

## Environmental and Workplace Health & Safety

# OSHA's Updated COVID-19 Workplace Safety Guidance: Now Employers Have the Hard Part



By: [Gabrielle Sigel](#)

On June 10, 2021, the US Occupational Safety and Health Administration (OSHA) published its long-awaited response to President Biden's January 21, 2021 [Executive Order to OSHA](#), which had directed the agency to consider and, if necessary, by March 15, 2021, issue an Emergency Temporary Standard (ETS) in response to workplace hazards from COVID-19. With the deadline long-passed, interest in OSHA's approach was heightened when the CDC, on May 13, 2021, issued its [Interim Public Health Recommendations for Fully Vaccinated People](#) (the "May 13 CDC Guidance"), and OSHA posted on its website that it was updating its guidance in response.

As the author [predicted](#), OSHA did not issue a broad COVID-19 ETS applicable to all industries. Instead, on June 10, 2021, OSHA issued two documents: (1) an ETS applicable only to the healthcare industry; and (2) updated guidance applicable to all other industries, implementing the recommendations from the May 13 CDC Guidance. This article addresses only the updated guidance.

The June 10, 2021 OSHA guidance, "[Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#)" ("Updated OSHA Guidance") replaces guidance of the same name that the agency issued on January 29, 2021. The difference between the two versions of OSHA's guidance reflects the significant changes that have occurred in disease transmission and workplace risks, due to vaccines and other factors. Because the May 13 CDC Guidance found that most "fully vaccinated people can resume activities without wearing a mask or physically distancing" in most locations, the Updated OSHA Guidance announced: "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" (emphasis removed). Therefore, the Updated OSHA Guidance "focuses only on protecting unvaccinated or otherwise at-risk workers in their workplaces (or well-defined portions of workplaces)." "At-risk workers" are defined as those (a) whose medical condition are such that they may not "have a full immune response to vaccination," or (b) who, under the Americans with Disabilities Act, "may be legally entitled to reasonable accommodations that protect them from the risk of contracting COVID-19 if, for example, they cannot be protected through vaccination, cannot get vaccinated, or cannot use face coverings."

With publication of the Updated OSHA Guidance, the agency clearly is pulling back from regulating COVID-19 in most workplaces, particularly compared to its stance earlier this year. As is typical, OSHA advises that its guidance "is not a standard or regulation, and it creates no new legal obligations." Also, as typical, the guidance has a subtext that its guidance could be used to establish a recognized hazard and methods of prevention under the OSH Act's General Duty Clause. Yet, by issuing guidance, rather than regulation, OSHA is signaling that its concerns about risks from COVID-19 in most workplaces have significantly decreased since vaccines have become widely available.

In the Updated OSHA Guidance, it advises that both at-risk workers and other unvaccinated workers (collectively, "protected workers") should be protected from the risks of COVID-19 in the workplace. The Updated OSHA Guidance proceeds to describe control measures that an employer "should take" to

protect these workers in all industries except healthcare (who are covered by the new ETS); public transportation (workers are subject to CDC's [transportation-related mask mandate](#)); and schools (which are to follow "applicable," but unspecified, CDC guidance).

With respect to recommended protections, OSHA provides a two-part approach. Part one describes controls for all workplaces, and part two is an "Appendix" with "Measures Appropriate for Higher Risk Workplaces with Mixed-Vaccination Status Workers." In part one, OSHA recommends 11 "multi-layered interventions" that "employers should engage with workers and their representatives to determine how to implement" for protected workers:

1. Grant paid time off for vaccination.
2. Sick or symptomatic employees, and protected workers who were exposed as "close contacts" should stay home.
3. Physical distancing in all communal areas, particularly indoors, and use barriers when distancing is not possible.
4. Provide, at employer's cost, CDC-compliant face coverings or surgical masks to protected workers, for indoor work. All but immunocompromised workers can opt for no mask-wearing outdoors. Employers can determine that PPE, *i.e.*, respirators, are necessary for protected workers, including when PPE is a "reasonable accommodation" under the ADA. In addition, if workers "want to use PPE if they are still concerned about their personal safety (*e.g.*, if a family member is at higher-risk for severe illness," employers should "[e]ncourage and support voluntary use of PPE in these circumstances and ensure the equipment is adequate to protect the worker." However, if face coverings present greater risk, *e.g.*, from heat-related illness, the employer should develop other face covering/respirator options.
5. Educate and train workers on COVID-19, controls (including vaccination), and workplace policies, and track that training "as appropriate." "Ensure" that supervisors are familiar with the employer's "workplace flexibilities and other human resources policies and procedures," and that all workers understand their rights.
6. "Suggest that unvaccinated customers, visitors, or guests wear face coverings," in workplaces where there are public interactions with protected workers, "even if no longer required by your jurisdiction.
7. Maintain ventilation systems, per [CDC](#) and [ASHRAE](#) guidance, including installing air filters at a minimum of MERV 13.
8. Routinely clean and disinfect if someone with COVID-19 symptoms or diagnosis was in the worksite within the past 24 hours, in accordance with OSHA standards for use of cleaning chemicals.
9. Record and report COVID-19 infections/deaths per 29 CFR part 1904, but through May 2022, OSHA is not requiring that adverse reactions to a mandated vaccine be recorded as a work-related illness.
10. Protect workers from retaliation and establish an anonymous process for voicing concerns.
11. Follow OSHA standards on PPE, sanitation, and other potentially applicable regulations, as well as an employer's obligations under the General Duty Clause.

In the Appendix, OSHA recommends that employers assess whether their protected workers are at greater risk, by evaluating close contact situations, duration of contacts, type of contacts, and "distinctive factors" such as employer-provided transport, community exposure, and communal housing and living

quarters, particularly in manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing. In those workplaces, employers should evaluate imposing additional protections for protected workers, such as physical distancing, staggered work schedules, ventilation improvements, and barriers.

Although OSHA urges employers to impose a separate set of obligations solely for a subset of workers, OSHA is silent on several issues of importance to an employer managing its workplace during this “vaccine-available” phase of the pandemic. Instead, it is up to employers to determine how to navigate the public health, safety, and equal opportunity employment law, and other legal constraints to implement those issues at their workplaces. For example, OSHA is silent on:

- An employer’s methods for identifying or verifying which of its workers are vaccinated and, therefore, no longer need to be protected from COVID-19 hazards.
- Whether there are any non-excepted industries where there should be protections for vaccinated workers, who are not known to be at-risk, but who may still get symptoms or test positive for COVID-19 because, as CDC has said: “How long vaccine protection lasts and how much vaccines protect against emerging SARS-CoV-2 variants are still under investigation.” However, vaccinated workers are indirectly addressed when OSHA states that “all workers should be supported in continuing face covering use if they choose, especially in order to safely work closely with other people.”
- Whether those who contracted COVID-19 over the past 90 days, but are not vaccinated, can be treated as vaccinated workers. (Note: [CDC guidance](#) states that people who recovered from COVID-19 do not need to quarantine after exposure to another COVID-19 case.)
- OSHA’s Appendix does not emphasize PPE, such as N95 respirators, even for voluntary use, and even at the higher-risk workplaces.
- The Updated OSHA Guidance does not refer to the agency’s March 12, 2021 COVID-19 [National Emphasis Program](#) or enforcement protocols.

The Updated OSHA Guidance no longer (or only briefly) discusses several topics that were discussed at length in the January 29, 2021 OSHA guidance. For example, the old guidance instructed employers to “Not distinguish[] between workers who are vaccinated and those who are not.” The Updated OSHA Guidance instructs the opposite. The Updated OSHA Guidance also:

- No longer addresses the need to assign a workplace coordinator for COVID-19 or to conduct a “thorough hazard assessment”.
- No longer recommends an extensive and enhanced cleaning and disinfection process.
- No longer addresses screening and testing.
- No longer provides extensive instructions regarding “good hygiene practices,” including hand washing and sanitizers.
- No longer states detailed recommendations on isolation, quarantine, contact tracing, and return to work protocols. Instead, OSHA now encourages employers to report COVID-19 cases as required locally and to support local contact tracing efforts, and to have all ill workers stay home, but does so in far less detail.

Throughout the pandemic, employers have been looking to the CDC and OSHA, as well as the EEOC, for guidance on the steps they should take to protect workers and to avoid liability to their workers, the government, and the public. Particularly now that state and local governments have eliminated all or most COVID-19 restrictions, employers seeking to limit their liabilities will have the difficult task of developing different ways to work now that their employees can, and according to OSHA, should be

divided into two populations: the vaccinated worker and the protected worker. The Updated OSHA Guidance describes how the protected worker should be treated differently, but the employer has the more difficult challenge of adapting that guidance to the business's unique culture, financial constraints, and goals for survival and success, during yet another unprecedented phase of working in a pandemic.

For more information or advice on the OSHA standards and enforcement during the pandemic, please contact the [author](#). Additional information regarding working during the COVID-19 pandemic can be found in Jenner & Block's [Corporate Environmental Lawyer](#) blog and in the [Jenner & Block COVID-19 Resource Center](#).

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