

## Employer Challenges After New OSHA Virus Guidance

By **Gabrielle Sigel** (June 15, 2021, 2:38 PM EDT)

On June 10, the Occupational Safety and Health Administration published its long-awaited response to President Joe Biden's Jan. 21 Executive Order,[1] which directed the agency to consider and, if necessary, by March 15, issue an emergency temporary standard, or ETS, in response to workplace hazards from COVID-19.

With the deadline long passed, interest in OSHA's approach was heightened when the Centers for Disease Control and Prevention on May 13 issued its interim public health recommendations for fully vaccinated people,[2] and OSHA posted on its website that it was updating its guidance in response.

OSHA did not issue a broad COVID-19 ETS applicable to all industries. Instead, on June 10, OSHA issued two documents: (1) an ETS applicable only to those providing health care; and (2) updated guidance applicable to all other industries, implementing the recommendations from the May CDC guidance.

This article addresses only the updated guidance.

The June 10 OSHA guidance[3] replaces guidance that the agency issued on Jan. 29. 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 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.

Therefore, the updated OSHA guidance only focuses on protecting unvaccinated or otherwise at-risk workers in their workplaces.

"At-risk workers" are defined as those (1) whose medical condition are such that they may not "have a full immune response to vaccination," or (2) who, under the Americans with Disabilities Act, "may be legally entitled to reasonable accommodations that protect them from the risk of contracting COVID-19



Gabrielle Sigel

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 Occupational Safety and Health 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.

The updated OSHA guidance 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 health care, which is covered by the new ETS;
- Public transportation, where workers are subject to the CDC's transportation-related mask mandate;<sup>[4]</sup> 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 that "employers should engage with workers and their representatives to determine how to implement" 11 multilayered interventions to protect unvaccinated or other at-risk workers, including:

- Granting paid time off for vaccination;
- Telling sick, symptomatic employees to stay home;
- Maintaining physical distancing in all communal areas, particularly indoors;
- Providing, at the employer's cost, CDC-compliant face coverings or surgical masks for indoor work;
- Educating and training workers on COVID-19, controls — including vaccination — and workplace policies, and track that training as appropriate;
- Suggesting 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 the jurisdiction;
- Maintaining ventilation; and

- Protecting workers from retaliation, including establishing an anonymous process for voicing concerns.

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 address 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.

It is also silent on whether there are any nonexcepted 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 the 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."

OSHA also did not address whether those who contracted COVID-19 over the past 90 days, but are not vaccinated, can be treated as vaccinated workers. The CDC guidance[5] states that people who recovered from COVID-19 do not need to quarantine after exposure to another COVID-19 case.

The agency is also silent regarding the use of personal protective equipment, such as N95 respirators, even voluntarily and at the higher-risk workplaces, and the agency's March 12 COVID-19 National Emphasis Program[6] or enforcement protocols.

The updated OSHA guidance no longer — or only briefly — discusses several topics that were discussed at length in the Jan. 29 OSHA guidance. For example, the old guidance instructed employers not to 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;
- Recommends an extensive and enhanced cleaning and disinfection process;

- Addresses screening and testing;
- Provides extensive instructions regarding good hygiene practices, including hand-washing and use of sanitizers; and
- 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 U.S. Equal Employment Opportunity Commission, 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.

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[1] President Biden's January 21, 2021 Executive Order to OSHA.

[2] CDC Interim Public Health Recommendations for Fully Vaccinated People.

[3] Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace.

[4] CDC Transportation-related Mask Mandate.

[5] CDC Guidance: When You Can be Around Others After You Had or Likely Had COVID-19.

[6] OSHA National Emphasis Program from March 12, 2021.