

# PUBLICATION

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## Is COVID-19 Enforcement Stayed? OSHA's Path Forward After the Supreme Court's Decision

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Following the Supreme Court's ruling staying the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS) on vaccination and testing, U.S. Secretary of Labor Marty Walsh issued a statement providing guidance for employers on how they should currently be protecting employees from COVID-19. Although Secretary Walsh urged employers to either require workers to get vaccinated or tested weekly to most effectively fight COVID-19 in the workplace, he specifically referred employers to prior guidance issued by OSHA in January 2021 and updated most recently on August 13, 2021. Walsh advised that OSHA would proceed under the COVID-19 National Emphasis Program and would cite employers, where necessary, under the General Duty Clause.

While we previously issued an [alert](#) when OSHA updated its Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, we wanted to remind employers of those recommendations, which it appears OSHA may now seek to enforce. OSHA adopted the July 27, 2021 Centers for Disease Control (CDC) public health recommendations for fully vaccinated persons. Specifically, OSHA advised that fully vaccinated employees should wear a mask in public indoor settings if they are in an area of "substantial or high transmission" (as defined by the CDC); and that if these employees are exposed to someone with suspected or confirmed COVID-19, that they be tested three to five days after exposure, and wear a mask in public indoor settings for 14 days or until they receive a negative test result.

### OSHA's Recommended Multi-Layer Approach for Unvaccinated Workers

For those employees that are unvaccinated or otherwise at-risk, OSHA recommends that employers implement a multi-layered approach by:

1. granting paid time off for employees to get vaccinated and recover from any side effects;
2. instructing certain employees to stay home, ensuring absence policies that are non-punitive:
  - all who have symptoms or a positive test, whether vaccinated or unvaccinated; and
  - all unvaccinated employees who have had close contact with someone who tested positive;
3. implementing physical distancing, using flexible or remote work schedules or erecting barriers for unvaccinated or otherwise at-risk employees;
4. providing appropriate face coverings for employees;
5. educating workers on the basic facts about COVID-19 and the company's policies and procedures to protect them, including the training of managers in how to implement the company's COVID-19 policies and procedures;

6. suggesting or requiring that unvaccinated customers, visitors or guests wear face coverings in public-facing workplaces and that all customers, visitors or guests wear face coverings in areas of substantial or high transmission;
7. maintaining ventilation systems;
8. performing routine cleanings and disinfection, as well as specific cleaning and disinfection if someone in the facility is suspected or has a confirmed case of COVID-19;
9. recording and reporting work-related COVID-19 infections and deaths;
10. implementing anti-retaliation protections; and
11. following other applicable OSHA standards, such as requirements for Personal Protective Equipment (PPE) (29 CFR part 1910, Subpart I (e.g., 1910.132 and 133)), respiratory protection (29 CFR 1910.134), sanitation (29 CFR 1910.141), protection from bloodborne pathogens (29 CFR 1910.1030), and OSHA's requirements for employee access to medical and exposure records (29 CFR 1910.1020).

### Measures Appropriate for Higher-Risk Workplaces

OSHA also includes an Appendix for Measures Appropriate for Higher-Risk Workplaces. OSHA recommends that these employers take additional steps to mitigate the spread of COVID-19 in their workplaces. These higher-risk workplaces include production or assembly lines and busy retail settings where workers are in close contact with one another or with customers for extended periods of time. OSHA specifically referred to the following workplaces as higher-risk: manufacturing; meat, seafood, and poultry processing; high-volume retail and grocery; and agricultural processing settings. For these higher-risk workplaces, OSHA recommends the following, in addition to the precautions described above:

- Stagger break times or provide temporary break areas and restrooms to avoid groups of unvaccinated or otherwise at-risk workers congregating during breaks.
- Stagger workers' arrival and departure times to avoid congregations of unvaccinated or otherwise at-risk workers in parking areas, locker rooms, and near time clocks.
- Provide visual cues (e.g., floor markings, signs) as a reminder to maintain physical distancing.
- Implement strategies to improve ventilation that protects workers.

In **high-volume retail workplaces** (or well-defined work areas within retail workplaces) where there are unvaccinated or otherwise at-risk workers:

- Consider ways to promote physical distancing between unvaccinated or otherwise at-risk people and/or limiting occupancy to allow for physical distancing consistent with CDC guidance.
- Move the electronic payment terminal/credit card reader farther away from unvaccinated and otherwise at-risk workers in order to increase the distance between customers and such workers, if possible.
- Adjust stocking activities to limit contact between unvaccinated and otherwise at-risk workers and customers.

**In meat, poultry, and seafood processing settings; manufacturing facilities; and assembly line operations (including in agriculture)** involving unvaccinated and otherwise at-risk workers:

- Ensure adequate ventilation in the facility, or if feasible, move work outdoors.
- Space such workers out, ideally at least six feet apart, and ensure that such workers are not working directly across from one another.
- If barriers are used where physical distancing cannot be maintained, they should be made of a solid, impermeable material, like plastic or acrylic, that can be easily cleaned or replaced.
- Barriers do not replace the need for physical distancing – at least six feet of separation should be maintained between unvaccinated and otherwise at-risk individuals whenever possible.

For further information on this Guidance or OSHA's National Emphasis Program, please reach out to Ashley Strittmatter or Mary Katherine Campion.