

February 4, 2021

COVID-19 Update: OSHA Issues New COVID-19 Guidance as Directed by President Biden's Executive Order

As directed by President Joseph Biden, the Occupational Safety and Health Administration ("OSHA") has issued updated guidance on mitigating and preventing the spread of COVID-19 in the workplace (the "OSHA Guidance").¹ The OSHA Guidance includes recommendations on topics that were not explicitly addressed in the agency's guidance issued during the previous administration (the "2020 Guidance"), including COVID-19 vaccination.² While the OSHA Guidance is advisory in nature and does not create additional legal obligations, it is a harbinger of anticipated binding and more robust worker safety measures.³ In a January 21, 2021 Executive Order (the "Executive Order"), President Biden declared that ensuring the health and safety of workers during the COVID-19 pandemic is "a national priority and a moral imperative" and instructed federal agencies to "take swift action," including directing OSHA to launch a national program to strengthen its enforcement efforts.⁴ OSHA is expected to issue emergency temporary standards on COVID-19 in the coming weeks which could lead to increased inspections and citations.

¹ OSHA, Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace (Jan. 29, 2021), <https://www.osha.gov/coronavirus/safework>.

² OSHA, Guidance on Preparing Workplaces for COVID-19, <https://www.osha.gov/Publications/OSHA3990.pdf>.

³ OSHA, US Department of Labor Issues Stronger Workplace Guidance on Coronavirus (Jan. 29, 2021), <https://www.osha.gov/news/newsreleases/national/01292021-0>.

⁴ Executive Order on Protecting Worker Health and Safety (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/>.

Key Takeaways

- ▶ The OSHA Guidance recommends that employers implement COVID-19 prevention programs in the workplace for limiting the spread of COVID-19. The programmatic elements proposed by OSHA, including identification of potential workplace hazards relating to COVID-19 and isolation of workers with COVID-19 symptoms at work, are largely consistent with its 2020 Guidance.
- ▶ The OSHA Guidance includes several recommendations that were not included in its 2020 Guidance, such as proposing that employers: (1) provide face coverings to workers at no cost; (2) make COVID-19 vaccine available at no cost to all eligible employees; (3) adopt and implement leave policies that are non-punitive; (4) establish an anonymous process for workers to voice concerns about COVID-19-related hazards at the workplace to prevent retaliation; and (5) inform workers of the employer's COVID-19 testing requirements, if any, and availability of testing options.
- ▶ Employers are encouraged to direct workers who are vaccinated to continue to follow other safety guidelines, including wearing a face covering and maintaining physical distancing.
- ▶ The Occupational Safety and Health Act (the "OSH Act") prohibits employers from discriminating or retaliating against an employee for raising reasonable concerns about workplace safety or engaging in occupational safety and health activities. The OSHA Guidance provides that employees may voice reasonable concerns about COVID-19 through social or any other media or wear their own personal protective equipment ("PPE") without being subject to discrimination or retaliation.

I. The Executive Order

As presidential nominee, President Biden pledged that he would direct OSHA to take a more active role in protecting frontline workers from the risks of COVID-19. President Biden's published plan on COVID-19 provided that he, if elected President, would issue an Emergency Temporary Standard for health care facilities, increase the number of OSHA investigators, and work closely with state OSHAs, state governments, and unions to combat COVID-19.⁵ This focus on OSHA enforcement efforts reflected a change from OSHA's previous position that workplaces with "high and very high exposure risk" of COVID-19, such as hospitals, "will typically be the focus of inspection" and that workplaces with "medium or lower exposure risk tasks . . . will not normally result in an on-site inspection."⁶ Indeed, in the earlier phases of the pandemic, OSHA faced criticisms for failing to play a sufficiently active role in enforcing regulations and

⁵ Official Biden-Harris Campaign Website, "The Biden Plan to Combat Coronavirus (COVID-19) and Prepare for Future Global Health Threats," <https://joebiden.com/covid-plan/>.

⁶ OSHA, Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) (Apr. 13, 2020), <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

standards applicable to COVID-19.⁷ In 2020, the agency issued citations arising from 300 inspections for violations relating to COVID-19, resulting in proposed penalties totaling about \$3.9 million.⁸

In one of ten executive orders signed on his second day in office, President Biden directed OSHA to carry out the following:

- ▶ Issue revised guidance to employers on workplace safety during the COVID-19 pandemic by February 4, 2021;
- ▶ Issue emergency temporary standards on COVID-19, including with respect to masks in the workplace, if necessary, by March 15, 2021;
- ▶ Identify any short-, medium-, and long-term changes that could be made to better protect workers and ensure equity in enforcement related to COVID-19;
- ▶ Launch a national program to focus enforcement efforts on violations that put the largest number of workers at serious risk of COVID-19 or are contrary to anti-retaliation principles; and
- ▶ Conduct a multilingual outreach campaign to inform workers and their representatives of their rights under applicable law, with a special emphasis on communities hit hardest by the pandemic.

Notably, the Executive Order emphasized that protecting the health and safety of healthcare workers and other essential workers, "many of whom are people of color and immigrants," is "a national priority and a moral imperative."⁹

II. OSHA Guidance

Following the Executive Order, OSHA released updated guidance containing recommendations for protecting workplace health and safety, as well as descriptions of applicable mandatory safety and health standards. The recommendations in the OSHA Guidance are advisory in nature and do not create additional legal obligations for employers.

Implement a Workplace COVID-19 Prevention Program

The OSHA Guidance contains the following key recommendations for an effective COVID-19 prevention program: (1) assign a workplace coordinator who will be responsible for COVID-19 issues; (2) identify potential COVID-19 hazards that are specific to the workplace; (3) adopt workplace controls (e.g., sending sick individuals home, physical distancing, improving ventilation); (4) consider adopting supportive policies and practices to protect workers at higher

⁷ See Noam Scheiber, Protecting Workers From Coronavirus: OSHA Leaves It to Employers, *The New York Times* (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/business/economy/coronavirus-oshaworkers.html>; Eli Rosenberg, How Biden Could Revamp Worker Health Protections in the Midst of the Deadly Pandemic, *The Washington Post* (Nov. 13, 2020), <https://www.washingtonpost.com/business/2020/11/13/biden-oshaworkplace-protections/>; Deborah Berkowitz, Workplace Safety Enforcement Continues to Decline in Trump Administration, *National Employment Law Project* (Mar. 14, 2019), <https://www.nelp.org/publication/workplace-safety-enforcement-continues-decline-trump-administration/>.

⁸ OSHA, U.S. Department of Labor's OSHA Announces \$3,930,381 In Coronavirus Violations (Jan. 8, 2021), <https://www.osha.gov/news/newsreleases/national/01082021>.

⁹ Executive Order on Protecting Worker Health and Safety (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/>.

risk for severe illness; (5) establish effective communication systems provided in a language that workers understand; (6) provide education and training on the workplace COVID-19 policies and procedures, including basic facts about COVID-19 and the employer's COVID-19 prevention program; (7) adopt non-punitive absence policies; (8) consider flexible remote work and paid leave policies; (9) isolate workers who show COVID-19 symptoms at work; (10) perform enhanced cleaning and disinfection after a suspected or confirmed case of COVID-19; (11) provide guidance on the employer's screening and testing requirements, if any, and availability of testing options; (12) record and report work-related COVID-19 infections and deaths; (13) implement protections from retaliation and an anonymous process for workers to voice reasonable concerns about workplace safety; (14) provide COVID-19 vaccine at no cost to all eligible employees; and (15) enforce safety measures, such as face coverings or physical distancing, with respect to all workers, including those who are vaccinated.

Additionally, employers are directed to comply with applicable OSHA standards, including requirements for PPE,¹⁰ respiratory protection,¹¹ sanitation,¹² protection from bloodborne pathogens,¹³ and requirements for employee access to medical and exposure records,¹⁴ and also with the duty under the OSH Act to provide a safe workplace free from recognized hazards that can cause serious physical harm or death.¹⁵

COVID-19 Vaccinations

The OSHA Guidance recommends that employers provide a COVID-19 vaccine at no cost to all eligible employees and also provide information and training on the benefits and safety of vaccinations. As noted, this recommendation is currently advisory, although it is possible that the agency could require employers to provide free COVID-19 vaccines in the future.

Additionally, consistent with the Centers for Disease Control and Prevention (the "CDC") guidance that vaccinated individuals continue to wear face coverings and maintain physical distancing, the OSHA Guidance states that workplace COVID-19 policies should not distinguish between workers who are vaccinated and those who are not. It is recommended that employers continue to require all workers to follow protective measures until there is further guidance on how vaccination affects the transmissibility of COVID-19.

We note that the Equal Employment Opportunity Commission (the "EEOC") recently issued guidance on COVID-19 vaccinations clarifying that employers may require employees to get vaccinated for COVID-19 as long as they provide reasonable accommodations to employees who are unable to receive a COVID-19 vaccine due to a disability or sincerely held religious practice or belief.¹⁶ If an employee indicates that they are unable to receive a COVID-19 vaccine due to a disability or a religious belief, the employer should engage in an interactive process with the employee to offer reasonable accommodations absent an undue hardship to the employer. Only if the unvaccinated employee poses a direct threat to the workforce that cannot be reduced to an acceptable level can the employer "exclude the

¹⁰ 29 C.F.R. 1910, Subpart I (e.g., 1910.132 and 133).

¹¹ 29 C.F.R. 1910.134.

¹² 29 C.F.R. 1910.141.

¹³ 29 C.F.R. 1910.1030.

¹⁴ 29 C.F.R. 1910.1020.

¹⁵ 29 U.S.C. § 654(a).

¹⁶ EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Section K (Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

employee from physically entering the workplace.”¹⁷ Employers may not automatically terminate or discriminate against an employee who is unable to be or has not yet been vaccinated.¹⁸

Guidance on Screening and Testing

The OSHA Guidance also recommends that employers follow state or local guidance for COVID-19 screening and viral testing and inform employees of their workplace testing requirements, if any, and availability of testing options. Employers may incorporate COVID-19 testing in their COVID-19 prevention programs and refer to the CDC guidance on COVID-19 testing strategies for non-healthcare workplaces.¹⁹

Prohibition on Discrimination and Retaliation

Unlike the 2020 Guidance, the OSHA Guidance explicitly states employers are prohibited from discharging or discriminating against an employee for speaking out about unsafe working conditions or reporting an infection or exposure to COVID-19 to the employer or OSHA. The OSHA Guidance further recommends that employers (1) notify workers of their rights to a safe workplace; (2) ensure that workers know whom to contact with questions or concerns about workplace health and safety; (3) prohibit retaliation for raising workplace safety and health concerns or engaging in other protected activities under the OSH Act; and (4) consider setting up an anonymous process for raising concerns about workplace hazards relating to COVID-19. For example, the OSHA Guidance provides that employers may not discriminate against an employee for raising a reasonable concern about the employer’s COVID-19 infection control on their online, social, or any other media, or against an employee for wearing their own PPE such as respirators or gloves.

III. Implications for Employers

- ▶ Employers should stay abreast of any updated guidance from OSHA on mitigating and preventing the spread of COVID-19 in the workplace. It is anticipated that OSHA will issue binding emergency temporary standards on COVID-19 in the coming weeks.
- ▶ Employers may wish to review their COVID-19 prevention programs to ensure that they are in compliance with the OSHA regulations and standards, as well as any applicable federal, state or local law. It is anticipated that OSHA will increase its inspection and citation efforts, given the Biden administration’s increased focus on enforcement.

The OSHA Guidance can be found [here](#).

¹⁷ *Id.*

¹⁸ The EEOC clarified that although the vaccination itself is not a medical examination, pre-screening vaccination questions may qualify as disability inquiries under the Americans with Disabilities Act (the “ADA”). Pre-screening questions are asked before administering a vaccine to ensure that there is no medical reason that would prevent an individual from receiving the vaccine. In practice, to comply with the ADA, employers wishing to administer COVID-19 vaccines to employees must show that pre-screening questions are “job-related and consistent with business necessity,” except in the following two circumstances: when (1) the employer offers a vaccination on a voluntary basis and employees can opt out of answering pre-screening questions or (2) employees receive the vaccination from a third party.

¹⁹ CDC, SARS-CoV-2 Testing Strategy: Considerations for Non-Healthcare Workplaces (updated Oct. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html>.

The 2020 Guidance can be found [here](#).

President's Biden's Executive Order on Protecting Workers Health and Safety can be found [here](#).

The EEOC Guidance on COVID-19 vaccinations can be found [here](#).

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus Resource Center](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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