

Manufacturing: An Updated COVID-19 Policy

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June 30, 2021

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Since the Centers for Disease Control and Prevention (CDC) and Occupational Safety and Health Administration (OSHA) offered new COVID-19 guidance allowing fully vaccinated individuals to avoid wearing masks or social distancing in most settings, manufacturing employers are left in the tough position of trying to manage the frustrations of a pandemic-weary workforce while navigating constant guidance updates.

Updated OSHA Guidance

On June 10, 2021, OSHA updated its general Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace. This updated OSHA Guidance is applicable to all manufacturing employers. Citing the CDC's recent "Interim Public Health Recommendations for Fully Vaccinated People," OSHA advises, unless otherwise required by state or local law, employers "no longer need to take steps to protect their fully vaccinated workers who are otherwise at risk from COVID-19 exposure."

The Updated OSHA Guidance focuses on protecting unvaccinated and otherwise at-risk employees. OSHA explains that "at-risk workers" are those vaccinated employees who, due to a medical condition or medication, may not have a full immune response to the vaccination. Therefore, employers should take steps to protect at-risk workers as they would unvaccinated workers, regardless of their vaccination status.

Some of OSHA's recommendations include:

- Granting time off for employees to be vaccinated;
- Instructing all infected individuals, unvaccinated employees who have had close contact with someone who has tested positive for COVID-19, and all workers with COVID-19 symptoms to stay home from work; and
- Implementing physical distancing protocols for unvaccinated and at-risk employees in communal work areas.

Many of OSHA's previous recommendations, including maintaining ventilation systems, educating the workforce, and performing routine cleaning, remain the same.

However, the Updated OSHA Guidance also recognizes that there are "higher-risk workplaces," such as in manufacturing workplaces, and provides additional best practices to protect unvaccinated and otherwise at-risk workers. Those precautions include:

- Staggering break times or provide temporary break areas and restrooms to avoid groups of unvaccinated or at-risk workers;
- Promoting that unvaccinated or at-risk workers always remain at least six feet apart from others, including on breaks;
- Staggering workers' arrival and departure times to avoid congregations of unvaccinated or at-risk workers in parking areas, locker rooms, and near time clocks;
- Providing visual cues (*e.g.*, floor markings and signs) as a reminder to maintain physical distancing; and
- Implementing strategies tailored to the specific workplace to improve ventilation.

Many of these practices are similar to those in the CDC's Updated Manufacturing Guidance, which was published on June 11, 2021. While the CDC Updated Manufacturing Guidance continues to recommend that vaccinated and unvaccinated individuals wear masks and to social distance, it is likely that further updates by the CDC will mirror the Updated OSHA Guidance.

Although the Updated OSHA Guidance is not a mandate, and creates "no new legal obligations," OSHA reminds employers of their obligations under the Occupational Safety and Health Act's General Duty Clause to provide a safe and healthy workforce free from hazards.

Considerations for Vaccinated/Unvaccinated Worker Policies

As everyone hopes to start having business return to normal, manufacturers need to carefully consider whether to maintain the status quo or begin to implement new policies that differentiate between vaccinated and unvaccinated workers in line with the Updated OSHA Guidance. So far in the industry, the policies vary widely. For instance, some Michigan automakers will require all employees to continue wearing masks but phase out temperature screenings upon entering facilities or entry questionnaires, while other will not require fully vaccinated employees to wear masks at all, and still others have not made any changes to their COVID-19 policies.

If your company decides to change your current COVID-19 policies to differentiate between vaccinated and unvaccinated workers, give some thought to the following issues:

1. *Whether it is necessary to bargain with the union over mask policy changes.* Even if you conclude that the COVID-19 policy is not covered by the collective bargaining agreement, it is still a good idea to discuss the changes with the union.

2. *Whether there is a state or local ordinance where your facility is located with more stringent policies than the CDC and OSHA.* The Updated OSHA Guidance is subject to the caveat that it does not override other federal, state, local, tribal, or territorial laws, rules, and regulations that govern workplaces. This is because the state and local governments control public safety and OSHA has primary jurisdiction over workplace health and safety, not the CDC. States and local governments vary widely on COVID-19 policies. For example, New Jersey and Oregon require employers to verify that employees are fully vaccinated before allowing them to take off their mask and not social distance. Other states do not have verification requirements.

3. *Whether to ask employees to provide proof of vaccination.* In order to enforce a policy that differentiates between vaccinated and unvaccinated individuals, the company must determine who falls into each category. There are two approaches a company can take. First, employers can require or request employees provide documentation of vaccination status before allowing them to drop their masks or follow other vaccinated-only policies in the facility. Such a request does not violate the Health Insurance Portability and Accountability Act or the Americans with Disabilities Act. The information, however, is considered confidential medical information that should be treated accordingly, including a prohibition on sharing this confidential information. Many state and local laws or regulations require companies to take this approach.

Another option is to rely on an honor system, but this has its own risks and may be contrary

to OSHA's position. The Updated OSHA Guidance makes clear that unvaccinated employees should wear face coverings primarily to protect other employees — including at-risk workers — from the spread of COVID-19. OSHA also makes clear that employers need to try to protect unvaccinated and at-risk employees, which can mean ensuring unvaccinated employees wear masks even if they are personally willing to take certain risks related to contracting COVID-19 at work. An employee's preference to not wear a mask or follow other COVID-19 precautions does not override an employer's obligations under OSHA's General Duties Clause to provide a safe and healthy workforce free from hazards.

4. How to deal with divisiveness in the workforce based on vaccination status. The unmasking of fully vaccinated workers can create a two-tiered system that can cause divisiveness in the workplace, as many employees have strong opinions about mask-wearing and vaccines. Consider communicating to employees that they are not allowed to confront one another about mask-wearing. In other words, whatever opinion an employee has about their coworkers' mask-wearing habits, they should not take matters into their own hands. There should be a clear policy about how an employee can report mask-wearing issues that do not involve employee-to-employee communication. A policy also can include language that requires everyone to treat each other with respect regarding personal decisions on wearing masks, regardless of vaccination status.

This is an evolving topic, and employers should keep up-to-date on federal, state, and local developments. As always, when creating and implementing any new policy, please consult a labor and employment attorney who can help identify potential legal issues and make sure it complies with all federal, state, and local laws.

Please contact a Jackson Lewis attorney with any questions.

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