

## HRAGC LEGAL UPDATE

### FEDERAL

JUNE 17, 2021

#### **Centers for Disease Control and Prevention**

On May 13, 2021 the CDC issued an updated guidance for vaccinated persons. Fully vaccinated people can:

- Resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.
- Resume domestic travel and refrain from testing before or after travel or self-quarantine after travel.
- Refrain from testing before leaving the United States for international travel (unless required by the destination) and refrain from self-quarantine after arriving back in the United States.
- Refrain from testing following a known exposure, if asymptomatic, with some exceptions for specific settings.
- Refrain from quarantine following a known exposure if asymptomatic.
- Refrain from routine screening testing if feasible.

#### **Equal Employment Opportunity Commission**

On May 28, 2021 the EEOC issued an updated and expanded technical assistance addressing vaccination practices, including approving vaccine mandates, requesting proof of vaccination and offering incentives. The EEOC summarized the key updates to the technical assistance as follows:

- Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations. Other laws, not in EEOC's jurisdiction, may place additional restrictions on employers. From an EEO perspective, employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.
- Federal EEO laws do not prevent or limit employers from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party (not the employer) in the community, such as a pharmacy, personal health care provider, or public clinic. If employers choose to obtain vaccination information from their employees, employers must keep vaccination information confidential pursuant to the ADA.
- Employers that are administering vaccines to their employees may offer incentives for employees to be vaccinated, as long as the incentives are not coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information.
- Employers may provide employees and their family members with information to educate them about COVID-19 vaccines and raise awareness about the benefits of vaccination.

The EEOC also issued a new resource for job applicants and employees. The EEOC explained that the resource provides basic information about how federal employment discrimination laws help workers who are being harassed; who need extra protection against getting sick; who are not being allowed to work; or who need a modification of their employer's COVID-19 safety requirements.

## United States Department of Labor

On June 10, 2021 OSHA issued an Emergency Temporary Standard for health care employers to maintain a safe workplace and protect workers from the coronavirus. OSHA also issued updated guidance to other industries to help employers and workers in other industries protect workers who are still not vaccinated, with a special emphasis on industries noted for prolonged close-contacts like meat processing, manufacturing, seafood, and grocery and high-volume retail. The standard and recommendations track the CDC guidelines.

**Health Care Employers.** OSHA explained the ETS in its news release as follows:

The health care emergency temporary standard is aimed at protecting workers facing the highest coronavirus hazards—those working in health care settings where suspected or confirmed coronavirus patients are treated. This includes employees in hospitals, nursing homes, and assisted living facilities; emergency responders; home health care workers; and employees in ambulatory care settings where suspected or confirmed coronavirus patients are treated.

The standard will require non-exempt facilities to conduct a hazard assessment and have a written plan to mitigate virus spread, and requires healthcare employers to provide some employees with N95 respirators or other personal protective equipment. In addition, covered employers must ensure 6 feet of distance between workers. In situations where this is not possible, employers should erect barriers between employees where feasible.

The standard also requires covered employees to provide workers with paid time off to get vaccinated and to recover from any side effects. Covered employees who have coronavirus or who may be contagious must work remotely or otherwise be separated from other workers if possible, or be given paid time off up to \$1400 per week. For most businesses with fewer than 500 employees, tax credits in the American Rescue Plan may be reimbursed through these provisions.

The 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 will be present with suspected or confirmed coronavirus.

The ETS is effective immediately upon publication in the Federal Register. Employers must comply with most provisions within 14 days and with the remaining provisions within 30 days. OSHA will use its enforcement discretion to avoid citing employers who miss a compliance deadline but are making a good faith effort to comply with the ETS. OSHA will continue to monitor trends in coronavirus transmission.

**Other Employers.** OSHA outlined in its new release recommendations for employers not in the health care setting, and specifically indicates they are not mandatory but are advisory:

Employers should engage with workers and their representatives to determine how to implement multi-layered interventions to protect unvaccinated or otherwise at-risk workers and mitigate the spread of COVID-19, including:

1. ***Grant paid time off for employees to get vaccinated.*** The Department of Labor and OSHA, as well as other federal agencies, are working diligently to ensure access to COVID-19 vaccinations. CDC provides [information on the benefits and safety](#) of vaccinations. Businesses with fewer than 500 employees may be eligible for [tax credits under the American Rescue Plan](#) if they provide paid time off for employees who decide to receive the vaccine and to recover from any potential side effects from the vaccine.
2. ***Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for SARS-CoV-2, and all workers with COVID-19 symptoms to stay home from work*** to prevent or reduce the risk of transmission of the virus that causes COVID-19. Ensure that absence policies are non-punitive. Eliminate or revise policies that encourage workers to come to work sick or when unvaccinated workers have been exposed to COVID-19. Businesses with fewer than 500 employees may be eligible for refundable tax credits under the American Rescue Plan if they provide paid time off for sick and family leave to

their employees due to COVID-19 related reasons. The ARP tax credits are available to eligible employers that pay sick and family leave for qualified leave from April 1, 2021, through September 30, 2021. More information is [available from the IRS](#).

- 3. *Implement physical distancing for unvaccinated and otherwise at-risk workers in all communal work areas.*** A key way to protect unvaccinated or otherwise at-risk workers is to physically distance them from other unvaccinated or otherwise at-risk people (workers or customers) – generally at least 6 feet of distance is recommended, although this is not a guarantee of safety, especially in enclosed or poorly ventilated spaces.

Employers could also limit the number of unvaccinated or otherwise at-risk workers in one place at any given time, for example by implementing flexible worksites (e.g., telework); implementing flexible work hours (e.g., rotate or stagger shifts to limit the number of such workers in the workplace at the same time); delivering services remotely (e.g., phone, video, or web); or implementing flexible meeting and travel options, all for such workers.

At fixed workstations where unvaccinated or otherwise at-risk workers are not able to remain at least 6 feet away from other people, transparent shields or other solid barriers (e.g., fire resistant plastic sheeting or flexible strip curtains) can separate these workers from other people. Barriers should block face-to-face pathways between individuals in order to prevent direct transmission of respiratory droplets, and any openings should be placed at the bottom and made as small as possible. The posture (sitting or standing) of users and the [safety of the work environment](#) should be considered when designing and installing barriers, as should the need for enhanced ventilation.

- 4. *Provide unvaccinated and otherwise at-risk [workers with face coverings or surgical masks](#), unless their work task requires a respirator or other PPE.*** Such workers should wear a face covering that covers the nose and mouth to contain the wearer's respiratory droplets and help protect others and potentially [themselves](#). [Face coverings](#) should be made of at least two layers of a tightly woven breathable fabric, such as cotton, and should not have exhalation valves or vents. They should fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face. CDC provides [general guidance on masks](#).

Employers should provide face coverings to unvaccinated and otherwise at-risk workers at no cost. Under federal anti-discrimination laws, employers may need to provide [reasonable accommodation](#) for any workers who are unable to wear or have difficulty wearing certain types of face coverings due to a disability or who need a religious accommodation under Title VII. In workplaces with employees who are deaf or hard of hearing, employers should consider acquiring masks with clear coverings over the mouth for unvaccinated and otherwise at-risk workers to facilitate lip-reading.

Unless otherwise provided by federal, state, or local requirements, unvaccinated workers who are outdoors may opt not to wear face coverings unless they are at-risk, for example, if they are immunocompromised. Regardless, all workers should be supported in continuing face covering use if they choose, especially in order to safely work closely with other people.

When an employer determines that PPE is necessary to protect unvaccinated and otherwise at-risk workers, the employer must provide PPE in accordance with [relevant mandatory OSHA standards](#) and should consider providing PPE in accordance with other [industry-specific guidance](#). Respirators, if necessary, must be provided and used in compliance with 29 CFR [1910.134](#) (e.g., medical determination, fit testing, training on its correct use), including certain provisions for voluntary use when workers supply their own respirators, and other PPE must be provided and used in accordance with the applicable standards in 29 CFR 1910, Subpart I (e.g., [1910.132](#) and [133](#)). There are times when PPE is not called for by OSHA standards or other industry-specific guidance, but some workers may have a legal right to PPE as a reasonable accommodation under the

ADA. Employers are encouraged to proactively inform employees who have a legal right to PPE as a reasonable accommodation for their disability about how to make such a request. Other workers may want to use PPE if they are still concerned about their personal safety (e.g., if a family member is at higher-risk for severe illness, they may want to wear a face shield in addition to a face covering as an added layer of protection). Encourage and support voluntary use of PPE in these circumstances and ensure the equipment is adequate to protect the worker.

For operations where the face covering can become wet and soiled, provide unvaccinated and otherwise at-risk workers with replacements daily or more frequently, as needed. Face shields may be provided for use with face coverings to protect them from getting wet and soiled, but they do not provide protection by themselves. See [CDC's Guide to Masks](#).

Employers with workers in a setting where face coverings may increase the [risk of heat-related illness indoors](#) or [outdoors](#) or cause safety concerns due to introduction of a hazard (for instance, straps getting caught in machinery) may wish to consult with an occupational safety and health professional to help determine the appropriate face covering/respirator use for their setting.

5. **Educate and train workers on your COVID-19 policies and procedures using accessible formats and in language they understand.** Train managers on how to implement COVID-19 policies. Communicate supportive workplace policies clearly, frequently, and via multiple methods to promote a safe and healthy workplace. Communications should be in plain language that unvaccinated and otherwise at-risk workers understand (including non-English languages, and American Sign Language or other accessible communication methods, if applicable) and in a manner accessible to individuals with disabilities. Training should be directed at employees, contractors, and any other individuals on site, as appropriate, and should include:
  - A. Basic facts about COVID-19, including how it is spread and the importance of physical distancing (including remote work), ventilation, vaccination, use of face coverings, and hand hygiene.
  - B. Workplace policies and procedures implemented to protect workers from COVID-19 hazards.

For basic facts, see [About COVID-19](#) and [What Workers Need to Know About COVID-19](#), above and see more on [vaccinations](#), improving ventilation, physical distancing (including remote work), PPE, and face coverings, respectively, elsewhere in this document. Some means of tracking which workers have received this information, and when, could be utilized, by the employer, as appropriate.

In addition, ensure that workers understand their rights to a safe and healthful work environment, whom to contact with questions or concerns about workplace safety and health, and their right to raise workplace safety and health concerns free from retaliation. This information should also be provided in a language that workers understand. (See [Implementing Protections from Retaliation](#), below.) Ensure supervisors are familiar with workplace flexibilities and other human resources policies and procedures.

6. **Suggest that unvaccinated customers, visitors, or guests wear face coverings**, especially in public-facing workplaces such as retail establishments, if there are unvaccinated or otherwise at-risk workers in the workplace who are likely to interact with these customers, visitors, or guests. This could include posting a notice or otherwise suggesting unvaccinated people wear face coverings, even if no longer required by your jurisdiction. Individuals who are under the age of 2 or are actively consuming food or beverages on site need not wear face coverings.
7. **Maintain Ventilation Systems.** The virus that causes COVID-19 spreads between people more readily indoors than outdoors. Improving ventilation is a key engineering control that can be used as part of a layered strategy to reduce the concentration of viral particles in indoor air and the risk of virus transmission to unvaccinated workers in particular. Some measures to improve ventilation are discussed in [CDC's Ventilation in Buildings](#) and

in the [OSHA Alert: COVID-19 Guidance on Ventilation in the Workplace](#). These recommendations are based on ASHRAE [Guidance for Building Operations During the COVID-19 Pandemic](#). Adequate ventilation will protect all people in a closed space. Key measures include ensuring the HVAC system(s) is operating 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.** Under **mandatory OSHA rules in 29 CFR 1904**, employers are responsible for recording work-related cases of COVID-19 illness on OSHA's [Form 300 logs](#) if the following requirements are met: (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 1904](#) when [reporting COVID-19 fatalities and hospitalizations to OSHA](#). More information is available [on OSHA's website](#). Employers should also report outbreaks to health departments as required and support their contact tracing efforts.

In addition, employers should be aware that [Section 11\(c\) of the Act](#) prohibits reprisal or discrimination against an employee for speaking out about unsafe working conditions or reporting an infection or exposure to COVID-19 to an employer. In addition, **mandatory OSHA standard** [29 CFR 1904.35\(b\)](#) also prohibits discrimination against an employee for reporting a work-related illness.

*Note on recording adverse reactions to vaccines:* DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not want to give any suggestion of discouraging workers from receiving COVID-19 vaccination or to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022. OSHA will reevaluate the agency's position at that time to determine the best course of action moving forward. Individuals may choose to submit adverse reactions to the federal [Vaccine Adverse Event Reporting System](#).

10. **Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards:** [Section 11\(c\) of the OSH Act](#) prohibits discharging or in any other way discriminating against an employee for engaging in various occupational safety and health activities. Examples of violations of Section 11(c) could include discriminating against employees for raising a reasonable concern about infection control related to COVID-19 to the employer, the employer's agent, other employees, a government agency, or to the public, such as through print, online, social, or any other media; or against an employee for voluntarily providing and safely wearing their own PPE, such as a respirator, face shield, gloves, or surgical mask.

In addition to notifying workers of their rights to a safe and healthful work environment, ensure that workers know whom to contact with questions or concerns about workplace safety and 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 (see [educating and training workers about COVID-19 policies and procedures](#), above); also consider using a hotline or other method for workers to voice concerns anonymously.

11. **Follow other applicable mandatory OSHA standards:** All of OSHA's standards that apply to protecting workers from infection remain in place. These **mandatory OSHA standards** include: requirements for PPE (29 CFR 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](#)). Many healthcare workplaces will be covered by the **mandatory OSHA COVID-19 Emergency Temporary Standard**. More information on that standard is available on the OSHA website. Where the ETS does not apply, employers are required under the 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.

## United States District Court for the Southern District of Texas

On June 12, 2021 a federal judge in Texas dismissed a lawsuit by employees of Houston Methodist Hospital challenging the hospital's mandatory vaccination policy. A small number of employees had refused to comply with the policy, were suspended and are facing termination (none were entitled to accommodations under the policy for sincerely held religious beliefs or disabilities, or to delay vaccination due to pregnancy. Many joined a lawsuit seeking a temporary restraining order prohibiting enforcement, which was denied. The Court granted the hospital's motion to dismiss. The Court rejected each of the plaintiffs' contentions, including that the vaccines were not properly approved by the FDA, that this was medical experimentation akin to the Holocaust, that they were being improperly coerced in violation of public policy, and their termination for refusing the vaccine would be wrongful. In the end the judge simplified the issue: employees have a choice to either comply with the policy or find other employment.

## NEW HAMPSHIRE

### New Hampshire Legislature

An update on bills that may be of interest to private employers:

- SB 69. This bill requires employers to provide a sufficient space and break time for nursing mothers to express milk. The bill passed the Senate 24-0 but was retained in committee by the House.
- SB 61. This bill, named the Right to Work bill, prohibits a CBA from requiring an employee join or contribute to a labor union. The bill passed the Senate 13-11 but has been indefinitely postponed by the House.
- SB 67. This bill requires the accrual of paid sick leave and regulates its use with a cap on how many hours may be used in a year. It was deemed inexpedient to legislate by the Senate Commerce Committee, killing the bill.
- HB 517. This bill requires payment for earned but unused vacation and personal time at the end of employment. It was retained in the House Industrial and Rehabilitative Services Committee.
- HB 258. This bill permits wage and hour records to be approved and retained electronically. It passed both the House and Senate and was signed by the Governor.
- HB 165. This bill makes unenforceable non-compete agreements for certain mental health professionals. It was laid on the table in the House Commerce and Consumer Affairs Committee.
- HB 408. This bill prohibits employers from hiring registered sex offenders if the job will involve contact with a minor. It was retained in the House Criminal Justice and Public Safety Committee.
- HB 303. This bill exempts ski and snowboard instructors at ski resorts from the required minimum pay law. It passed both the House and Senate and was signed by the Governor.
- HB 544. This bill prohibits the dissemination of "divisive concepts" related to race and gender in state contracts, grants and training programs. It was laid on the table in a House committee effectively killing the bill. Language from this bill has been added to the budget bill (HB 2) keeping it alive.

## Updated Pandemic Best Practices for Businesses

New Hampshire's Universal Guidelines were amended April 29, 2021 and became effective May 8. [Welcome | Best Practices \(nh.gov\)](#). While many mandatory aspects of the Universal Guidelines have been relaxed the Governor's office recommends the same general steps and actions that have been in place to maintain a safe workplace. The State mask mandate has been lifted and the state of emergency has ended.

## Summary

Moving forward under state and federal recommendations, employers must continue to take measures to protect unvaccinated employees and those who may be at higher risk, taking care to explore accommodations where appropriate. The extent of those measures will depend on the workplace, vaccination rates and the individual needs of employees. And vaccinated employees may be entitled to accommodations, particularly those who are high-risk, as they remain at some risk of contracting the virus and either suffering adverse health effects or transmitting the virus to others. In carrying out the duty to maintain a safe workplace, employers should carefully consider the CDC, EEOC, OSHA, and New Hampshire guidelines as they develop a safety plan tailored to the specific needs of the employer and employees.

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