

## Services

### Employment Law

[OSHA Compliance & Defense](#)

[Employment Litigation and Arbitration](#)

[FLSA Litigation and Wage and Hour Defense](#)

[Immigration](#)

[Unfair Competition and Trade Secrets](#)

[Labor Law](#)

[Employment Advice, Counseling and Risk Management](#)

## COVID-19 Update: FDA Approval of Pfizer Vaccine and New OSHA Guidance

### FDA Approval of Pfizer Vaccine

On August 23, 2021 the Food and Drug Administration (“FDA”) approved the Pfizer-BioNTech COVID-19 vaccine for individuals 16 years or older. Previously, the Pfizer vaccine had received only Emergency Use Authorization (“EUA”) from the FDA. The FDA’s EUA now applies to all other available COVID-19 vaccines, the Pfizer vaccine for individuals between the ages of 12 and 15, and COVID-19 booster shots for immunocompromised individuals.

The FDA’s approval of the Pfizer vaccine likely will lead to more employers implementing mandatory vaccine policies across various industries, including military personnel, federal employees, public and private employers, public schools and universities. The Biden administration also has strongly encouraged mandatory COVID-19 vaccine policies.

### New OSHA Guidance

The U.S. Occupational Safety and Health Administration (“OSHA”) updated its [Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#) on August 13, 2021 in response to the Center for Disease Control’s (“CDC”) July 27, 2021 recommendations for fully vaccinated people to reduce their risk of becoming infected with the Delta variant and potentially spreading it to others. The CDC had recommended that even people who are fully vaccinated wear a mask in public indoor settings in areas of substantial or high transmission, or if they have had a known exposure to someone with COVID-19 and have not had a subsequent negative test three to five days after the last date of exposure.

In issuing its recent guidance, OSHA noted that employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm. Although OSHA’s recent guidance is not mandatory, it does provide employers with best practices to prevent the

spread of COVID-19 in light of evidence related to the Delta variant. OSHA noted the CDC has reported that breakthrough infections in fully vaccinated people occur only in small proportions, which reinforces that vaccines are effective for bringing the pandemic under control. Preliminary evidence, however, suggests that fully vaccinated persons who do become infected with the Delta variant can be infectious and spread the virus to others.

OSHA's updated guidance, which is intended for employers and workers not covered by OSHA's COVID-19 Emergency Temporary Standard for Healthcare, adopts recommendations that are analogous to the CDC's July 27th recommendations regarding mask wearing for all employees regardless of vaccination status, including:

- Wearing a mask in public indoor settings in areas of substantial or high community transmission;
- Choosing to wear masks in public indoor settings regardless of community level of transmission, particularly if the person is at risk for severe illness or if someone in their household has an increased risk or is not fully vaccinated;
- Testing 3 to 5 days after known exposure to COVID-19 and wearing a mask in public indoor settings for 14 days or until receiving a negative test result.

OSHA's updated guidance also encourages employers to:

- Help employees get vaccinated, including granting paid time off for employees to get vaccinated and recover from any side effects, working with local public health authorities to provide vaccinations in the workplace, adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing—in addition to mask wearing and physical distancing—if they remain unvaccinated.
- Instruct infected, unvaccinated workers who have had close contact with someone who tested positive, and all workers with COVID-19 symptoms, to stay home from work.
- Implement physical distancing in communal work areas for unvaccinated and otherwise at-risk workers.
- Provide appropriate face coverings or masks to workers at no cost.
- Provide training and education for COVID-19 policies and procedures using accessible formats and in languages workers understand.
- Suggest or require that unvaccinated visitors wear face coverings in public-facing workplaces, and that all visitors wear face coverings in public indoor settings in areas of substantial or high transmission.
- Maintain ventilation systems.
- Perform routine cleaning and disinfection.
- Record and report COVID-19 infections and deaths.
- Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards.

OSHA further recommends employers take additional steps to mitigate the spread of COVID-19 among unvaccinated or otherwise at-risk workers due to workplace environmental factors, particularly in areas of substantial or high transmission. For example, OSHA's mask recommendations are even narrower than the CDC guidance by encouraging mask wearing to protect at-risk employees working in specific industries, including "manufacturing; meat, seafood, and poultry processing; high-volume retail and grocery; and agricultural processing settings." OSHA also recommends unvaccinated or at-risk employees wear masks when sharing a vehicle.

### **Employment Issues to Consider**

These recent updates are intended to provide guidance to employers in protecting themselves and their employees from COVID-19, though guidance itself is not law. Nevertheless, we recommend employers update their COVID-19 policies and protocols in response to the FDA's approval of the Pfizer vaccine and OSHA's updated guidance.

In improving COVID-19 safety precautions, employers may choose to adopt a commonsense approach by requiring masks for all workers, including those who are fully vaccinated, only in specific situations such as in common areas. Employers also could require employees to wear masks at all times to best eliminate the risk of COVID-19 transmission in the workplace. Additionally, implementing a mandatory mask or COVID-19 vaccine policy could raise several practical issues for employers to consider, such as how those policies would affect hiring, retention and employee morale, and how employers can provide employees with reasonable accommodations due to medical reasons or religious beliefs. For more information regarding employer-mandated vaccination requirements, please see Kutak Rock's prior [client alert](#) on whether employers may mandate COVID-19 vaccines.

If you have any questions about workplace management of COVID-19, including how to comply with OSHA's updated guidance or implement a mandatory COVID-19 vaccine for your workforce, please contact your Kutak Rock attorney or a member of our [National Employment Law Group](#). You may also visit us at [www.KutakRock.com](http://www.KutakRock.com).

