

COVID-19: OSHA Standards & Vaccine Issues in the Workplace

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Overview: DOL & State OSHA Responses to COVID-19

- After issuing shifting/conflicting guidance during 2020, OSHA issued new guidance on 1/29/21, followed by a COVID-19 NEP and an OSHA C-19 enforcement plan on 3/12/21

 - January 29th Employer Compliance Guidance: <https://www.osha.gov/coronavirus/safework>
 - NEP Link: <https://www.osha.gov/enforcement/directives/dir-2021-01cpl-03>
 - Enforcement Memorandum: <https://www.osha.gov/memos/2021-03-12/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>
- MSHA issued new guidance 3/21 as well, tracks with OSHA/CDC elements but includes unique recommendations for mining work environments: <https://www.msha.gov/protecting-miners>
- CalOSHA, MI-OSHA, OR-OSHA & Virginia OSHA all issued COVID ETS
 - Virginia **finalized permanent rule** on COVID-19 – effective 1/27/21
 - CalOSHA had ATD standard but now adopted ETS and working on additional rules and policy
 - OR-OSHA has permanent COVID-rule to replace ETS
 - MIOSHA adopted COVID ETS in October 2020 – only in effect for 6 mo. (further action TBA)
 - WISHA has issued proposed rule intent for infectious disease rulemaking
- In total, 14+ states have adopted some form of worker safety protections in addition to separate executive orders requiring face masks in the workplace, which have been issued by some governors

Federal OSHA Response to C-19

- New May 2021 CDC policy on vaccinated persons has complicated OSHA guidance and ETS rulemaking
- CDC says vaccinated persons need not wear masks (indoor or outdoor) but unvaxxed should wear masks indoors – but this is for PUBLIC safety (not workplace, which OSHA governs)
- Biden administration COVID-19 workplace COVID guidance – updated June 10, 2021
- “At Risk” workers now defined as those with health conditions (transplants, steroid use, immune conditions) who may not have full immune response to vaccination.
 - Under ADA, these may be required to additional accommodations – as must workers who cannot safely wear face coverings
- Other OSHA guidance (post-inauguration):
 - 1/29/21: Employer Compliance Guidance: <https://www.osha.gov/coronavirus/safework>
 - 3/12/21 NEP Link: <https://www.osha.gov/enforcement/directives/dir-2021-01cpl-03>
 - 3/12/21 Enforcement Memorandum: <https://www.osha.gov/memos/2021-03-12/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>

OSHA ETS for Health Care

- ETS aimed at protecting workers facing the highest COVID-19 hazards— in healthcare settings where suspected or confirmed COVID-19 patients are treated
- ETS takes effective immediately upon publication in the Federal Register.
- Employers must comply with most provisions within 14 days, and with provisions involving physical barriers, ventilation, and training within 30 days.
 - OSHA will use its enforcement discretion for employers who are making a good faith effort to comply with the ETS.
- Covers the following workplaces:
 - hospitals, nursing homes, and assisted living facilities;
 - emergency responders;
 - home healthcare workers; and
 - employees in ambulatory care facilities where suspected or confirmed COVID-19 patients are treated.
- *ETS exempts fully vaccinated workers from masking, distancing, and barrier requirements when in well-defined areas where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present.*

OSHA ETS – Health Care

COVID-19 ETS is one standard with multiple sections, all contained in Subpart U:

- 29 CFR 1910.502 – Healthcare: Except as otherwise provided in the standard, applies to all settings where any employee provides healthcare services or healthcare support services.
- 29 CFR 1910.504 – Mini Respiratory Protection Program: Addresses limited requirements for situations where respirators are used in accordance with specific provisions in 1910.502.
- 29 CFR 1910.505 – Severability: Provides that each section of Subpart U and each provision within those sections is separate and severable from the other sections and provisions.
- 29 CFR 1910.509 – Incorporation by Reference: Contains materials adopted as part of the ETS, including: Centers for Disease Control and Prevention (CDC) guidance, consensus standards for personal protective equipment (PPE), and EPA's list of approved disinfectants.

OSHA ETS – Key Requirements

- COVID-19 plan: Develop and implement a C-19 plan (in writing if more than 10 employees) that includes a designated safety coordinator with authority to ensure compliance, a workplace-specific hazard assessment, involvement of non-managerial employees in hazard assessment and plan development/implementation, and policies and procedures to minimize the risk of transmission to employees.
- Patient screening and management: Limit and monitor points of entry to settings where direct patient care is provided; screen and triage patients, clients, and other visitors; implement patient management strategies.
- Standard and Transmission-Based Precautions: Develop and implement policies and procedures to adhere to Standard and Transmission-Based precautions based on CDC guidelines.
- Personal protective equipment (PPE): Provide and ensure each employee wears a facemask when indoors and when occupying a vehicle with other people for work purposes; provide and ensure employees use respirators and other PPE for exposure to people with suspected or confirmed C-19, and for aerosol-generating procedures on a person with suspected or confirmed C-19.
- Aerosol-generating procedures on a person with suspected or confirmed COVID-19: Limit employees present to only those essential; perform procedures in an airborne infection isolation room, if available; and clean and disinfect surfaces and equipment after the procedure is completed.
- Physical distancing: Keep people at least 6 feet apart when indoors. ? Physical barriers: Install cleanable or disposable solid barriers at each fixed work location in non-patient care areas where employees are not separated from other people by at least 6 feet
- Cleaning and disinfection: Follow standard practices for cleaning and disinfection of surfaces and equipment in accordance with CDC guidelines in patient care areas, resident rooms, and for medical devices and equipment; in all other areas, clean high-touch surfaces and equipment at least once a day and provide alcohol-based hand rub that is at least 60% alcohol

OSHA ETS – Key Requirements

- Ventilation: Ensure that employer-owned or controlled existing HVAC systems are used in accordance with manufacturer's instructions and design specifications for the systems and that air filters are rated MERV 13+
- Health screening and medical management: (1) Screen employees before each workday and shift; (2) Require each employee to promptly notify the employer when the employee is COVID-19 positive, suspected of having COVID-19, or experiencing certain symptoms; (3) Notify certain employees within 24 hours when a person who has been in the workplace is COVID-19 positive; (4) Follow requirements for removing employees from the workplace; (5) Employers with more than 10 employees, provide medical removal protection benefits in accordance with the standard to workers who must isolate or quarantine.
- Vaccination: Provide reasonable time and paid leave for vaccinations and vaccine side effects.
- Training: Ensure all employees receive training so they comprehend COVID-19 transmission, tasks and situations in the workplace that could result in infection, and relevant policies and procedures
- No Retaliation – and requirements must be implemented at no cost to workers
- ***Recordkeeping: Establish a COVID-19 log (if more than 10 employees) of all employee instances of COVID-19 without regard to occupational exposure and follow requirements for making records available to employees/representatives.***
- ***Report work-related COVID-19 fatalities and in-patient hospitalizations to OSHA.***

OSHA C-19 – General Industry Guidance – 6/21

- Except for workplace settings covered by OSHA's ETS and mask requirements for public transportation - most employers no longer need to take steps to protect workers from C-19 exposure in any workplace, where ALL EMPLOYEES are fully vaccinated.
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- Employers should take steps to protect unvaccinated or at-risk workers in their workplaces, including:
 1. Giving paid time off for employees to get vaccinated
 2. Instructing workers who've had close contact with infected persons, or who are themselves infected, to stay home
 3. Implementing physical distancing for unvaxxed or at-risk workers in all communal work areas
 4. Protecting unvaxxed or at-risk workers with face coverings or surgical masks, unless work task requires respirator or other PPE
 5. Training workers on C-19 policies and procedures in accessible formats and in language they understand
 6. Suggesting that unvaxxed customers, visitors and guests wear face coverings
 7. Maintaining ventilation systems
 8. Performing routine cleaning & disinfection
 9. Recording and reporting C-19 infections and deaths*
 10. Implementing protections from retaliation and set up anonymous process for workers to voice concerns about C-19 hazards
 11. Following other applicable OSHA mandatory standards (PPE assessment, respiratory protection, sanitation, BBP, medical and exposure records)

OSHA 2021 Enforcement Memorandum: Key Points

OSHA will perform onsite inspections, identify C-19 hazard exposures, ensure appropriate controls are implemented, and address violations of OSHA standards and General Duty Clause (Sec 5(a)(1) of OSH Act)

OSHA may use phone/video conferencing in lieu of F2F employee interviews to mitigate exposure, and will minimize in-person meetings with employers, and ask for docs to be provided electronically

CSHOs who believe they've been exposed to C-19 during inspection must immediately report this to AD

OSHA will continue to prioritize unprogrammed C-19 inspections as well as Programmed NEP Inspections

OSHA will consider workplace risk levels using the following factors:

- Extent of community transmission
- Type of work activity
- Ability of workers to wear face coverings and appropriate PPE
- Extent to which employer follows OSHA standards and CDC guidance
- Need to work in close contact with other people (within 6 feet for TOTAL of 15 minutes in 24-hour period)
- May consider mitigation such as vaccines

2021 COVID-19 National Emphasis Program (NEP)

NEP includes criteria to identify “high hazard industries” targeted for enforcement and compliance actions—
in effect immediately (3/12/21) for one year -- can be amended or canceled

Goal of NEP is to “significantly reduce or eliminate worker exposures to C-19 by targeting industries and worksites where employees may have a high frequency of close contact exposures” and controlling the associated health hazards

C-19 NEP includes a focus on Whistleblower Protections & CSHOs will distribute educational information to workers on their rights under Section 11C & 29 CFR Part 1904

NEP uses combination of inspection targeting, outreach to employers, and compliance assistance; if worksite is also under SST, the inspections will be concurrent and wall-to-wall

OSHA NEP will include follow up inspections at sites visited in 2020 to monitor efforts

➤ ***2021 C-19 relief bill included \$100 MILLION in additional OSHA funding (above current \$592M level) with at least \$5M used for C-19 enforcement activities under the NEP and \$10M for Harwood Grants***

➤ ***Biden administration proposed budget for DOL FY 2022 includes 17% increase overall***

COVID-19 National Emphasis Program

NEP Inspections will focus on verifying that employers are taking correct actions to protect workers from C-19 and augments non-programmed activities such as follow-up inspections on complaints, referrals, and severe incident reports (all worksites eligible for unprogrammed events)

Includes Precautions for CSHOs to take during on-site inspections (App. D)

- Unprogrammed C-19 inspections will continue at worksites where employees have high frequency of “close contact” exposures (particularly in health care)
- Area offices will continue to prioritize C-19 fatalities, complaints and referrals for inspection
- Within 60 days, state plan states must provide notice of intent indicating whether already have substantially similar policy in place, intend to adopt new policies, or do not intend to adopt the directive

Any other health or safety hazards observed (non-C-19) will be referred for later inspection (health) or will be cited if in plain view (safety)

For programmed inspections, NEP will generate two “master lists”:

- Master List 1 – Establishments having NAICS code in Appendices A or B
- Master List 2 – Establishments in NAICS code in App A/B with ELEVATED illness rate as indicated by Form 300A

State OSHA/MSHA Responses to COVID-19

- MSHA issued new guidance 3/10/21, tracks with OSHA/CDC elements but includes unique recommendations for mining work environments: <https://www.msha.gov/protecting-miners>
- State plan rulemakings now conflict with CDC and federal OSHA guidance!
 - Virginia **finalized permanent rule** on COVID-19 – effective 1/27/21
 - CalOSHA had ATD standard but now adopted ETS and working on additional rules and policy
 - OR-OSHA adopted **permanent** COVID-rule in May 2021
 - MIOSHA adopted COVID ETS in October 2020 – in effect for 6 mo. (further action TBA)
 - WISHA has proposed a new infectious disease/C-19 rule
 - Nevada-OSHA just issued new COVID policy in May 2021
 - In total, 14+ states have adopted some form of worker safety protections in addition to separate executive orders requiring face masks in the workplace, which have been issued by some governors

MSHA & COVID-19

- MSHA guidance requires mine operators to adopt either stand-alone programs or additions to existing training and education programs, that include the following key elements:
 - Conducting a [hazard assessment](#) of the mine site – ventilation emphasis;
 - Appointing a mine coordinator who will be responsible for C-19 issues on operator's behalf and will regularly communicate with the miners' rep or directly with miners;
 - Identifying a combination of measures that limit the spread of COVID-19 in mine settings;
 - Recording and reporting C-19 infections and deaths;
 - Performing enhanced cleaning and disinfecting after people with suspected or confirmed C-19 have been in the mine setting;
 - Providing guidance on screening and testing, and consider making a C-19 vaccine available at no cost to eligible employees;
 - Adopting measures to ensure that miners who are infected or potentially infected are separated and sent home from the mine;
 - Educating and training miners on C-19 policies and procedures in formats and language that they understand;
 - Instructing miners who are infected or potentially infected to stay home and isolate or quarantine and isolating miners who show symptoms at work;
 - Considering protections for miners at higher risk for severe illness through supportive policies and practices; and
 - Implementing protections from retaliation for miners who raise COVID-19-related concerns.

Whistleblower Protections: OSHA & MSHA

President Biden's EO directs OSHA to focus enforcement on employers who engage in retaliation against workers who complaint about unsafe/unhealthful conditions or who exercise any rights under Section 11(c)(1) of Occupational Safety & Health Act of 1970, which states:

- “No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.”

29 CFR 1904.36 states:

- “In addition to protections in 1904.35, the final rule also codifies Section 11(c) into recordkeeping regs, stating:
Section 11(c) of the OSH Act also prohibits you [Employer] from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises any rights afforded by the OSH Act.”
- **NOTE: MSHA has comparable protections under Section 105(c) of the Mine Act and these also cover contractors**

Virginia OSHA (VOSH) Permanent C-19 Standard

Virginia issued United States' first COVID ETS in 2020 – Permanent rule enacted 1/21 with all provisions in effect as of 3/26/21

Modifies detailed standard in some ways but retains focus on applying specific provisions to places of employment based on the exposure risk level presented by SARS-CoV-2 virus-related and COVID-19 disease-related hazards present or job tasks undertaken by employees at the place of employment

Employers may comply with CDC guidelines, both mandatory and non-mandatory, instead as long as CDC recommendation provides equivalent or greater protection than provided by a provision of VOSH rule

- In order for an employer to take advantage of the provision, it would have to demonstrate that it was complying with language in CDC publications that could be considered both “mandatory” (e.g., “shall”, “will”, etc.) and “nonmandatory” (“it is recommended that”, “should”, “may”, etc.). In other words, an employer would have to comply with a CDC “recommended” practice even if the CDC publication doesn't “require” it.

VOSH COVID-19 PERMANENT STANDARD

VOSH recognizes that various hazards or job tasks at the same place of employment can be designated as “very high”, “high”, “medium”, or “lower” as presenting potential exposure risk for purposes of application of the requirements of this standard.

Factors to consider for types of hazards encountered:

- Exposure to airborne transmission of COVID-19
- Contact with contaminated surfaces or objects (e.g., tools, workstations, break rooms, locker rooms, and entrances and exits to facilities)
- Shared work vehicles
- Employer sponsored shared transportation such as ride-share vans, shuttle vehicle, car-pools and public transportation

➤ ***Don't forget to document COVID hazards on your PPE Hazard Assessment under 29 CFR 1910.132***

Provisions Applicable to all Virginia Employers

Employers shall:

- assess their workplace for hazards and job tasks with potential COVID-19 exposure
- classify each job task according to the hazards employees are potentially exposed to and ensure compliance with applicable sections of standard
- develop and implement policies and procedures for employees to report when they are experiencing signs and/or symptoms consistent with COVID-19, and no alternative diagnosis has been made
- NOT permit employees known to be infected to report to or be allowed to remain at work or on a job site until cleared for return to work
- discuss with subcontractors, and companies that provide contract or temporary employees about the importance of suspected COVID-19 and known COVID-19 subcontractor, contract, or temporary employees staying home and encourage them to develop non-punitive sick leave policies
- notify employees at the place of employment, other employers, and the building/facility owner if an employer is notified of a COVID-19 positive test for one of its own employees, a subcontractor employee, or other person who was present at the place of employment
- notify VDH and DOLI in certain situations and implement policies and procedures for employee return to work

Workplace Classifications: VOSH

Very High – Places of employment with high potential for employee exposure to known or suspected sources of COVID-19, or known or suspected to be infected with COVID-19

- Group – Special medical, postmortem, or laboratory procedures

High – Places of employment with high potential for employee exposure inside 6 ft with person known or suspected sources of COVID-19, or person known or suspected of being infected with COVID-19

- Group – Healthcare, first responders, medical transport, mortuary services

Medium – Not classified as Very High or High, that require more than minimal contact inside 6 ft with other employees, persons, or general public or may be but are not known or suspected to be infected with COVID-19

- Group is large and will capture most non-office plant, manufacturing, and construction jobsites.

Lower – Not classified as Very High, High, or Medium and that does not require contact inside 6 ft with persons known or suspected of being infected with COVID-19 (offices or workplaces that have achieved minimal contact through implementation of engineering, administrative and work practice controls)

VOSH COVID-19 Training Requirements

Employers with hazards or job tasks classified as **VH, H, or M** exposure risk at a POE shall provide training on hazards and characteristics of COVID-19 to all employees working at the POE regardless of risk classification

Training must be given in a language and vocabulary that workers understand, bearing in mind illiteracy issues if using written materials

Employees should be able to recognize the hazards of COVID-19 and train employees to minimize these hazards

Training must include,

- Requirements of this rule
- Mandatory and non-mandatory recommendations of CDC guidelines or VA guidance documents the employer is complying with in lieu of the rule
- Characteristics and methods of transmission
- Signs and symptoms of COVID-19 illness and underlying health conditions
- Awareness of pre-symptomatic and asymptomatic COVID-19 persons to transmit

Other VOSH Rule Provisions

- Final Rule provides:

- *No enforcement action shall be brought against an employer for failure to provide PPE required by standard, if PPE is not readily available on commercially reasonable terms, and the employer or institution makes a good faith effort to acquire or provide PPE*
- Final Rule could serve as template for federal OSHA ETS - also subject to litigation by business community
- Final Rule: <https://www.doli.virginia.gov/wp-content/uploads/2021/01/Final-Standard-for-Infectious-Disease-Prevention-of-the-Virus-That-Causes-COVID-19-16-VAC25-220-1.27.2021.pdf>
- Guidance on Final Rule: <https://www.doli.virginia.gov/proposed-permanent-standard-for-infectious-disease-prevention-for-covid-19/>

Maryland COVID-19 Law

- MD legislature enacted legislation requiring creation of C-19 workplace safety rules (HR 581)
 - It became law this month, without the governor's signature
- Requires MOSH to implement an ETS in response to pandemic – similar to VOSH rule – and to adopt any new federal standard that OSHA issues
- Allows essential workers to refuse to perform certain tasks as provided under certain circumstances, and requires essential employers to take steps to minimize infectious disease transmission
- Prohibits employers from discharging or discriminating against an essential worker who files a complaint or exercises other rights under the law
- Mandates that employers cover COVID-19 testing and report certain test results to MD Dept of health, which must categorize and publish the results
- Requires employers to grant emergency paid bereavement and public health emergency leave to “essential employees” during public health emergency on top of existing paid leave

Michigan COVID-19 ETS

- MIOSHA adopted Emergency Rules for all businesses , with specific requirements for manufacturing, construction, retail, health care – amendments made May 24, 2021
- MIOSHA has removed the requirement that employers must create a “policy prohibiting in-person work for employees to the extent that their work activities can feasibly be completed remotely.”
- The agency has also rescinded the draft permanent COVID-19 rules, and its ETS has been modified effective 5/24/21:
 - Employers may allow fully vaccinated employees to not wear face coverings and social distance provided they have a policy deemed effective to ensure non-vaccinated individuals continue to follow these requirements.
 - The rules have been reformed focusing on performance, eliminating industry-specific requirements. Definitions have been updated to more clearly reflect changes in close contact and quarantining requirements for fully vaccinated employees.
 - Cleaning requirements have been updated to reflect changes in CDC recommendations.
 - Employers should continue to have and implement a written COVID-19 preparedness and response plan in accordance with the updated rules.

Cal/OSHA ATD & COVID-19

Cal/OSHA's regulations require protection for workers exposed to airborne infectious diseases such as COVID-19 - ***California Code, Title 8, Subtitle 5199***

CalOSHA COVID-19 resource page: <https://www.dir.ca.gov/dosh/coronavirus/>

Aerosol Transmissible Diseases (ATD) standard contains requirements for protecting employees from diseases and pathogens transmitted by aerosols

Cal/OSHA's ATD Standard applies to:

- Hospitals, skilled nursing facilities, clinics, medical offices, outpatient medical facilities, home health care, long-term health care facilities, hospices, medical outreach services, medical transport and emergency medical services, correctional facilities, laboratories etc.
- BUT ... can be applied at any other locations when Cal/OSHA informs employers in writing that they must comply with the ATD Standard.

➤ Cal-OSHA ETS was put in place in all workplaces, but then ...

Now What, Cal-OSHA?

- June 9, 2021: CAL-OSHA's Occupational Safety and Health Standards Board held a special meeting to hear from the California Department of Public Health on new face covering guidance, and Board withdrew revisions to the Emergency Temporary Standards that were previously sent to the Office of Administrative Law in order to update Cal/OSHA's COVID-19 prevention requirements with the latest guidance.
- The board posted [new revisions](#) on June 11 that incorporate the latest public health guidance.
- The revisions were considered at the board's regular meeting on June 17, and rejected 5-1 and Gov. Newsom issued EO making changes immediately effective.
- NEW RULES:
 - Workplaces must provide masks to workers who are not fully vaxxed and make sure they wear face coverings indoors or in shared work vehicles or employer-provided transport.
 - Employers must also provide a respirator (N95) if employee who is not yet fully vaccinated requests one.
 - Unvaxxed workers can take off masks indoors only if alone or eating/drinking
 - Cal-OSHA eliminated requirement for solid, cleanable partitions
 - Employers must document vax status of employees who will go without face coverings indoors, but do not have to retain copies of the cards, and employees can "self-attest" to their inoculation status
- Review the latest information on the revisions in Cal/OSHA's FAQs: <https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.html>

OR-OSHA COVID-19 ETS

- OR-OSHA's ETS rule was adopted 11/6/2020 – took effect on 11/16/2020 (with certain parts phased in but all now in effect) – and permanent rule has been adopted (subject to modification)
 - Final Rule: <https://osha.oregon.gov/OSHARules/div1/437-001-0744.pdf> (effective 5/4/2021 - all workplaces)
- Final version reflects changes from the draft after stakeholder meetings with employer/worker reps
- Possible Rescission? Oregon OSHA Partnership Committee and Rulemaking Advisory Committees will meet beginning 7/21 at least bimonthly to determine if any parts of the rule can be repealed
- June 7: Press release stating once OR reaches 70% vax threshold, state will not require masks or face coverings except in transit and health care settings, and OR-OSHA will repeal its requirement at that time
- Face Coverings & Distancing: includes the requirements, although it removes most such references from the appendices and creates a base requirement for workplaces where the guidance does not apply.
- ETS/Final Rule: OR-OSHA “scrubbed” all ETS appendices to eliminate guidance not specific to worker protection, reducing the number of appendices by six and their overall length by more than 70 percent
- NOTE: Proposed rule language on informing workers about leave rights and also provisions on vaccines were eliminated from final rule

OR-OSHA COVID-19 Rule

Basic provisions:

- Employer must ensure 6-foot distancing between all individuals in the workplace through design of work activities and workflow, unless shown infeasible
- Employer must ensure that face coverings are worn at the workplace by ALL individuals (employees (FT/PT), and customers, as well as at any establishment under employer's control
- Face masks/coverings/shields must be provided to employees by employer at no cost
- Whenever employees are transported in a motor vehicle for work purposes, all persons inside must wear a face covering (unless all members of the same household).
- Employer must maximize the effectiveness of existing ventilation systems, maintain and replace air filters, clean intake ports (but do not have to purchase new ventilation systems)
 - Final rule requires employers with more than 10 employees to attest that they are running their ventilation system in accordance with the rule
- Post COVID-19 Hazards poster (available from state in English/Spanish)

OR-OSHA COVID-19 Final Rule

Employers must develop an infection control plan, with participation and feedback from employees

- This involves conducting risk assessment to address when workers must use PPE, and a description of controls
-

Employers must provide information and training to their employees:

- Employers must train their employees about PPE/social distancing requirements and how they will be implemented in the workplace, and
- Employers must provide an opportunity for employee feedback about those practices (through the Social Distancing Officer and through either the Safety Committee, an interactive safety meeting, or both). Such notification must be conducted in a manner and language understood by the affected workers.

Employers must provide an explanation of the employer's policies and procedures for employees to report signs or symptoms of COVID-19. Such explanations must be conducted in a manner and language understood by the affected workers.

Employers must notify affected workers with 24hrs of work-related COVID-19 infection and cooperate with public health officials if testing within the workplace is necessary.

➤ *Additional measures included for high-risk jobs including: detailed infection control training and planning, sanitation procedures for routine cleaning & disinfecting, "robust" use of PPE, operating ventilation systems according to nat'l standards, use of barriers and isolation rooms, and screening/triaging for C-19 symptoms*

Washington State OSHA

- May 13: filed notice of possible rulemaking on “Occupational Exposures to Infectious or Contagious Diseases - <https://www.lni.wa.gov/rulemaking-activity/AO21-12/2112CR101.pdf>
- Would provide guidelines for state to follow in case of infectious disease outbreak, subject to public health emergency or under national or state declared emergency
- There will be opportunity for public comment and testimony
- <https://www.lni.wa.gov/rulemaking-activity/>

Nevada Dept. of B&I Guidance

Issues 5/14/21 – applies to all businesses operating in NV, and NV-OSHA imposes new requirements, including:

- Encourage employees to get COVID-19 vaccine
- Follow CDC guidance on face coverings – but private entities can have more restrictive policies
- Unvaccinated employees must be provided by employer with face coverings and wear them when in close contact with public or where food is prepared, packaged or distributed
- Wear face coverings in common areas (unvaxxed)
- Maintain regular housekeeping practices, cleaning and disinfecting of surfaces and equipment
- Conduct daily surveys of changes to labor health conditions
- Provide access to potable and sanitary water
- Post signage with latest CDC guidance
- Complete JHA for each task that is identified where transmission of C-19 is an immediate concern

EEOC Guidance on Mandatory Vaccines

- Guidance addresses how vaccination interacts with ADA, Title VII, ADEA and GINA
 - UPDATED 5/28/2021: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the [reasonable accommodation provisions of Title VII and the ADA and other EEO considerations](#)
- Requesting proof of vaccine is NOT a medical exam prohibited under ADA – but avoid reviewing medical screening questionnaires (HIPAA/GINA considerations)
- EEOC currently says that if worker cannot be vaccinated because of disability/religious belief and there are no feasible reasonable accommodations available, employer may lawfully exclude worker from physical workplace
 - Unvaccinated person is not “per se” a “direct threat to safety” – individualized assessment needed
- Employer should avoid termination or other adverse actions before carefully evaluating whether worker may work remotely or has protected rights under OTHER employment laws or regulations at federal, state or local level (including state OSHA COVID ETS)
 - Don’t forget about FMLA, which may require intermittent leave and could be triggered by new federal Executive Orders or emergency ETS – stay alert!

Labor Law & Union Implications

- Employer decision to require some employee groups to be vaccinated as a condition of employment will likely require bargaining with labor organizations for represented workers
- EEOC guidance suggesting vaccines may be mandated does not address more restrictive terms under the NLRA – matters which affect T/C of employment are mandatory subjects of bargaining
- Employer may need to defend against ULP charge or a request for legal injunctive relief by a union to prevent employer's implementation of a unilateral vaccine mandate
- Time to begin negotiations is YESTERDAY – vaccine rollout has begun in most states for 1A/1B
- Prepare to negotiate related issues – including right to refuse vaccination under the Food, Drug & Cosmetic Act (statutory right to refuse vaccine but no process for accommodating workers who exercise such right) - as well as employer access to worker vaccine records and union access to same records
 - ✓ **Good practice is to get workers to sign declination of vaccine if offered to workforce at worksite**
- Do NOT summarily terminate such workers – consider whether they can consider to (safely) work but this is NOT an ADA accommodation process so do not blur the lines
 - Accommodations for non-vaccinated workers could include telework, enhanced PPE such as PAPRs, leaves of paid/unpaid absence

Employee Vaccine Incentive Programs

- OSHA: in Obama admin, position was that incentive programs that deprive a worker from getting a benefit (prize, bonus, gift card etc.) because of having an injury OR exercising ANY rights under Section 11(c) of the OSH Act were a violation of whistleblower protections
- OSHA can issue citation under 29 CFR 1904.36 for any retaliation against a worker for protected activity – including refusal of assignments that worker believes pose a risk to health/safety – civil penalties of up to \$136,532 per affected worker, plus “make whole” relief for worker as needed
- Where will vaccines – which CAN cause health complications in some workers – fall in this analysis?
- What about the medical ethics of “economic coercion” of \$\$ vulnerable low wage retail or frontline workers?
- Some Grocery Chains have announced “incentives” to offer workers compensation for getting vaccinated
 - Aldi is offering workers 2 hours with pay for each of the two vaccine doses, and says workers will not lose pay for missed hours from work and that it will help pay for the shots
 - Trader Joe’s and Dollar General are offering workers extra hourly wages to get the COVID-19 vaccine (but DG will not force workers to get vaccinated)
 - Online delivery company Instacart is offering a \$25 stipend for eligible workers and contractors

Solutions

- Employer can rebut any presumption of compensability by showing compliance with public health guidelines in place at the time of exposure,
- If federal guidance encourages vaccines, and employer's policy is consistent with those guidelines, that is helpful evidence
- Employers may consider different policies based on job duties and anticipated COVID exposure (triage using state ETS classifications)
- Employers who mandate or encourage vaccinations also need process in place for tracking which workers have been inoculated (initial/booster), or if they signed waiver for health/religious reasons
- Provide PTO for workers who get the shot for them to recover
- Have telemedicine options available for workers who have adverse reactions

Solutions

- Where feasible, have third party provider (e.g., pharmacy) administer the vaccine and coordinate verification process
- Evaluate industry conditions and practices (and culture!) to determine whether to implement mandatory vaccination program
- Consider what specific protections for workers may be required under unique state/municipal employment, OSHA or COVID-specific statutes and regulations – one-size-fits-all may not work!
- Stay abreast of changing guidance from EEOC, NLRB, OSHA as all have new political leadership
- Watch for additional COVID-19 Executive Orders impacting vaccine administration and paid leave requirements
- Consider that under new EO, workers who reasonably refuse a hazardous job will be entitled to unemployment insurance compensation and may also have rights under Section 11(c) of OSH Act (and Section 105(c) of Mine Act)



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Questions???

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