

Insights

A DELICATE BALANCE: PROTECTING UNVACCINATED AND AT RISK-WORKERS WHILE RELAXING COVID-19 WORKPLACE POLICIES UNDER OSHA'S UPDATED COVID-19 GUIDANCE

Jun 28, 2021

On June 10, 2021, the federal Occupational Safety and Health Administration (“OSHA”) released its long anticipated COVID-19 Healthcare Emergency Temporary Standard (“ETS”) and an updated COVID-19 guidance (“Guidance”). Following President Biden’s January 2021 Executive Order—directing OSHA to take action to reduce the risk of contracting COVID-19 in the workplace—many expected OSHA to issue an ETS applicable to all workplaces. OSHA, however, decided to issue an ETS limited in scope, applicable only to the healthcare setting. Not to be deterred, however, OSHA also took the opportunity to issue the updated Guidance, which applies to all employers not subject to the ETS. For employers that have implemented safety programs or measures under OSHA’s previous January 29, 2021 guidance, the updated Guidance will allow for relaxation of some COVID-19 control measures. Nevertheless, the Guidance does create new considerations and complexities, particularly because many of the requirements only apply to a subset of employees. The Alert provides a brief introduction to the ETS and an overview of the latest Guidance, highlighting important considerations for employers.

I. IMPLICATIONS OF THE ETS

The ETS is only applicable to employees that work in “health care services¹ or health care support service².” Importantly, the ETS explicitly excludes pharmacies, home health settings where all employees are fully vaccinated and nonemployees are screened before entry, and healthcare settings where all employees are fully vaccinated and non-employees who may have COVID-19 are not permitted entry. On July 6, 2021, covered employers must be compliant with ETS requirements—except for those requirements pertaining to physical barriers, ventilation, and training, which must be implemented by July 21, 2021.

Though limited in scope, the ETS mandates important control measures to limit the spread of COVID-19 in the healthcare setting, such as developing a COVID-19 preparedness and response plan (must be written if employer has more than 10 employees), designating COVID-19 safety

coordinators, training, limiting points of entry, requiring patient screening, providing facemasks or other personal protection equipment (“PPE”) and requiring that PPE be worn while working, implementing physical distancing, and installing physical barriers. Of note, healthcare employers subject to the ETS with more than 10 employees must provide certain benefits to employees impacted by COVID-19 regulations and policies. For example, if an employer removes an employee from the workplace due to testing positive for COVID-19, the ETS provides that the employer must pay the employee in accordance with the new regulations (with a cap at \$1,400 per week). The ETS also states that covered employers must provide reasonable time and paid leave for employees to get vaccinated and recover from any side effects. [29 CFR 1910.502\(m\)](#).

II. SCOPE OF THE NEW OSHA GUIDANCE

OSHA issued the Guidance for the benefit of all employers not subject to the ETS. Unlike the ETS, OSHA emphasizes the Guidance does not create new legal obligations and is advisory in nature; however, implementation of the Guidance can well be viewed as direction from OSHA with respect to measures the agency would like to see employers implement to provide a safe and healthful workplace consistent with the Occupational Safety and Health Act’s General Duty Clause (“General Duty Clause”).

III. MEASURES RELAXED BY THE GUIDANCE

OSHA’s previous January 29, 2021 guidance included a number of recommendations that are absent from the current Guidance, indicative of improving conditions in the United States leading to lower risk of COVID-19 transmission in the workplace. For instance, OSHA designed the January 2021 guidance to protect all employees through various controls, such as the use of face covering and social distancing. In the current guidance, OSHA clearly states that fully vaccinated employees³ no longer need to be protected from COVID-19 in the workplace:

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.

This recommendation is consistent with the Centers for Disease Control and Prevention (“CDC”) guidelines, which have been integral to OSHA’s past and current COVID-19 recommendations. We can expect OSHA to continue monitoring CDC recommendations and adapting OSHA guidance accordingly.

Apart from relaxing protections for vaccinated workers, through the new Guidance OSHA also removed the following recommendations from prior OSHA guidance: the need to assign a workplace COVID-19 coordinator or to conduct a full COVID-19 hazard assessment; enhanced cleaning (more than normally required by OSHA standards); and implementing screening and testing procedures.

IV. NEW RECOMMENDATIONS APPLICABLE TO ALL EMPLOYERS NOT SUBJECT TO THE ETS

Now that large segments of the US population are fully vaccinated, OSHA's new Guidance focuses on protecting, in particular, unvaccinated and "at-risk workers."⁴ While the Guidance does provide a general definition for "at-risk workers,"^[4] OSHA does not provide insight as to how employers should determine which employees are unvaccinated or at-risk. OSHA recommends employers protect at-risk workers as they would unvaccinated workers, regardless of their vaccination status. Specifically, the Guidance includes the following multilayered interventions to protect unvaccinated and otherwise at-risk workers:

1. Grant paid time off for employees to get vaccinated.
2. Instruct infected workers, unvaccinated workers who have had a close contact with someone who testing positive for COVID-19, and all workers with COVID-19 symptoms to stay home from work.
3. Implement physical distancing for unvaccinated and otherwise at-risk workers in all communal work areas.
4. Provide unvaccinated and otherwise at-risk workers with face coverings or surgical masks, unless required under OSHA standards to provide a respirator or other PPE.
5. Train workers on workplace COVID-19 policies and procedures using accessible formats and in a language they understand.
6. Suggest that unvaccinated customers, visitors, or guests wear face coverings.
7. Maintain ventilation systems in accordance with [CDC's Ventilation in Buildings Guidance](#) and [OSHA Alert: COVID-19 Guidance on Ventilation in the Workplace](#).
8. Perform routine cleaning and disinfection and follow CDC cleaning and disinfection recommendations when someone suspected or confirmed to have COVID-19 has entered the workplace.
9. Record and report COVID-19 infections and deaths on OSHA Form 300 logs in compliance with 29 CFR 1904.
10. Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards.

V. NEW RECOMMENDATIONS APPLICABLE TO HIGHER-RISK WORKPLACES WITH MIXED-VACCINATION STATUS WORKERS

Most workplaces in the US will have both vaccinated and unvaccinated employees, but OSHA recognizes that only some workplaces have a heightened risk of COVID-19 transmission. In the appendix to the Guidance, OSHA includes further recommendations for workplaces with heightened risk due to close contact of unvaccinated employees and at-risk employees, duration of that contact, the type of contact (unvaccinated vs. vaccinated) and other factors (shared transportation, elevated community transmission, community housing). OSHA also specifically identifies the following industries as high-risk: manufacturing, meat and poultry processing, and high-volume retail and grocery. OSHA's recommendations for these workplaces include implementing administrative controls such as limiting contact through staggered break times and arrival/departure times, providing visual cues (floor markings, signs), and implementing strategies to improve ventilation.

VI. CONCLUSION

As cities, states, and countries rapidly begin to “open up” following COVID-19 lockdowns and restrictions, employees will be eager to experience similar liberties in the workplace. Employers will need to find a balance between relaxing workplace COVID-19 policies while also complying with law, including adequately protecting unvaccinated and at-risk workers consistent with the General Duty Clause. By consulting OSHA's non-binding and “advisory” Guidance, employers will be better equipped to ensure their workplace is safe and healthful, consistent with the General Duty Clause. Additionally, employers should further note that the Guidance highlights and reminds employers that they remain subject to various standards which are implicated by COVID-19 (e.g., regulations pertaining to PPE, hazard communication, respiratory protection, sanitation, protection from bloodborne pathogens, access to medical and exposure records, reporting workplace infections and deaths, and anti-discrimination for reporting work-related illnesses), to the extent applicable to their operations. Nonetheless, the Guidance is not a one-stop shop for compliance and employers should also consult state and local laws to ensure compliance at all levels. Finally, healthcare employers subject to the ETS will need to make a plan for implementing its many new requirements before the impending compliance dates.

We will continue to provide insights on COVID-19 issues in the future. If you have questions specific to your company's situation, please contact any of the authors identified under Meet the Team or your BCLP relationship attorney.

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1. Health care services include hospitals, long-term care facilities, ambulatory (outpatient) care, home health and hospice care, emergency medical response, patient transport, and facilities performing autopsies.
 2. Health care support services include patient admission, patient food services, equipment and facility maintenance, housekeeping services, healthcare laundry services, medical waste handling services, and medical equipment cleaning/reprocessing services.

3. OSHA states that full vaccination is achieved two weeks or more after completing the final dose of a vaccine approved by the federal Food and Drug Administration
4. Those employees with compromised immune systems such that they are unable to have a full immune response.

RELATED CAPABILITIES

- Health & Safety

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