

August 20, 2021

COVID-19 Update: OSHA Issues Updated COVID-19 Guidance for Non-Healthcare Employers Incorporating the CDC Guidance for Fully Vaccinated People

Last week, the Occupational Safety and Health Administration (“OSHA”) updated its guidance on mitigating and preventing the spread of COVID-19 in the workplace (the “OSHA Guidance”)¹ to reflect the recent changes in the Centers for Disease Control and Prevention (the “CDC”) guidance for fully vaccinated people in light of evidence related to the Delta variant (the “CDC Guidance”).² In addition to emphasizing that vaccination is “the most effective way” to protect workers from risks of COVID-19 in the workplace, the OSHA Guidance now recommends that all workers, including fully vaccinated individuals, wear a mask in public indoor settings in areas of substantial or high transmission and that employers consider requiring workers to get vaccinated or to undergo regular COVID-19 testing. The OSHA Guidance applies to non-healthcare settings,³ and it is advisory in nature and does not create additional legal obligations.

Key Takeaways

- OSHA adopted the following recommendations for fully vaccinated individuals that are analogous to those in the CDC Guidance: (i) wear a mask in public indoor settings in areas of substantial or high transmission; (ii) choose to wear a mask regardless of level of transmission, particularly if individuals have underlying medical conditions or have someone in their household who is at increased risk of severe disease or is not fully vaccinated; and (iii) in case of a known exposure to someone with a suspected or confirmed case of COVID-19, get tested and wear a mask in public indoor settings for 14 days or until a negative test result is obtained.
- Employers may want to consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing—in addition to wearing masks and physical distancing—if they remain unvaccinated.

¹ OSHA, Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, <https://www.osha.gov/coronavirus/safework> (updated Aug. 13, 2021).

² CDC, Interim Public Health Recommendations for Fully Vaccinated People, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (updated July 27, 2021).

³ The OSHA Guidance states that while it applies to “most workplaces,” employers who are subject to the OSHA COVID-19 Emergency Temporary Standard (ETS) for Healthcare must comply with the requirements therein.

- Employers are encouraged to provide paid time off to workers for the time it takes for them to get vaccinated and recover from any side effects.

The CDC Guidance

The CDC previously advised that fully vaccinated people no longer needed to wear a mask or physically distance in any setting, except where otherwise required, and could refrain from testing following a known exposure to COVID-19, subject to certain exceptions.⁴ Last month, the CDC reversed course on its mask and testing guidance for fully vaccinated people, recommending that fully vaccinated people (i) wear a mask in public indoor settings if they are in “an area of substantial or high transmission”; (ii) get tested if experiencing COVID-19 symptoms; and (iii) if they came into close contact with someone with COVID-19, get tested and wear a mask in public indoor settings for 14 days after the exposure or until they get a negative test result.⁵ As of the date of this memorandum, 94.72% of U.S. counties qualify as areas of substantial or high transmission.⁶ In light of preliminary evidence suggesting that fully vaccinated people can be infected with the Delta variant and spread the virus to others, the CDC Guidance stated that fully vaccinated people can further reduce the risk of COVID-19 infection and transmission by wearing a mask.⁷

The OSHA Guidance

The OSHA Guidance is “designed to help employers protect workers who are unvaccinated . . . or otherwise at-risk” and to implement the CDC Guidance involving workers who are fully vaccinated but located in areas of substantial or high community transmission. The recommendations in the OSHA Guidance are advisory in nature and do not create additional legal obligations for employers.

Masks and Testing

Consistent with the CDC Guidance, the OSHA Guidance added the following recommendations:

- Fully vaccinated people in areas of substantial or high transmission should be required to wear face coverings (or other appropriate PPE and respiratory protection) in indoor settings.
- Fully vaccinated people who have had close contact⁸ with someone with COVID-19 should get tested three to five days after the exposure and be required to wear face coverings for 14 days in public indoor settings after their contact unless they test negative for COVID-19.
- Fully vaccinated people may choose to wear masks in public indoor settings regardless of the level of transmission in the relevant community, particularly if they are at-risk or have someone in their household who is at-risk or is not fully vaccinated.

COVID-19 Vaccination Policy

Employers are encouraged to consider adopting COVID-19 policies that require workers to get vaccinated or alternatively undergo regular COVID-19 testing (in addition to wearing masks and social distancing) if they remain unvaccinated. The OSHA Guidance also recommends that employers consider working with local public health authorities to provide vaccinations on-site.

⁴ CDC, Interim Public Health Recommendations for Fully Vaccinated People, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (updated May 13, 2021).

⁵ See *id.* (updated July 27, 2021).

⁶ See CDC, COVID-19 Integrated County View, <https://covid.cdc.gov/covid-data-tracker/#county-view> (last accessed Aug 20, 2021).

⁷ See *id.*

⁸ The CDC defines “close contact” as being “within 6 feet of an infected person (laboratory-confirmed or a clinically compatible illness) for a cumulative total of 15 minutes or more over a 24-hour period.” CDC, COVID-19, Contact Tracing, Case Investigation & Contract Tracing Guidance, Appendices, <https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/appendix.html#contact>.

Employers are encouraged to continue implementing multiple layers of controls (e.g., mask wearing, social distancing, increased ventilation, removing sick workers from the workplace) to mitigate the spread of COVID-19.

Implications for Employers

- In light of the CDC Guidance and OSHA Guidance recommending that fully vaccinated individuals wear a mask in public indoors settings in areas of substantial or high transmission, employers who do not already require wearing a mask in indoor settings may want to reevaluate whether it is appropriate to mandate masks at the workplace based on different environmental and risk factors on-site. Employers may also need to comply with any relevant state or local requirements on masks or social distancing.
- Employers who decide to adopt a COVID-19 vaccination policy that requires workers to get vaccinated or undergo regular COVID-19 testing per the OSHA Guidance may want to keep in mind that employers are required to provide reasonable accommodations for employees who, because of a disability, a sincerely held religious belief, practice or observance, or pregnancy or pregnancy-related conditions, do not get vaccinated, absent undue hardship on the operation of their business.⁹
- Employers may want to stay abreast of any further guidance from the CDC or OSHA on guidelines for fully vaccinated individuals as the public health situation is rapidly developing.

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

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

Data on the level of community transmission can be found [here](#).

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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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⁹ See EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws at J.2, K.2., K.13 <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (“If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules”; “An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer’s business”; “Employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions for other employees.”).