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Employment Law Update: Updated OSHA Workplace Safety Guidelines Creates Opportunity for Employers to Update COVID-19 Policies and Procedures

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On June 10, the Occupational Safety and Health Administration (“OSHA”) [issued updated guidance](#) for employers regarding the spread of COVID-19 in the workplace, replacing its previous employer guidelines issued on January 29, 2021.

OSHA provides guidance, “not a standard or regulation, and it creates no new legal obligations.” However, despite not presenting employers with legal obligations, OSHA guidance helps employers to acknowledge a recognized hazard and create methods of prevention as they are required to do under the Occupational Safety and Health Act’s [general duty clause](#).

Updated OSHA Guidance for Employers Regarding COVID-19 Safety in the Workplace

OSHA states:

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. Accordingly, the updated OSHA guidance only focuses on protecting unvaccinated or otherwise at-risk workers in their workplaces (collectively “protected workers”).

Defining “At-Risk Workers” Under OSHA Guidelines

“At-risk workers” are defined as those (1) whose medical condition is such that they may not “have a full immune response to vaccination,” or (2) who, under the [Americans with Disabilities Act](#) or New Jersey Law Against Discrimination, “may be legally entitled to reasonable accommodations” that protect them, if, for example, they cannot be protected through vaccination, cannot get vaccinated, or cannot use face coverings.

Protecting At-Risk Workers under COVID-19 OSHA Guidelines

The updated OSHA guidance outlines control measures that an employer should take to protect the aforementioned workers in all industries except:

- Health care, which is covered by [OSHA’s new Emergency Temporary Standard](#);
- Public transportation, where workers are subject to the CDC’s transportation-related mask mandate; and
- Schools, which are to follow applicable CDC guidance.

New COVID-19 OSHA Guidance

OSHA recommends that “employers should engage with workers and their representatives to determine how to implement” these ten multilayered interventions to protect unvaccinated or other at-risk workers, including:

1. Grant paid time off for employees to get vaccination;

2. Advise workers who are infected, workers who are not vaccinated and have been exposed and workers with COVID-19 symptoms to stay home;
3. In communal areas, implement physical distancing for protected workers;
4. Provide, at the employer's cost, CDC-compliant face coverings or surgical masks for protected workers;
5. Educate and train employees regarding COVID-19 policies and procedures in a format and language they employee will understand;
6. Suggest that unvaccinated customers, visitors or guests wear face coverings even if no longer required by the jurisdiction;
7. Maintain ventilation systems;
8. Perform routine cleaning and disinfection;
9. Report and record COVID-19 infections and deaths; and
10. Protect workers from retaliation, including establishing an anonymous process for voicing concerns regarding COVID-19.

Physical Contact Assessment in the Workplace Protection

OSHA also 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 high-risk workplaces, employers should evaluate imposing additional protections for protected workers, such as physical distancing, staggered work schedules, ventilation improvements and barriers.

Assessing Vaccinated Employees

OSHA does not outline which method(s) an employer should take to identify and verify workers that have been vaccinated and, therefore, no longer need to be protected from COVID-19 hazards.

New Jersey [Executive Order No. 243](#) requires an employee to provide an employer "proof" of vaccination before being permitted in the workplace without a mask. For details, see [this earlier Employer Legal Resource blog post](#). Congruent with Executive Order No. 243, 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."

Updated Guidance Removes these Employer COVID-19 Measures

The updated OSHA guidance removes these employer COVID-19 measures:

- The need to assign a workplace coordinator for COVID-19 or to conduct a thorough hazard assessment;
- Extensive and enhanced cleaning and disinfection process;
- Screening and testing;
- Providing extensive instructions regarding good hygiene practices, including hand-washing and use of sanitizers; and
- Following 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.

TAKEAWAY: This update is an opportunity for employers to review the COVID-19 policies and update their own policies and procedures to align with these updated OSHA standards and guidance.

If you are an employer with questions or concerns about COVID-19 safety in your workplace, contact [Tracy Armstrong](#) or another member of the Wilentz [Employment Law](#) team.

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