

BIDEN ADMINISTRATION ISSUES NEW OSHA COVID-19 GUIDANCE AND SIGNALS MORE TO COME

On Jan. 21, 2021, President Biden issued an executive order requiring new COVID-19 guidance to be issued for employers. In response, the Occupational Safety and Health Administration (OSHA) issued the new guidance on Friday, Jan. 29, 2021. The guidance is not significantly different from previous OSHA or CDC guidance. It states that additional guidance will be issued, and that the existing industry-specific guidance already on OSHA's website will be updated over time, which signals more to come.

OSHA guidance does not have the force of law, but an employer who does not act in a manner consistent with OSHA guidance is more likely to be cited by OSHA for violating an OSHA standard, such as the personal protective equipment standard, or the General Duty Clause, as compared to an employer who follows the guidance. The prior administration received some criticism for not issuing more citations for COVID-19-related issues, and it is expected that the new administration will increasingly pursue enforcement actions for COVID-19 issues. Employers should watch closely for additional OSHA guidance.

Additionally, under the Jan. 21 executive order, OSHA has until March 15 to consider implementing an emergency COVID-19 standard, and to issue the standard within that time if it determines a standard is warranted. Unlike guidance, such a standard would have the effect of law. It seems likely that such a standard will be issued. Several states have already issued their own worker safety COVID-19 standards, so possible models already exist.

Some highlights of the new OSHA guidance include:

- a recommendation that employees who have been vaccinated still wear a face covering and maintain social distance because it is not yet known "how vaccination affects transmissibility";
- a recommendation to make the COVID-19 vaccine available to employees at no cost;
- encouragement of employers to include employees and their representatives in the development of their prevention programs, and assign a workplace coordinator. It notes that workers with disabilities may be legally entitled to "reasonable accommodations under the

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- a recommendation that employers supply employees with face coverings – prior OSHA guidance had recommended that they be used, but did not specify who should supply; and
- potential ventilation improvements that can be made. It is predicted that ventilation is one area that OSHA will emphasize under the new administration. Employers who have not at least evaluated changes in their ventilation systems should do so now.

Many employers have been led to believe that they are required to record every COVID-19 case experienced by their employees on their 300 log under the OSHA recordkeeping standard, and that they are required to report all COVID-19 hospitalizations and deaths of their employees to OSHA under the regulation that requires reporting to OSHA of all workplace fatalities and hospitalizations. However, employers need to be careful and should avoid over-reporting. Employers are only required to record or report such confirmed cases if they are “work-related,” in other words, if the virus was likely contracted in the workplace. The Jan. 28 guidance reiterates that concept. OSHA’s guidance on May 19, 2020, which is still available on OSHA’s website, notes the difficulty in determining *where* an employee contracted the virus. The May 2020 guidance states that it will be sufficient, in most circumstances, for the employer to ask the employee:

1. where the employee believes he/she contracted the virus;
2. while respecting employee privacy, discussing with the employee his/her work and out-of-work activities that may have led to the illness; and
3. review the employee’s work environment for potential COVID-19 exposure. The review should be informed by any other instances of workers in that environment who have contracted the virus. The employer should also consider case experience in the community.

The May 2020 guidance states that if, after a reasonable and good faith inquiry, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role in the case, the case is *not* required to be recorded on the 300 log. The same analysis applies in determining whether a hospitalization or fatality due to COVID-19 is required to be reported.

Because OSHA is likely to ramp up enforcement under the new administration, and because reports to OSHA often result in a visit to the workplace by OSHA, employers should be cautious when recording or reporting cases if they are unable to determine where the employee contracted the virus.



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