

OSHA Releases Updated Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

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On August 13, 2021, the United States Occupational Safety and Health Administration (“OSHA”) released updated guidance on mitigating and preventing the spread of COVID-19 in the workplace to reflect changes in the Centers for Disease Control and Prevention (“CDC”) guidance for fully vaccinated individuals in response to the spread of the Delta variant. The guidance serves to update OSHA’s June 10, 2021 COVID-19 workplace safety rule, but is advisory in nature and does not create any legal obligations for employers. OSHA emphasized that vaccination is “the most effective way” to protect workers from the transmission of COVID-19 in the workplace, but now also recommends that all workers wear masks in public indoor settings in areas of substantial or high transmission, regardless of vaccination status. OSHA also recommends that employers consider requiring workers to get vaccinated or submit to regular COVID-19 testing.

Canadian employers with operations in the U.S. should review OSHA’s guidance and implement COVID-19 safety measures for their U.S. worksites.

CDC Guidance

The CDC had previously advised that fully vaccinated people no longer needed to wear masks or physically distance, and could forego testing following exposure to COVID-19 under most circumstances. However, in July, the CDC issued revised guidance for fully vaccinated individuals, recommending that they:

- Wear masks in public settings if they are in “an area of substantial or high transmission”;
- Get tested if experiencing symptoms of COVID-19; and
- Wear masks and get tested following exposure to a suspected or confirmed case of COVID-19 for 14 days or until they receive a negative test result.

In response to preliminary evidence suggesting that fully vaccinated people can be infected by – and spread – the Delta variant, the CDC Guidance states that fully vaccinated individuals can help to stop the spread of COVID-19 by wearing masks.

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OSHA Guidance

OSHA's August guidance is "designed to help employers protect workers who are unvaccinated. . . or otherwise at risk" and to incorporate CDC guidance involving individuals who are fully vaccinated, but who are located in areas with substantial or high levels of community transmission. To that end, OSHA recommends that employers adopt a multi-layered approach to protect workers and mitigate the spread of COVID-19.

- **Mandatory Vaccination or Regular Testing.** OSHA encourages employers to adopt policies requiring workers to get vaccinated or submit to regular COVID testing. In addition to suggesting that employers consider a mandatory vaccine program (or a testing regime), OSHA continues to encourage employers to provide paid leave for workers taking time off to get vaccinated or to recover from any side effects associated with the vaccine. Employers requiring vaccination should comply with the reasonable accommodation requirements under the Americans with Disabilities Act and Title VII.
- **Worker Mask Requirements.** Under the new OSHA guidance, employers should continue to provide appropriate personal protective equipment ("PPE") for workers. OSHA has adopted the CDC recommendation that all workers should wear masks or other face coverings in public indoor settings in areas with substantial or high transmission of COVID-19, regardless of vaccination status. Where respirators, including N95 face masks, are necessary (e.g., for certain jobs such as in healthcare where surgical face masks are insufficient) to protect workers from exposure to COVID-19, employers must provide such respirators in accordance with the relevant OSHA standards, which would include the implementation of a Respiratory Protection Program.
- **Visitor Mask Requirements.** OSHA encourages employers to suggest or require that unvaccinated customers, visitors, and guests over the age of two wear masks or other face coverings in public indoor settings in areas of substantial or high transmission of COVID-19.
- **Physical Distancing.** OSHA recommends that employers implement physical distancing in all communal work areas for unvaccinated and at risk workers. OSHA also recommends limiting the number of such workers in one place at any given time by offering flexible worksite policies and staggering worker shifts. In workplaces where unvaccinated and other at-risk workers cannot maintain six feet of physical distancing, OSHA recommends that employers use solid physical barriers to separate workers.
- **Other Recommendations.** OSHA also continues to recommend that employers mitigate the spread of COVID-19 in the workplace by:
 - Educating workers on their COVID-19 policies in a manner that is easily understood;
 - Maintaining adequate ventilation in the workplace;
 - Performing regular cleaning and disinfection;
 - Prohibiting discrimination and retaliation regarding reports of workplace safety and health concerns;
 - Reporting work-related COVID-19 cases to OSHA in compliance with OSHA's COVID-19 reporting guidance; and
 - Complying with other applicable OSHA standards, including PPE requirements, sanitation, etc.

Key Takeaways

- OSHA adopted recommendations for fully-vaccinated workers that align with the most recent CDC Guidance:
 - Fully-vaccinated individuals should continue to wear masks in public indoor settings in areas of substantial or high transmission;
 - Individuals may choose to mask, regardless of the level of transmission, particularly if they – or someone in their household – are at an increased risk of severe disease or are not fully-vaccinated; and
 - Regardless of vaccination status, individuals who are exposed to someone with a suspected or confirmed case of COVID-19 should get tested and wear a mask in public indoor settings for 14 days, or until they receive a negative test result.
- Employers should consider adopting vaccine requirements. Employers should consider requiring workers who are unvaccinated to undergo regular COVID-19 testing, in addition to mandatory masking and physical distancing.
- Employers are encouraged to provide paid leave to workers for time spent getting vaccinated and recovering from any vaccine side effects.