

OSHA, States Lag Behind CDC Guidance Lifting Requirements for Vaccinated Workers

By

May 20, 2021

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Since the Centers for Disease Control and Prevention (CDC) offered new [COVID-19 guidance](#) allowing fully vaccinated individuals to avoid wearing masks or socially distancing in most settings, employers have been pushing the Occupational Safety and Health Administration (OSHA) and state equivalents to embrace the change, but change is slow.

CDC Guidance

On May 13, 2021, CDC published an [“Interim Public Health Recommendations for Fully Vaccinated People,”](#) embracing findings that vaccines are effective not only in preventing vaccinated individuals from developing the disease, but also in preventing them from spreading COVID-19 to others. With exceptions for environments “subject to federal, state, local, tribal, or territorial laws, rules, and regulations, *including local business and workplace guidance,*” public transportation, prisons, and homeless shelters, CDC concluded, “Fully vaccinated people can resume activities without wearing a mask or physically distancing.” CDC has also published separate guidance for healthcare settings and schools.

CDC’s often-overlooked caveat that it does not override other federal, state, local, tribal, or territorial laws, rules, and regulations that govern workplaces is critical to employers’ obligations in the workplace. This is because OSHA has primary jurisdiction over workplace health and safety, not CDC. OSHA has not yet fully embraced the CDC guidance.

OSHA

On January 29, 2021, OSHA published a 12-page guidance document, [“Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace.”](#) The agency has produced little guidance to employers apart from making minor adjustments to its frequently asked questions and dedicated COVID-19 webpage.

On May 18, OSHA added a banner to its website, which simply states: “OSHA is reviewing the recent CDC guidance and will update our materials on this website accordingly. Until those updates are complete, please refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers.”

OSHA has not made entirely clear how employers should apply the CDC guidance in workplaces. The banner also appears to conflict with OSHA’s prior directions to employers to treat vaccinated and unvaccinated employees equally for purposes of evaluating and responding to potential COVID-19 hazards. OSHA is also unclear as to what guidance it will use for enforcement purposes.

The situation is playing out just as OSHA is mulling an Emergency Temporary Standard to address COVID-19. President Joe Biden issued an [Executive Order](#) as soon as he was sworn into office, directing OSHA to review its guidance for consistency with scientific information known about COVID-19 and consider promulgating an Emergency Temporary Standard to address circumstances caused by the pandemic. Over two months after that deadline

passed, [the agency has yet to act](#). The White House Office of Management and Budget has even been reviewing a drafted standard since April 26, which OSHA has declined to make available to the public.

State Plan

To complicate matters further, some “State Plan” states authorized by OSHA to enact and enforce their own workplace safety and health standards (such as California, Michigan, Oregon, and Virginia) have promulgated their own COVID-19 standards, which remain on the books and are actively being enforced.

For example, on January 27, 2021, Virginia enacted a permanent standard that requires all workers to wear face coverings if they cannot maintain physical distancing. The Virginia standard does not distinguish between vaccinated and unvaccinated workers. These requirements remain in place, despite Governor Ralph Northam’s Executive Order lifting face covering requirements consistent with CDC guidance.

Similarly, in New York, employers must grapple with the [recently enacted HERO Act](#), which amends the state’s labor code and requires employers to implement an infectious disease control plan and preventive measures required by state directives. The HERO Act is also silent on the impact of COVID-19 vaccinations on required workplace preventive measures.

Things on the West Coast are just as unsettled. California’s Emergency Temporary Standard similarly requires strict social distancing measures, employee use of face coverings (with limited exceptions), and COVID-19 hazard assessment and controls, such as mandatory workplace testing obligations, worker exclusions, and COVID-19 case investigations. Although California’s safety agency, the California Department of Industrial Relations (Cal OSHA) has issued guidance providing that employers may treat vaccinated individuals differently, the current guidance conflicts with the plain language of Cal OSHA’s emergency temporary standards. Cal OSHA also is considering readopting and revising the standards in its standard board meetings, but the revisions under consideration were issued before CDC released its updated guidance.

States that did not have standards, like Nevada, have been able to respond more quickly. The Nevada Occupational Safety and Health Administration (Nevada OSHA) has [issued guidance on May 14, 2021](#), clarifying that employers could have stricter face mask requirements than CDC guidance and directing employers to follow CDC guidance and the state directives. However, Nevada OSHA also emphasized that COVID-19 is a recognized hazard and, thus, employers need to have a written COVID-19 Prevention and Response Plan addressing workplace hazards related to COVID-19 and implement appropriate controls as identified through a hazard assessment.

While CDC has paved the way to easing face covering and social distancing requirements (which employers and employees welcome), employers would be well-advised to continue to follow state and local requirements until they come in line with CDC. Employers operating in multiple states also likely will continue to face compliance hurdles and challenges in setting up a single COVID-19 response plan or procedures because the delay in response from federal OSHA and State Plan states to CDC guidance may lead to and continue disparities in required workplace safety obligations.

Jackson Lewis attorneys are closely monitoring updates and changes to legal requirements and guidance and are available to help employers weed through the complexities involved with [state-specific or multistate-compliant plans](#).

If you have questions on your compliance obligations under applicable federal or state laws, or need assistance with OSHA inspections and citations, please reach out to the Jackson Lewis attorney with whom you regularly work, or any member of our [COVID-19 team](#) or our [Workplace Safety and Health Practice Group](#).

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