

COVID-19: OSHA FURTHER UPDATES NON-HEALTHCARE GUIDANCE TO ENCOURAGE VACCINE MANDATES, STRENGTHEN MASK RECOMMENDATIONS, AND AMEND SUGGESTED POLICIES FOR VACCINATED WORKERS

Date: 20 August 2021

U.S. Labor, Employment, and Workplace Safety Alert

By: Kathleen D. Parker, M. Claire Healy

On 13 August 2021, the Occupational Safety and Health Administration (OSHA) updated its “[Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#)” for non-healthcare employers and workers (the Guidance) to encourage employer vaccine mandates and to reflect the Centers for Disease Control and Prevention's (CDC) July guidance regarding face masks and testing for vaccinated individuals. OSHA's changes follow its 10 June 2021 updates to the Guidance, which are discussed in the K&L Gates client alert available [here](#).

Although the Guidance remains advisory in nature, it is best practice to follow OSHA's recommendations as if they were compulsory, whenever possible and appropriate. Doing so assists employers in making informed decisions about hazard prevention as part of their obligation to provide a safe workplace, helps protect workers, and lessens employers' potential exposure to liability.

THE GUIDANCE - EMPLOYER FACILITATION OF EMPLOYEE VACCINATION

The Guidance continues to recommend that employers implement multi-layered controls tailored to their workplace to keep workers safe. The August revision highlights the importance of vaccines in that multi-layered approach. Specifically, while the June updates to the Guidance recommended that employers take steps to *encourage* employee vaccinations, OSHA now recommends that employers “consider” adopting policies *requiring* employees to receive COVID-19 vaccinations (or to submit to regular COVID-19 testing).

THE GUIDANCE - UPDATED RECOMMENDATIONS FOR VACCINATED WORKERS IN ALL WORKPLACES

OSHA also amended some of its previously issued recommendations relating to vaccinated workers. These updates are aimed at addressing evidence that fully vaccinated people who become infected with the Delta variant can be infectious and can spread the virus, and align with the CDC's July masking and testing recommendations. OSHA now recommends that:

- All employees, regardless of vaccination status, wear a mask in public indoor settings *in areas of substantial or high transmission*;

- All employees, regardless of vaccination status, might choose to wear a mask *regardless* of level of transmission, particularly if they are at risk or have an at-risk individual in their household or someone in their household is not fully vaccinated; and
- Fully vaccinated employees get tested 3–5 days following COVID-19 exposure (suspected or confirmed) *and* wear a mask in public indoor settings for 14 days after exposure or until a negative test result.

THE GUIDANCE - HIGHER RISK WORKPLACES

OSHA also updated its recommended measures for “higher-risk” workplaces (such as manufacturing facilities, meat, seafood, and poultry processing plants, high volume retail and grocery, agricultural processing settings, and workplaces where there are unvaccinated or otherwise at-risk workers).

Under the updated Guidance, in addition to the steps previously recommended, OSHA now advises all higher-risk workplaces to:

1. *Require* unvaccinated and at-risk workers to wear a mask (OSHA previously recommended masks be suggested for these workers); and
2. *Encourage* vaccinated workers in substantial or high community transmission areas to wear masks (OSHA did not previously include any mask recommendations for vaccinated workers).

Further, OSHA recommends that certain sectors take the following additional steps to ensure the health and safety of their workers:

High volume retail workplaces

3. *Ask or require* customers and visitors to wear masks (OSHA previously recommended suggesting masks for unvaccinated (or unknown-status) customers and visitors).

In-employer transportation

4. *Require* unvaccinated and at-risk workers sharing a vehicle to wear masks (OSHA previously recommended masks be suggested for these workers); and
5. *Ensure* all workers wear masks in areas of substantial or high community transmission.

WHAT DOES THIS MEAN FOR EMPLOYERS AND WORKERS?

Due to increased transmission of the Delta variant, employers should consider whether they should resurrect many of the health and safety practices they imposed earlier in the pandemic, including mask wearing, social distancing, physical barriers, decreased capacity, health screenings, and remote work. Employers should also analyze how vaccines will factor into their in-person workforce policies, including whether they should take additional steps to encourage or mandate vaccinations *and* whether they should maintain separate policies for vaccinated individuals.

As is always the case, employers should look to this Guidance, other OSHA guidance, CDC guidance, and any local, state or federal guidance, rules and laws (including relating to reasonable accommodations for disabilities or religious beliefs) as they finalize their policies for this phase of the pandemic. Employers should especially remember that, although the Guidance is advisory, they are subject to the Occupational Safety and Health Act's

General Duty Clause, which *requires* employers to provide a work environment “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

K&L Gates continues to advise clients on navigating the COVID-19 pandemic. More information about K&L Gates' COVID-19 resources is available on the K&L Gates [HUB](#).

KEY CONTACTS



KATHLEEN D. PARKER
PARTNER

BOSTON
+1.617.951.9281
KATHLEEN.PARKER@KLGATES.COM



M. CLAIRE HEALY
ASSOCIATE

RALEIGH, CHARLESTON
+1.919.743.7303
CLAIRE.HEALY@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.