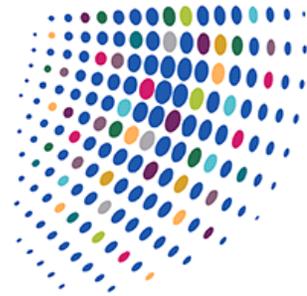


# Alerts & Publications

## OSHA Issues New COVID-19 Workplace Safety Guidance

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On January 21, 2021, President Biden issued an “[Executive Order on Protecting Worker Health and Safety](#),” which requires the Department of Labor (“DOL”), acting through its Occupational Safety and Health Administration (“OSHA”), to issue new COVID-19 workplace safety guidance for employers under the Occupational Safety and Health Act within two weeks of the date of the Executive Order. OSHA did so on January 29, 2021.

Among other things, the Executive Order also requires the DOL, through OSHA, to:

- consider issuing emergency temporary standards on COVID-19 by March 15, 2021;
- review enforcement efforts related to COVID-19 and identify changes that could be made to better protect workers and ensure equity in enforcement;
- launch a national program to focus on enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principles;
- coordinate with a multilingual outreach campaign to inform workers and their representatives of their rights under applicable law (with an emphasis on communities hit hardest by the pandemic);
- coordinate with states that have occupational safety and health plans to ensure that they are consistent with any revised guidance or emergency temporary standards issued by OSHA; and
- consult with state and local governments in states that do not have such plans to bolster COVID-19 protection for public-sector workers.

The Executive Order further requires the Secretary of Agriculture, the Secretary of Labor, the Secretary of Health and Human Services, the Secretary of Transportation, and the Secretary of Energy to explore mechanisms to protect workers not protected under the Act so that they remain healthy and safe on the job during the COVID-19 pandemic.

## January 29, 2021 OSHA Guidance

OSHA issued its [new COVID-19 workplace safety guidance](#), entitled “Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace,” on January 29, 2021 (the “OSHA Guidance”). The OSHA Guidance applies to non-healthcare workplaces and is supplemented by industry-specific OSHA guidelines for certain industries. The OSHA Guidance does not create any new legal obligations for employers but contains a summary of existing mandatory safety and health standards, along with advisory recommendations to assist employers in preventing the spread of COVID-19 in the workplace. The recommendations in the OSHA Guidance may be incorporated into mandatory standards in the future, including the emergency temporary standards OSHA must consider issuing by March 15, 2021, pursuant to the January 21, 2021 Executive Order.

The OSHA Guidance calls for all employers to implement COVID-19 Prevention Programs in the workplace. These programs should:

- assign a workplace coordinator;
- identify where and how workers might be exposed to COVID-19 at work;
- identify a combination of measures that will limit the spread of COVID-19 in the workplace, in line with principles of the hierarchy of controls;
- consider protections for workers at higher risk for severe illness through supportive policies and practices;
- establish a system for communicating effectively with workers and in a language they understand;
- educate and train workers on COVID-19 policies and procedures using accessible formats in a language they understand;
- instruct workers who are infected or potentially infected to stay home and isolate or quarantine;
- minimize the negative impact of quarantine and isolation on workers (e.g., through telework);
- isolate workers who show symptoms at work;
- perform enhanced cleaning and disinfection after people with suspected or confirmed COVID-19 have been in the facility;
- provide guidance on screening and testing;
- record and report COVID-19 infections and deaths;
- implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards;
- make a COVID-19 vaccination available at no cost to all eligible employees;
- not distinguish between workers who are vaccinated and those who are not; and
- comply with all other applicable OSHA standards relating to infection control.

In addition to the above recommendations, the OSHA Guidance contains more detailed recommendations for (i) isolating potentially infected workers, (ii) implementing physical distancing in communal areas, and (iii) using face coverings and personal protective equipment. These recommendations generally align with guidance issued by the U.S. Centers for Disease Control (“CDC”), although the new OSHA Guidance goes further than OSHA’s prior guidance by recommending that employers provide face coverings and make the COVID-19 vaccine available at no cost to all eligible employees.

The OSHA Guidance also contains detailed recommendations for improving ventilation in buildings to reduce the spread of COVID-19. Some of these recommendations are based on [guidance](#) issued by the American Society of Heating, Refrigerating and Air-Conditioning Engineers (“ASHRAE”), and OSHA recommends that employers review ASHRAE’s guidance for further information about ventilation recommendations. The ventilation recommendations in the OSHA Guidance include:

- ensure ventilation systems provide acceptable indoor air quality for the current occupancy level;
- increase ventilation rates and keep systems running at all times if possible;
- improve central air filtration and reduce or eliminate recirculation;
- use portable high-efficiency particulate air (“HEPA”) filtration systems to enhance cleaning in higher-risk areas;
- consider using ultraviolet germicidal irradiation (“UVGI”) technology if options for increasing room ventilation are limited;
- or, if ventilation cannot be increased, reduce occupancy in the building.

The OSHA Guidance largely aligns with existing CDC recommendations and the requirements of many state COVID-19 workplace safety laws, but employers should carefully evaluate the OSHA Guidance and consider whether any of its recommendations should be used to supplement their existing workplace safety plans. Although the OSHA Guidance is advisory in nature, it provides insight into what OSHA is likely to include in its binding emergency temporary standards on COVID-19, which the agency must consider issuing by March 15, 2021.

## Increased OSHA Penalties

OSHA’s new COVID-19 guidance coincides with all-time high OSHA penalties. Since the Federal Civil Penalties Inflation Adjustment Improvements Act (the “IAIA”) took effect in 2016, OSHA penalties nearly doubled from historical levels, driven mainly by a significant “catch up” increase in the IAIA’s first year to bring historical OSHA penalty amounts in line with modern inflation trends. As of January 15, 2021, OSHA penalties for repeat and willful violations increased to US\$136,532 and penalties for serious and lesser violations increased to US\$13,653. Going forward, the IAIA requires OSHA to make annual inflation adjustments to its penalty amounts, which could result in significant aggregate increases in the long term.

## State COVID-19 Workplace Safety Laws

On January 13, 2021, Virginia became the first state to enact a permanent workplace safety rule to protect employees from COVID-19 exposure. The Virginia rule, which took effect on January 27, 2021, imposes a range of requirements based on the type of workplace and level of employee exposure risk. Specific requirements include mandatory employee training, flexible sick leave policies, sanitation and disinfection practices, and systems for tracking employee COVID-19 testing information. In some areas, the Virginia rule aligns with or exceeds guidance issued by OSHA and CDC.

The permanent Virginia rule mirrors the temporary COVID-19 workplace guidance that was previously in effect in the state. Over the coming months, other states may elect to follow a similar path and convert their temporary workplace requirements, or more stringent requirements, into permanent rules. It is important to remember that state workplace laws may impose additional or stricter requirements than those issued at the federal level.

## Laws Shielding Employers from COVID-19 Liability

A wave of COVID-19 workplace lawsuits began last spring, driven by employees claiming they contracted the virus because of their employers' conduct. Prominent examples include ongoing lawsuits against Walmart, Tysons, and Albertsons Companies, each brought by the families of employees who died after allegedly contracting COVID-19 at the workplace.

A number of states have enacted legislation to shield businesses from COVID-19 personal injury lawsuits, including those brought by employees. These states include Alabama, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming. Most state "liability shield" laws protect businesses from COVID-19 related claims so long as the business did not act recklessly or intentionally expose the plaintiff to COVID-19. Substantial compliance (or, in some states, a good faith effort to comply) with COVID-19 health and safety directives will typically support a presumption that the defendant did not act recklessly. A few of these state laws, including those in Alabama and Tennessee, also require that plaintiffs meet a heightened burden of clear and convincing evidence in COVID-19 liability cases.

State legislatures in Florida, Indiana, and Montana are currently considering similar liability shield legislation. Florida's proposed legislation (S.B. 72) would require that COVID-19 personal injury claims be pled with particularity and accompanied by an affidavit from a physician attesting that the alleged injuries resulted from the defendant's acts or omissions. The law would also grant immunity from civil liability if the defendant made a good faith effort to substantially comply with government-issued health standards or guidelines.

Federal lawmakers have previously considered including business liability protections in federal COVID-19 relief packages, including December's Consolidated Appropriations Act, but so far these provisions have not made it into any final legislation.

## Conclusion

While the OSHA Guidance aligns in many ways with existing CDC guidelines and state law requirements, it also contains additional recommendations, such as improvements to building ventilation systems. If some or all of these recommendations are incorporated into binding OSHA standards, which may be issued as soon as March 2021, this could generate substantial increases in operating expenses for many businesses. In addition, permanent state workplace COVID-19 laws, such as Virginia's recent legislation, could similarly result in material, long-term increases in operating expenses. The ability of employers to take advantage of COVID-19 liability shields under state laws, such as Florida's S.B. 72, also could be affected by compliance with federal and state health and safety standards. This potential for liability will be a significant component of due diligence and documentation efforts in corporate transactions.

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