

## Virus Mitigation Steps For Employers Amid OSHA Ramp-Up

By **Robert Nichols and Caroline Melo** (February 8, 2021, 5:37 PM EST)

Just over a week after President Joe Biden, by executive order, instructed the Occupational Safety and Health Administration to publish revised guidance to employers on worker safety during the COVID-19 pandemic, the agency complied on Jan. 29, with the issuance of a 12-page document that the U.S. Department of Labor described as "stronger" worker safety guidance.[1]

With OSHA facing Biden's order to also consider issuing mandatory COVID-19 workplace standards by March 15, businesses need to self-audit their current workplace infection prevention programs based on this new guidance.

The new OSHA publication, "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace," to a large extent echoes previous Centers for Disease Control and Prevention guidance but also offers further insights into OSHA's current views as to the key steps to be taken by employers.

While OSHA recognizes in the guidance that the contents are not a binding regulation and the document creates no new legal obligations, the agency also expressly reminds employers that they are obligated to comply, not only with specific OSHA standards, but also with the Occupational Safety and Health Act's general duty clause,[2] which mandates that employers:

Provide their workers with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.

As a result, while this guidance is not legally binding, employers should not be surprised if OSHA compliance officers conducting inspections look to this agency document in assessing what a reasonable employer should do to provide a workplace compliant with the general duty clause.

Additionally, it would be reasonable for employers to expect that some of the provisions of this guidance will find themselves into any compulsory rules that OSHA releases on or before March 15 consistent with the president's order.

Prudent employers should give thoughtful consideration to this agency document now and reexamine



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their infection prevention efforts.

### **Have You Adopted a Formal COVID-19 Prevention Program?**

Importantly, the guidance advises employers to adopt a COVID-19 prevention program to address a number of issues including, for instance, assignment of a workplace coordinator to be "responsible for COVID-19 issues on the employer's behalf."

Consistent with this recommendation, you should ask yourself whether your organization has identified a specific person who is responsible for managing your COVID-19 mitigation efforts.

According to the guidance, that prevention program should also provide for a hazard assessment to pinpoint COVID-19 concerns in the employer's work locations and implement appropriate preventative measures.

In sum, employers, if they have not already done so, should have a working group assembled, with a company official serving as the coordinator for the group, to examine potential hazards and evaluate whether the protective measures in place are robust and consistent with OSHA and CDC guidance.

Moreover, the agency calls for the program to incorporate consideration of protections for workers at higher risk for severe illness and to adopt reasonable modifications such as, perhaps, work from home or assignment to a less densely occupied facility or office.

Accordingly, employers should have a plan for assessing what can be done to provide additional protections for elderly employees or others with health conditions that make them more susceptible to hospitalization or death following infection with the virus.

OSHA also directs in the guidance that the employer's program should implement a system of communicating with employees about the pandemic, including establishing a COVID-19 education and training program.

Consistent with this guidance, if you have not established a system for training employees on, and periodically reminding them of, appropriate infection control measures, you need to put that kind of formal training program in place.

As employers would expect, OSHA cautions businesses to keep employees home when they are diagnosed with the virus, show symptoms, or have been exposed, for time intervals consistent with CDC guidelines.

Some businesses, however, have been rushing workers back following an illness or exposure to COVID-19 more quickly than the CDC recommendations advice.

To do so is foolhardy and invites OSHA citations — in particular if another employee becomes infected by that worker who returned prematurely.

Curiously, OSHA also recommends that the employer's program include making "a COVID-19 vaccine or vaccination series available at no cost to all eligible employees."

Given the fact that members of the public are not to be charged any out-of-pocket cost to receive the

vaccine, it is uncertain what OSHA intends with this language.

Nonetheless, it is clear from the guidance that OSHA expects employers to proactively provide "information and training" to employees on the "benefits and safety of vaccinations."

Also, consistent with the OSHA guidance regarding "no cost" for workers to be vaccinated, employers will want to consider allowing employees to leave work during the day without loss of pay to obtain the vaccine when it is available to them.

OSHA further warns that employers are well advised not to distinguish between workers who are vaccinated and those who are not.

For instance, vaccinated workers should not be excused from wearing masks given the uncertainty as to whether those persons can still transmit the virus.

In other words, the agency plainly wants employers to apply all mitigation measures to both unvaccinated and vaccinated employees alike.

### **Assure Employee Involvement in Your Program**

OSHA leaves no doubt in this new guidance that it expects employers to involve employees directly in developing a program for COVID-19 infection prevention.

For example, with regard to the development of a hazard assessment, the guidance advises that:

[A]ssessment will be most effective if it involves workers (and their representatives) because they are often the people most familiar with the conditions they face.

This emphasis on employee involvement is not surprising given the fact that so many individuals selected by Biden for leadership positions in the Department of Labor and OSHA have union backgrounds.

For instance, the president's choice for principal deputy assistant secretary of labor for occupational safety and health, James Frederick, in his former position as head of health, safety and environment for the United Steelworkers union, repeatedly pressed employers to involve employees in the development of safety and health programs.

Accordingly, your working group established to study the adequacy of your COVID-19 infection prevention program should include a cross-section of employees — including nonsupervisory front-line workers.

### **Consider These Additional Nuts and Bolts of an Effective Program**

Some other recommendations by the agency in the guidance include:

- Remember that wearing a mask is not a substitute for maintaining proper social distancing — 6 feet or more. As a result, mask wearing at work should be a continuous exercise and not something that is only done with an employee within 6 feet of another individual.

- When employees have to work within 6 feet of each other because of considerations such as the placement of workstations, install solid barriers such as Plexiglas shields. As a result, you should audit your workstations to determine whether the 6-foot rule can be maintained and, if it cannot in some instances, erect appropriate barriers.
- Supply appropriate face coverings to employees at no cost and ensure those face coverings are either cloth coverings composed of least two layers or surgical masks. This particular observation by OSHA is especially important. Do not depend on your employees to necessarily bring their own face coverings. Have, for example, surgical masks available at each worksite for employees to use without charge.
- Adopt "an anonymous process for workers to voice concerns about COVID-19-related hazards" and implement other steps to protect employees against retaliation for speaking out about safety and health concerns. The key point is that you should welcome employee input on establishing better COVID-19 mitigation measures.
- Do not forget to comply with OSHA's illness/injury recording and hospitalization/death reporting requirements arising from workplace COVID-19 cases — bear in mind that the agency has released significant separate guidance on complying with recording and reporting requirements with respect to pandemic cases more likely than not involving workplace infection.[3]
- Reevaluate facility ventilation systems to determine any necessary improvements or changes. The new OSHA guidance has a specific list of ideas with regard to improved ventilation. Your facilities' staff should take the opportunity to reexamine whether they can make any further improvements to improve ventilation and protect employees.
- Post signage in work areas encouraging employees to engage in hand hygiene and physical distancing. For instance, have you placed posters in bathrooms, facility entrances, and in work areas reminding employees about handwashing, social distancing and face coverings?
- Exercise caution to not unnecessarily require a COVID-19 negative test result or a doctor's note as a prerequisite to return to work because of the significant delays that requirement may cause for both employers and employees.
- Remember that employees may test positive for three months or more after recovering from COVID-19 symptoms, but, at the same time, not represent a risk of infection to others if allowed to work. Therefore, you may want to bring an employee back who has plainly recovered from COVID-19 but continues to test positive — if it is clear from a health care provider that that individual does not represent a risk of infection.

### **The Time to Reexamine Your COVID-19 Program Is Now**

Employers must bear in mind that this latest guidance comes from a new administration determined to deliver more aggressive OSHA enforcement.

Businesses should expect higher fines and more disclosure to the public from the agency when a business is found to have committed workplace safety violations.

Although this new guidance is not, in and of itself, binding law, the contents plainly reflect what OSHA

now regards as appropriate measures to provide a reasonably safe workplace and may be indicative of what will be found in binding emergency regulations that may be promulgated on or prior to March 15.

In sum, even if you worked hard last spring after the pandemic began to develop a strong COVID-19 prevention program, now is the time to carefully reexamine those efforts in light of this new guidance.

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[1] <https://www.osha.gov/coronavirus/safework>.

[2] 29 U.S.C. § 654(a)(1).

[3] <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>; <https://www.osha.gov/coronavirus/faqs#reporting>.