CLIENT ALERT: OSHA Issues Updated Guidance on "Mitigating and Preventing the Spread of COVID-19 in the Workplace"

On August 13, 2021, the Occupational Safety and Health Administration ("OSHA") issued updated guidance on "Mitigating and Preventing the Spread of COVID-19 in the Workplace." This guidance is meant to help employers protect (1) unvaccinated employees (including people who are not fully vaccinated) or otherwise at-risk employees, including those who are immunocompromised, and (2) workers who are fully vaccinated but located in areas of substantial or high community transmission. Further, the updated guidance provides additional information on appropriate measures for protecting employees in higher-risk workplaces with mixed-vaccination status workers, such as manufacturing, meat, seafood and poultry processing workers and high volume retail and grocery workers who are often in prolonged close contact with other workers and/or non-workers. OSHA has largely adopted the Centers for Disease Control and Prevention's ("CDC") updated COVID-19 guidance issued on July 27, 2021, and recommendations regarding the use of face coverings.

Major Takeaways from the Guidance

OSHA:

- Recommends that fully vaccinated workers in areas of substantial or high community transmission wear masks in order to protect unvaccinated workers;
- Recommends that fully vaccinated workers who have close contact with people diagnosed with COVID-19 wear masks for up to 14 days unless they have a negative coronavirus test at least 3-5 days after such contact;
- Clarifies recommendations to protect unvaccinated workers and other at-risk workers in manufacturing, meat and poultry processing, seafood processing and agricultural processing; and
- Provides links to the latest guidance on K-12 schools and CDC statements on public transit.

Employer Specific-Recommendations

OSHA recommends that employers:

1. **Facilitate employees getting vaccinated** by offering paid time off for employees to get vaccinated and recover from any side effects;
2. **Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for COVID-19, and all workers with COVID-19 symptoms to stay home from work;**
3. **Implement physical distancing in all communal work areas for unvaccinated and otherwise at-risk workers,** including maintaining at least 6 feet of distance between employees and limiting the number of unvaccinated or otherwise at-risk workers in one space

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at a time, where possible (*ie.*, teleworking, rotate or stagger shifts to limit the number of such workers in the workplace at the same time, delivering services remotely, and flexible meeting and travel options);

4. **Provide all workers with** face coverings **or surgical masks at no cost, as appropriate, unless their work task requires a respirator or other personal protective equipment ("PPE").** The CDC is currently recommending that fully vaccinated people wear masks in public indoor settings in areas of substantial or high transmission;
5. **Educate and train workers on the workplace's COVID-19 policies and procedures using accessible formats and in languages that workers understand**. This includes training managers on how to implement such policies and having the company's COVID-19 policies available in multiple languages;
6. **Suggest or require that unvaccinated customers, visitors, or guests wear** face coverings **in public-facing workplaces such as retail establishments, and that all customers, visitors, or guests wear face coverings in public, indoor settings in areas of substantial or high transmission.** This may include posting a notice or otherwise suggesting or requiring that people wear face coverings, even if no longer required by law;
7. **Maintain ventilation system** by ensuring that heating, ventilation, and air conditioning (HVAC) systems are operating properly in accordance with the manufacturer's instructions and design specifications, conducting all regularly scheduled inspections and maintenance procedures, maximizing the amount of outside air supplied, installing air filters with a Minimum Efficiency Reporting Value (MERV) 13 or higher where feasible, maximizing natural ventilation in buildings without HVAC systems by opening windows or doors, when conditions allow (if that does not pose a safety risk), and considering the use of portable air cleaners with High Efficiency Particulate Air (HEPA) filters in spaces with high occupancy or limited ventilation;
8. **Perform routine cleaning and disinfection.** If someone who has been in the facility within 24 hours is suspected of having or confirmed to have COVID-19, follow the CDC cleaning and disinfection recommendations. Follow requirements in **mandatory OSHA standards** 29 CFR 1910.1200 and 1910.132, 133, and 138 for hazard communication and PPE appropriate for exposure to cleaning chemicals;
9. **Record and report COVID-19 infections and deaths,** in accordance with mandatory OSHA rules if: 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). Employers must follow the requirements in 29 CFR part 1904 when reporting COVID-19 fatalities and hospitalizations to OSHA. Employers should also report outbreaks to local health departments as required and support their contact tracing efforts;
10. **Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19 related hazards**. In addition to notifying employees of their rights to a safe and healthful work environment, employers should ensure that workers know who to contact with questions or concerns about workplace safety and

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health, and that there are prohibitions against retaliation for raising workplace safety and health concerns or engaging in other protected occupational safety and health activities. Employers may also consider using a hotline or other method for workers to voice concerns anonymously;

11. **Follow other applicable mandatory OSHA standard**s, including requirements for PPE, respiratory protection, sanitation, protection from bloodborne pathogens, and OSHA's requirements for employee access to medical and exposure records. Many healthcare workplaces will be covered by the mandatory OSHA COVID-19 Emergency Temporary Standard. More information on that standard is available on OSHA's website.

While the updated guidance is generally advisory in nature and relies heavily on recent CDC guidance, employers should use it as a basis to determine how to satisfy their obligation to provide a safe workplace during the COVID-19 pandemic. Although this particular guidance remains advisory, employers remain legally bound by OSHA's General Duty Clause, Section 5(a)(1) of the OSH Act, to provide a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. Accordingly, it would be best practice to implement the practices recommended in the Guidance where feasible and to remain mindful of the overall General Duty Clause obligation to provide a safe workplace.

The foregoing is an overview of the OSHA guidance as of the date of this publication. Employers should be mindful that these are evolving issues and should ensure that decisions are made based on the most recent information available. Employers with questions about this information should consult with their MBJ attorney.

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