AUGUST 17, 2021 | WORKPLACE SAFETY & HEALTH

Fed OSHA Updates Its COVID-19 Workplace Guidance – Realigns with CDC on Masks for Vaccinated Workers

By Conn Maciel Carey's COVID-19 Task Force

As we predicted a few week ago, following in CDC's footsteps, on Friday of last week (August 13, 2021), OSHA updated its primary COVID-19 guidance for non-healthcare employers – Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace to embraces CDC's updated mask recommendations for vaccinated individuals from July 27th. OSHA's updated guidance includes several links directly to CDC's July Interim Public Health Recommendations for Fully Vaccinated People, as well as CDC's COVID-19 Integrated County View Data Tracker, which depicts levels of county-level community transmission (low, moderate, substantial, or high).



Broadly, OSHA's updated COVID-19 guidance tracks CDC's updated guidance closely. For example, OSHA now

recommends that:

- Fully vaccinated workers in areas of substantial or high community transmission wear masks in order to protect unvaccinated workers; and
- Fully vaccinated workers everywhere in the country who experience a close contact exposure with a COVID-19 case wear a mask for 14 days or until they receive a negative COVID test taken at least 3 days after the contact.

Additionally, the guidance clarifies OSHA's recommendations for protecting unvaccinated workers and other at-risk workers in "*workplaces with heightened risk due to workplace environmental factors*," including those in manufacturing, meat and poultry processing, seafood processing and agricultural processing.

What Changed in OSHA's Updated COVID-19 Guidance?

Before this latest update, OSHA's June 10th COVID-19 guidance was aimed at non-vaccinated workers and otherwise-at-risk workers. Friday's updated guidance, however, applies in many circumstances to fully vaccinated workers, at least in areas that are experiencing "Substantial" and "High" levels of community transmission. Here is a summary of the major changes in OSHA's latest guidance:

- ***Encouragement of vaccines through vaccine/testing mandates***. OSHA "suggests" that employers consider adopting policies that require workers to get vaccinated or, if they remain unvaccinated, to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing. We think the timing of this suggestion, following the Biden Administration's announcement of a "soft" vaccine mandate for federal workers and federal contractors, is telling. OSHA has updated its guidance to "suggest" that employers consider adopting the same kind of policy; i.e., get the vaccine or submit to weekly testing. It is hard to see a scenario where an employer is cited under the General Duty Clause for not implementing a vaccine mandate, but this new guidance at least provides an additional layer of cover for employers who do so, from the anticipated lawsuits and public criticism; i.e., we are just following OSHA's guidance, which could effectively be mandatory under the GDC.
- ***Quarantine for fully vaccinated workers***. Employers should encourage fully vaccinated people who have a known exposure to someone with suspected or confirmed COVID-19 to get tested 3-5 days after exposure, and ensure that they wear a mask in public indoor settings for 14 days, or until they receive a negative test result.
- ***Face coverings***. Employers should provide workers with face coverings or surgical masks, as appropriate, unless their work task requires a respirator or other PPE. In addition to unvaccinated and otherwise at-risk workers, employers should ensure that even fully vaccinated people wear masks in public indoor settings in areas of Substantial or High transmission. Employers should allow fully vaccinated people to wear masks in public indoor settings regardless of the level of community transmission, particularly if they are at risk or have someone in their household who is at risk or not fully vaccinated. Additionally, employers should *suggest or require* that all customers, visitors or guests wear face coverings in public, indoor settings in areas of Substantial or High transmission.

Is Your County Experiencing Substantial or High Levels of Transmission?

OSHA has adopted the model proposed by the CDC last month for reverting back to indoor mask requirements

for all workers, regardless of vaccination status, in counties that are experiencing "Substantial" or "High" levels of community transmission. CDC uses two different metrics, the higher of which prevails, to determine whether your workplace is in a county experiencing substantial or high transmission of COVID-19:

1. total new cases per 100,000 persons over the past seven days; and
2. positive test rate over the past seven days.

In terms of new cases, "High" community transmission occurs when there are 100+ new cases per 100,000 persons over the past week, and "Substantial" transmission occurs when there are 50-99 total new cases per 100,000 persons. For the positivity rate (i.e., the percentage of OVID-19 tests taken in the country that come back positive), Substantial is 8%-9.99%, and High 10%+. Here is the CDC's indicator table:

Indicator *(If the indicators are at different transmission levels, the higher level prevails)*	**Low Transmission Blue**	**Moderate Transmission Yellow**	**Substantial Transmission Orange**	**High Transmission Red**
New Cases per 100,000 persons over 7 days	0-9.99	10-49.99	50-99.99	≥100
Test Positivity Rate over 7 days	0-4.99%	5-7.99%	8-9.99%	≥10.0%

What Stayed the Same in OSHA's Updated COVID-19 Guidance?

Although substantial changes were made to OSHA's COVID-19 guidance, much stayed the same. Here is a summary of key recommendations that did not change:

- ***Encouragement of vaccines through paid time off***. Employers should grant paid time off for employees to get vaccinated and recover from any side effects, and consider working with local public health authorities to provide vaccinations in the workplace for unvaccinated workers.
- ***Isolation/quarantine***. Employers should instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for SARS-CoV-2, and all workers with COVID-19 symptoms to stay home from work. Employers should encourage people who are not fully vaccinated to be tested immediately after being identified, and, if negative, tested again in 5–7 days after last exposure or immediately if symptoms develop during quarantine. Employers should ensure that absence policies are non-punitive and eliminate or revise policies that encourage workers to come to work sick or when unvaccinated workers have been exposed to COVID-19.
- ***Physical distancing***. Employer should implement physical distancing in all communal work areas for unvaccinated and otherwise at-risk workers. Note here that, like CDC's updated guidance, unlike masking, it does not appear that physical distancing has been reinstated for fully vaccinated individuals.
- ***Training***. Employers should educate and train workers on COVID-19 policies and procedures using accessible formats and in language they understand.

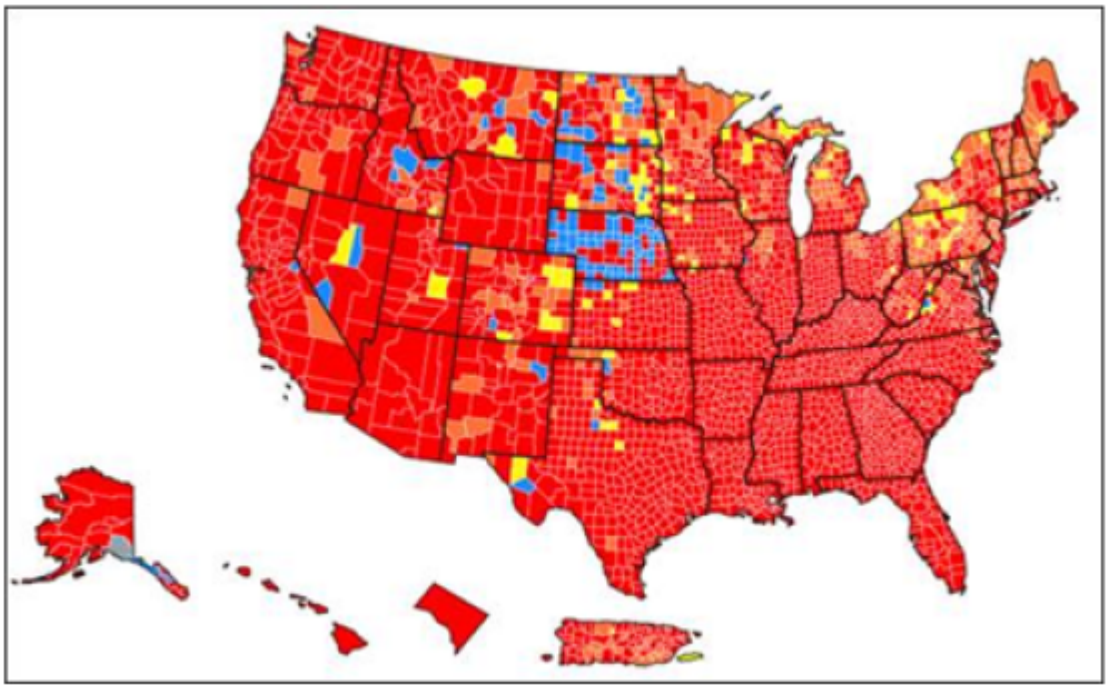
- ***Ventilation***. Employers should maintain ventilation systems, and can refer to CDC's Ventilation in Buildings and OSHA Alert: COVID-19 Guidance on Ventilation in the Workplace for ways to improve ventilation.
- ***Cleaning/disinfecting***. Employers should perform routine cleaning and disinfection, and ensure that, if someone who has been in the facility within 24 hours is suspected of having or confirmed to have COVID-19, they follow the CDC cleaning and disinfection recommendations.
- ***Recording and reporting COVID-19 infections and deaths***. Employers are required to record work-related cases of COVID-19 illness on OSHA's Form 300 logs if the following requirements are met: (1) the case is a confirmed case of COVID-19; (2) the case is work-related (as defined by 29 CFR 1904.5); and (3) the case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7) (e.g., medical treatment, days away from work). Note that OSHA will not enforce 300 Log recording requirements in connection with workers' reactions to COVID-19 vaccination through May 2022.
- ***Anti-retaliation***. Employers must implement protections against retaliation and should set up an anonymous process for workers to voice concerns about COVID-19-related hazards.

Why Did OSHA Backtrack on Its June Mask Guidance?

In last Friday's updated guidance, OSHA points to the CDC's updated mask recommendations for fully vaccinated individuals, specifically referencing the CDC's finding that fully vaccinated people who do become infected with the Delta variant can be infectious and can spread the virus to others. Like the CDC, OSHA makes a point of explaining that although infections in fully vaccinated people (i.e., breakthrough infections) can happen, the evidence indicates its happens in only a small proportion of people who are fully vaccinated, even with the Delta variant, and then even when these infections do occur among vaccinated people, they tend to be mild; i.e., the vaccines remain an effective and critical tool for bringing the pandemic under control.

While it is very disappointing to see things moving in the wrong direction, as we noted last month, CDC Director Walensky did not rule that out when the CDC told us in May that fully vaccinated individuals could remove their masks indoors. At that time, Dr. Walensky warned that *"the past year has shown us that this virus can be unpredictable, so if things get worse, there is always a chance we may need to make a change to these recommendations."* And conditions clearly got worse by July 27th when CDC updated its guidance, and have gotten even worse since then.

When we last reached out on July 28th, approx. 66% of US counties were at Substantial or High levels of transmission, and the Delta variant represented 83% of all new cases in the US. Today, only 16 days later, almost 92% of US counties are the Substantial or High transmission categories – essentially the entire country – and the Delta variant represents an even more staggering 93% of all new cases. Here is a map that shows in **red** and **orange** the counties that are currently experiencing substantial and high transmission.



We suspected that there was more to this change in guidance than just the "*rare occasions of vaccinated people … spreading the virus to others*." Businesses have faced enormous challenges enforcing OSHA's June mask guidance that set different expectations depending on employee vaccination status. Because we do not wear our vaccination status on our sleeves, and delving into that status with our employees has proven to be a highly sensitive subject, an unintended consequence of the CDC's and OSHA's guidance from earlier this summer was that many *unvaccinated* people also took off their masks unbeknownst to their employers. Unless employers view vaccination cards, which may be counterfeit and many are loathe to share, or require self-attestation, which may be false, there is no easy way to know whether someone is in fact fully vaccinated, and therefore, whether s/he should still be wearing a mask indoors. Accordingly, the CDC and OSHA likely concluded that the best way to ensure *unvaccinated* people are wearing masks, is to make *everyone* wear a mask.

As you know, like other governing bodies, OSHA has generally been following CDC's lead with respect to all things COVID-19. So we were very confident OSHA would pivot and embrace this updated guidance. But we were less sure whether OSHA would follow CDC's approach to distinguish between areas of high/substantial community transmission or would just adopt a blanket recommendation for all employers in the country (regardless of location). We know now that OSHA has opted for the more nuanced option. While that has little practical importance today, given that only 8% of US communities are in the lower transmission categories, that may become more meaningful as vaccination rates continue to climb and case rates begin to fall again (as they have in other parts of the world).

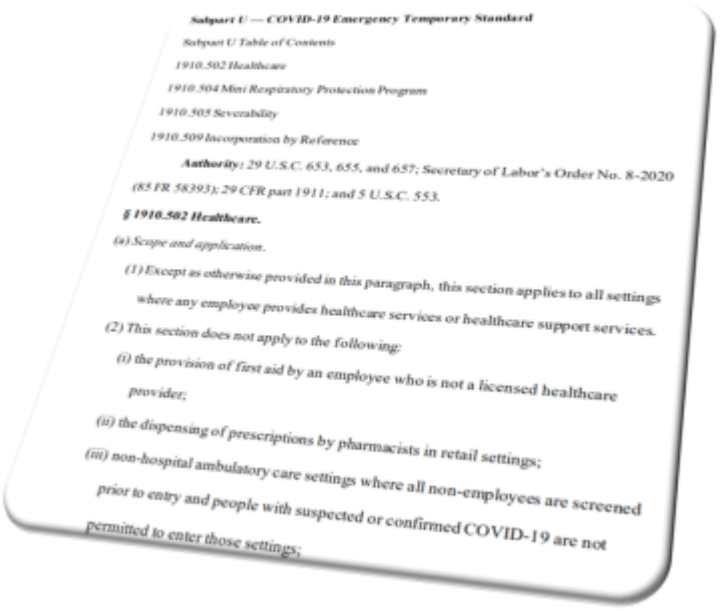
What Does All This Mean for Employers?

Remember that, outside of the healthcare industry, OSHA's enforcement of COVID-19 protocols, like mask and quarantine policies, is limited, for the time being, to the General Duty Clause. To date, President Biden's OSHA has already conducted more than 700 inspections under its COVID-19 National Emphasis Program, which just

launched a few months ago, and it has issued at least 5x more General Duty Clause citations than in the entire year of the pandemic before then, including at least two willful GDC violations. General duty citations are essentially judgments of employers' actions relative to a "reasonable employer" standard, and the citations we have seen include references to CDC's and OSHA's COVID-19 guidance.

Because OSHA has decided to track CDC's guidance exactly (i.e., applying it only in counties experiencing Substantial or High levels of transmission), that will require employers either to mandate masks indoors for everyone anywhere in the country, or to monitor COVID-19 data and adjust based on local conditions, similar to OSHA's expectations for protecting against Heat Illness (i.e., employers need to regularly check meteorological data for their work areas to determine whether high heat conditions are present that require actions under heat illness prevention plans). If you opt to adjust based on local conditions, employers can regularly check CDC's county map to determine whether their worksites, on any given day, are in counties experiencing Substantial or High levels of transmission, and enforce the mask requirement accordingly.

Last, but certainly not least, OSHA's updated guidance has raised our already high level of concern that OSHA will revisit its decision to exclude non-healthcare workplaces from its COVID-19 emergency temporary standard. As we know, the final ETS revealed in June was limited to healthcare workplaces only, but the proposed ETS delivered to OMB in late April was a broad, onerous rule applicable to all industries. One of the major reasons that OSHA shifted direction and issued the narrow healthcare-focused rule was the CDC's guidance in May that emphasized how safe vaccinated individuals are, and relaxed COVID protocols for vaccinated workers. The change in the landscape that drove CDC and OSHA to backtrack on their COVID-19 guidance could easily inspire OSHA to also reverse its decision to issue only a narrow emergency standard. That is especially worrisome when considering the confluence of several other factors, including the:



Subpart U — COVID-19 Emergency Temporary Standard

Subpart U Table of Contents

1910.502 Healthcare

1910.504 Mini Respiratory Protection Program

1910.505 Severability

1910.509 Incorporation by Reference

Authority: 29 U.S.C. 653, 655, and 657; Secretary of Labor's Order No. 8-2020 (85 FR 58393); 29 CFR part 1911; and 5 U.S.C. 553.

§ 1910.502 Healthcare.

(a) Scope and application.

(1) Except as otherwise provided in this paragraph, this section applies to all settings where any employee provides healthcare services or healthcare support services.

(2) This section does not apply to the following:

(i) the provision of first aid by an employee who is not a licensed healthcare provider;

(ii) the dispensing of prescriptions by pharmacists in retail settings;

(iii) non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings;

- general increase in recent COVID-19 cases and deaths (back to the level they were at when OSHA drafted a broad, all-industry COVID emergency standard);
- increased prevalence of the highly contagious Delta variant;
- upcoming confirmation (expected in September) of Doug Parker to head Fed OSHA, who led Cal/OSHA's efforts to issue its broad ETS;
- Biden Administration newfound boldness, reflected by its vaccine mandate for federal workers, which looked politically unpopular a couple of months ago;
- tension brewing between the White House and governors in some states who are interfering with implementation of COVID protocols;
- close next week of a public "comment" period about the healthcare ETS, that may create a procedural

opening for OSHA to update the ETS; and
- AFL-CIO's lawsuit challenging OSHA's decision to issue a narrow ETS despite OSHA's explicit determination that COVID-19 presented a grave danger in every shared workplace in the country.

Look out for a more detailed update from us next week about the risk of OSHA revisiting a broader COVID-19 emergency standard.

But at least for today, OSHA announced that after reviewing the latest CDC guidance, science and data, and consulting with the CDC and other partners, OSHA has determined the requirements of the healthcare ETS remain necessary to address the grave danger of the coronavirus ***in healthcare***. It also said that OSHA will continue to monitor and assess the need for changes in the healthcare ETS every 30 days.

We will be sure to keep you updated. In the meantime, let us know if you have any questions. Likewise, even before OSHA's vaccine-related suggestion last week, we had been participating in a lot of productive strategy discussions with many of our clients about vaccination programs (i.e., incentives, mandates, soft-mandates, and/or standing up a vaccine clinics on-site, etc.). Please contact any of the attorneys in CMC's national OSHA Practice if you have any questions, if you are starting to evaluate any of those kinds of options, or want to hear about that landscape.