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OSHA Provides Employers With Guidance on Masks and Vaccines

OSHA References CDC Mask Guidance for Current Standard

On May 13, 2021, the Centers for Disease Control and Prevention (“CDC”) modified its recommendations related to SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (“COVID-19”), in its [“Interim Public Health Recommendations for Fully Vaccinated People.”](#)

The CDC advised, “Fully vaccinated people no longer need to wear a mask or physically distance in any setting, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.”

The CDC also specified that fully vaccinated, asymptomatic individuals do not need to quarantine, be restricted from work, or be tested following an exposure to someone with suspected or confirmed COVID-19 due to the low risk of infection.

Exceptions to this new guidance include recommendations of continued mask use for individuals within the healthcare industry, in correctional facilities and in homeless shelters. For unvaccinated individuals, the CDC also specifically stated, “Prevention measures are still recommended for unvaccinated people.”

With this shift, employers immediately looked to the Occupational Safety and Health Administration (“OSHA”) for guidance on whether businesses may now permit fully vaccinated employees to stop wearing face coverings or social distancing in locations where public health ordinances have relaxed such measures. Within days, OSHA updated its January 29, 2021 non-mandatory guidance entitled “Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace,” stating it was “reviewing the recent CDC guidance and will update our materials on this website accordingly.”

OSHA further advised, “Until those updates are complete, please refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers.” Given OSHA’s deference to

the CDC on the issues of mask use and social distancing, employers may now permit fully vaccinated employees to remove their masks in workplaces, including hallways and other common areas, assuming state and local ordinances similarly permit such measures.

Businesses should check state and local mask mandates before modifying their COVID-19 policies and practices for fully vaccinated employees in their workplaces, as well as continue to uphold all safety measures, including mask use and social distancing, for unvaccinated workers.

OSHA Publishes New FAQs for Recording Adverse Reactions to COVID-19 Vaccines

OSHA also recently released three new answers to frequently asked questions (“FAQs”) regarding employers’ recording obligations where COVID-19 vaccinations result in adverse reactions.

In brief, if an employer *requires* employees to receive a COVID-19 vaccination as a condition of employment, then any adverse reaction to the COVID-19 vaccine is considered to be work-related and must be recorded on the employer’s OSHA 300 log, assuming the other requirements of a recordable event are met. However, employers that merely *recommend* COVID-19 vaccinations to their workforce are not required to record any adverse reactions suffered by employees who choose to take the vaccine.

For this enforcement discretion to apply, OSHA cautions that vaccination decisions must be “truly voluntary.” If an employer makes any adverse employment decision based on an employee’s choice to accept or reject a COVID-19 vaccine, it will undercut any representation by the company that it merely recommends vaccinations instead of requiring them.

OSHA’s full responses to these new FAQs are as follows:

Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?

In general, an adverse reaction to the COVID-19 vaccine is recordable if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR 1904.7 (e.g., days away from work, restricted work or transfer to another job, medical treatment beyond first aid).

If I require my employees to take the COVID-19 vaccine as a condition of their employment, are adverse reactions to the vaccine recordable?

If you require your employees to be vaccinated as a condition of employment (i.e., for work-related reasons), then any adverse reaction to the COVID-19 vaccine is work-related. The adverse reaction is recordable if it is a new case under 29 CFR 1904.6 and meets one or more of the general recording criteria in 29 CFR 1904.7.

I do not require my employees to get the COVID-19 vaccine. However, I do recommend that they receive the vaccine and may provide it to them or make arrangements for them to receive it offsite. If an employee has an adverse reaction to the vaccine, am I required to record it?

No. Although adverse reactions to recommended COVID-19 vaccines may be recordable under 29 CFR 1904.4(a) if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR 1904.7, OSHA is exercising its enforcement discretion to only require the recording of adverse effects to required vaccines at this time. Therefore, you do not need to record adverse effects from COVID-19 vaccines that you recommend, but do not require.

Note that for this discretion to apply, the vaccine must be truly voluntary. For example, an employee's choice to accept or reject the vaccine cannot affect their performance rating or professional advancement. An employee who chooses not to receive the vaccine cannot suffer any repercussions from this choice. If employees are not free to choose whether or not to receive the vaccine without fearing adverse action, then the vaccine is not merely "recommended" and employers should consult the above FAQ regarding COVID-19 vaccines that are a condition of employment.

Note also that the exercise of this discretion is intended only to provide clarity to the public regarding OSHA's expectations as to the recording of adverse effects during the health emergency; it does not change any of employers' other responsibilities under OSHA's recordkeeping regulations or any of OSHA's interpretations of those regulations.

Finally, note that this answer applies to a variety of scenarios where employers recommend, but do not require vaccines, including where the employer makes the COVID-19 vaccine available to employees at work, where the employer makes arrangements for employees to receive the vaccine at an offsite location (e.g., pharmacy, hospital, local health department, etc.), and where the employer offers the vaccine as part of a voluntary health and wellness program at my workplace. In other words, the method by which employees might receive a recommended vaccine does not matter for the sake of this question.

If you need any further guidance or information on OSHA's current positions related to mask use or vaccinations for your organization's workforce, please contact any of the attorney members of Kutak Rock's [OSHA Compliance & Workplace Safety Group](#) or its [Employment Law Group](#). You may also visit us at www.KutakRock.com.

