

# PUBLICATION

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## Updated OSHA Return-to-Work Guidance

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**On January 29, the Occupational Safety and Health Administration (OSHA) issued updated guidelines outlining steps employers can take to facilitate a seamless return-to-work plan after COVID-19 subsides. Although guidelines are helpful, employers should take note, prepare, and incorporate a return-to-work plan to prevent OSHA liability.**

The updated guidance is "intended to inform employers and workers working in most workplace settings outside of health care to help them identify risks of being exposed to and/or contracting COVID-19 at work and to help them determine appropriate control measures to implement." As the COVID-19 vaccine continues to roll out, the virus begins to abate, and businesses begin to return to work, consideration of these guidelines will be critical to avoiding unnecessary Occupational Health and Safety (OHS) violations.

### Liability

Notably, OSHA's guidance is just that, guidance. There is no inherent liability – outside of the requirement to provide a healthful work environment – for an employer's failure to implement workplace plans, policies, and procedures to deal with the risks COVID-19 presents. Of course, employers are still best served through the creation and implementation of such a return-to-work plan.

In fact, the exposure associated with a failure to implement commonsense protections for employees is so great that employers returning to work should consult counsel, develop a tailor-made return-to-work plan, and scrupulously enforce the plan, paying particular attention to the OSHA guidelines.

### Employer Analysis of Risk Guidance

OSHA's guidance focuses on employer analysis of risks posed upon return to work, including, but not limited to:

- Conducting a hazard assessment;
- Identifying a combination of measures that limit the spread of COVID-19 in the workplace;
- Adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and
- Implementing protections from retaliation for workers who raise COVID-19-related concerns.

Such measures include steps employers have already implemented since the onset of COVID-19, but also comprise business practices that may not have been considered.

### Create Your Return-to-Work Plan

By taking the ongoing threat of COVID-19 in the return-to-work context seriously, employers can best prepare themselves to remain in compliance with OHS regulations. Certainly, such steps could also provide protection against other employment claims that could arise by virtue of an employer's mishandling of return-to-work protocols (i.e., discrimination, abusive discharge, etc.). Below is a general plan designed to assist your business in weighing the necessary aspects of an appropriate return-to-work policy such that your business can appropriately, expediently, and effectively create and implement a safe return-to-work plan:

1. **Assign a Workplace Coordinator.** Name someone who will be responsible for COVID-19 issues on the employer's behalf. Ensure this person has the authority needed or direct access to the person or person(s) with authority to make necessary and last-minute policy shifts related to COVID-19. Flexibility and adaptability to last-minute OSHA recommendations is critical to ensuring up-to-date policies.
2. **Conduct a Hazard Assessment.** This hazard assessment should consider and determine where and how workers might be exposed to COVID-19 at work. Include employees as the hazard assessment is occurring. Collect information about existing hazards, inspect the workplace, identify health hazards, conduct incident investigations, characterize the nature of the identified hazards, and prioritize the hazards for control. Knowing what is needed to prevent hazard exposure is necessary to actual prevention of the spread of COVID-19.
3. **Identify Measures That Limit the Spread of COVID-19 in Your Workplace.** Many employers already identified and implemented measures to limit the spread of COVID-19 in the workplace. These measures include, but are not limited to, wearing masks, social distancing, plexiglass, extra cleaning, and limits on the number of persons in spaces. An employer should continue whatever measures have already been instituted and determine if there are any additional measures that should be included in its policy. A key measure for limiting the spread will begin with ensuring infected or potentially infected people are sequestered from the workplace. An employer's policy should address when to stay home and what to do if an employee begins exhibiting symptoms while at work.
4. **Develop a Vaccination Plan.** With the COVID-19 vaccine now available on a limited basis, many employers are asking if they can or should mandate the vaccination for employees. The December [guidance](#) issued by the Equal Employment Opportunity Commission (EEOC) states that an employer may mandate a vaccine for employees if there is a business necessity, as long as the business adheres to exemptions for medical or religious reasons. OSHA's guidance, however, does not analyze the difference between an emergency-use-authorized vaccine and a vaccine that has received full approval. Until there is a fully authorized vaccine employers can, and should, strongly encourage employees to receive a vaccination, but not mandate receipt of the vaccine. Continuing studies of the COVID-19's vaccine efficacy could alter or amend this recommendation.
5. **Implement or Update Protections From Retaliation for Workers who Raise COVID-19 Concerns.** Under current OHS rules, an employer may not discharge or in any other way discriminate against an employee for engaging in various occupational safety and health activities. This includes raising concerns about the spread of COVID-19. Employers should ensure employees know who to contact with questions or concerns about workplace safety. Moreover, employers should be encouraged to review policies and procedures to determine if any updates to such policies need to be made.
6. **Continue to Record/Report Infections and Deaths.** Employers should continue to report work-related cases of COVID-19 illnesses if they meet certain requirements. Even if employers are not required to report positive tests for COVID-19, they should be recording illnesses. Employers should also have a system in place for contact tracing related to any recorded illness.
7. **Regularly Meet with Leadership to Reevaluate Return-to-Work Plans.** Leadership should meet regularly with the workplace coordinator, as OSHA, the EEOC, the Centers for Disease Control, and other agencies are expected to issue additional and amended guidance. As such, it will likely be necessary to tweak or update any COVID-19 return-to-work and workplace safety policies, in accordance with such additions and amendments.

## Takeaway

Employers should strongly consider how to incorporate OSHA guidance on mitigating and preventing the spread of COVID-19 in the workplace, especially as businesses begin to establish and implement return-to-work policies. As knowledge of how the virus spreads, variants, and the efficacy of the vaccines increase or change, employers must be flexible with their return-to-work policies and remain ready to make necessary changes. If you have any questions about policies or the related OSHA guidance, please contact the author or your Baker Donelson employment attorney to discuss a plan that is tailored to your business.