. Those measures include, but are not limited to, the following:

- Grant time off for employees to be vaccinated.
- Instruct all employees (vaccinated and unvaccinated) who have COVID-19 or have COVID-19 symptoms to stay home and instruct unvaccinated employees who have had close contact with someone who tested positive for COVID-19 to stay home.
- Implement physical distancing for unvaccinated and otherwise at-risk employees in all communal work areas and limit the number of unvaccinated or otherwise at-risk

employees in one place at a given time.

- Provide unvaccinated and otherwise at-risk employees with face coverings or surgical masks, unless their work task requires a respirator. The Updated OSHA Guidance states that unvaccinated and otherwise at-risk employees “should wear a face covering...to contain the wearer’s respiratory droplets and help protect others and potentially themselves.”

Employers who have been eagerly awaiting the Updated OSHA Guidance got some, but not all, of their questions answered. Notably, employers have a “road-map” as to what actions OSHA believes employers should take to maintain a safe working environment as it relates to COVID-19.

Employers now also know that OSHA allows them to treat vaccinated and unvaccinated employees differently. However, this begs the question—what are an employer’s responsibilities in implementing policies that differentiate between vaccination status? For example, the Updated OSHA Guidance makes it clear that unvaccinated employees should wear face coverings primarily in an effort *to protect other employees*—including at-risk workers—from the spread of COVID-19. If a business intends to permit employees who report being vaccinated to be at work without wearing a mask or engaging in physical distancing, the employer must evaluate whether to collect employee vaccination records, absent a state or local law mandate requiring it to do so, before allowing workers to take advantage of this policy.

Further, in implementing differing policies for vaccinated and unvaccinated workers employers may encounter unvaccinated employees who want to be treated the same as vaccinated employees based on the premise that they are willing to take certain risks related to contracting COVID-19 at work. However, accepting this approach would be at odds with OSHA’s position. First, the Updated OSHA Guidance makes it clear that efforts need to be taken with respect to unvaccinated employees in order to protect all unvaccinated or at-risk employees in the workplace. Second, an employee’s preference does not override an employer’s obligations under OSHA’s General Duty Clause.

Additionally, there is the question of whether the employer should continue to screen employees entering the workplace. In the Updated OSHA Guidance, OSHA states that employers should instruct sick employees to stay home, but only unvaccinated employees (consistent with CDC Guidance) need to stay home if they have had close contact with someone who tested positive for COVID-19. The Updated OSHA Guidance may lead employers to utilize screening that differentiates between vaccinated and unvaccinated employees.

Finally, in the Appendix, the Updated OSHA Guidance recognizes that there are “higher-risk workplaces” where unvaccinated and otherwise at-risk workers work in areas of close and/or prolonged contact. These higher-risk workplaces include manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing. For these higher-risk workplaces, OSHA provides best practices to protect unvaccinated and otherwise at-risk workers. These recommendations are in addition to those general precautions described in the main portion of the Updated OSHA Guidance.