The New BA.5 Subvariant Is a Reminder for Employers the Perils of COVID-19 Aren't Going Away: Your 4-Step Plan

Insights

7.15.22

With the uptick in the COVID-19 positivity rate due to the emerging dominance of the BA.5 variant – thought to be the most transmissible yet – beleaguered employers once again find themselves in the position of confronting the politics and perils of implementing effective COVID-19 mitigation strategies. The increase is notable enough that it prompted the White House to issue a new fact sheet outlining its strategy to "manage BA.5," including boosters, free testing, free masks, and encouraging building owners to implement ventilation and filtration improvements through the Clean Air in Buildings Challenge. While the positivity rate is still below January's peak, increasing case numbers and the doubling of hospitalizations since May are impacting employers' obligations under guidance from the Centers for Disease Control and Prevention (CDC), from the Occupational Safety and Health Administration (OSHA), and from the Centers for Medicare & Medicaid Services (CMS) and state and local health departments. Employers should keep in mind the following when considering whether their current policies are compliant and should consider adopting this four-step plan.

Should We Be Mandating Masks Again?

CDC guidance on quarantine and isolation remains unchanged from March 2022. If a fully vaccinated employee (or one who has had COVID-19 within the last 90 days) has close contact with someone with COVID-19 and has no symptoms, they should wear a well-fitting mask for 10 days and get tested five days after the exposure. If symptoms develop or the employee tests positive, they must isolate for at least five days from that positive test result or the onset of symptoms.

Employees may end isolation after the fifth day when they are fever-free for 24 hours without the use of fever-reducing medication and their symptoms are improving. Those employees not up to date with their vaccines have the additional hurdle of quarantining for five days after close contact, along with the same testing and masking requirements.

Any individuals who are positive for COVID-19, symptomatic, or have been exposed to someone positive for COVID-19 must wear a well-fitting mask for no less than 10 full days, regardless of vaccination status. Though they have not explicitly said so, CDC has been downplaying the use of cloth masks, emphasizing instead "fit and filtration" – such as respirators (N95s and KN95s), or using surgical mask layered with cloth mask. Though, employers should be aware that requiring use of N95s or KN95s in the workplace comes with additional OSHA obligations.

use of N95s or KN95s in the workplace comes with additional OSHA obligations.

New data from the CDC shows about one-third of the U.S. population is now living in a county with a "high COVID-19 infection level," which means the agency recommends universal indoor masking. If you are in a locality currently in a "high COVID-19 community level," CDC's guidance recommends you should implement the following mitigation strategies:

- Have individuals wear a well-fitting mask indoors in public, regardless of vaccination status;

- Have immunocompromised individuals, or those at high risk for severe disease, wear a mask or respirator that provides greater protection, consider avoiding non-essential indoor activities in public where you could be exposed, talk to your healthcare provider about whether you need to wear a mask and take other precautions (e.g., testing), and have a plan for rapid testing if needed (e.g., having home tests or access to testing);

- Stay up to date with COVID-19 vaccines and boosters;

- Maintain improved ventilation throughout indoor spaces when possible;

- Follow CDC recommendations for isolation and quarantine, including getting tested if you are exposed to COVID-19 or have symptoms of COVID-19;

- Consider setting-specific recommendations for prevention strategies based on local factors; and

- Consider implementing screening testing or other testing strategies for people who are exposed to COVID-19 in workplaces, as appropriate.

OSHA? I Thought the Mandates Were Struck Down?

If you are in a locality currently below the "high" level and are considering whether to resurrect your mask mandate, there's no "one size fits all" answer to this question. Rather, each business should weigh the pros and cons of requiring masks in their workplace and decide what's best for their particular locations and circumstances. Here are some considerations to take into account before dropping your mask mandates.

While OSHA's general Emergency Temporary Standard (ETS) was struck down by the Supreme Court, the agency still considers COVID-19 infection a "recordable illness" if work-related. It has continued to conduct investigations and issue citations for COVID-19 hazards under its general duty clause.

Likewise, as we discussed recently, healthcare employers must also keep an eye out for OSHA's impending infectious disease standard, which is likely to encompass more than the ETS. For those non-healthcare employers still testing their employees – something employers must reexamine based on the EEOC's most recent curveball – OSHA's access to medical record standard requires employers to retain certain medical documentation (e.g., created by a pharmacist, nurse, doctor, or other healthcare provider) for the length of the worker's employment plus 30 years.

Though it has promised otherwise – stating since March 2022 that there is an "UPDATE COMING SOON" – OSHA has not updated its COVID-19 Guidance since August 2021 to reflect this change. Th

SOON – <u>OSHA has not updated its COVID-19 Guidance since August 2021</u> to reflect this change. The agency's *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace* is still using the old CDC data model for indicating the areas of "High" or "Substantial" transmission. For those counties, OSHA indicates employees <u>should be masking</u> in public indoor settings.

Fisher Phillips is closely monitoring OSHA's activity through its <u>OSHA Inspections Tracker</u>. While the inspection trends are broad, COVID-19-related inspections are still among OSHA's priorities.

By way of example, an Administrative Law Judge recently upheld a $95,500 penalty assessed against a Massachusetts tax preparation business for prohibiting employees and customers from wearing masks. OSHA issued a "willful" <u>citation pursuant to its general duty clause</u>, noting the employer forced unmasked employees to work within six feet of each other and failed to have adequate means of ventilation or cleaning and disinfecting measures. This is just one of many cautionary tales of employers finding themselves on the wrong side of OSHA regarding responsibility for workplace safety.

What Should Employers Keep in Mind? Your 4-Step Plan

With all that being said, here is your current four-step plan to make sure you are up to date on your current obligations.

1. **Have a Written COVID-19/Infectious Disease Policy**. Even if you never adopted a written COVID-19 plan, it's never too late to document the policies you have in place to keep employees safe from any infectious disease. This is especially important when considering future changes in infection rates in different communities. Work with counsel and/or a safety professional to write down what you are doing to keep employees healthy in response to COVID-19 or any other infectious disease. This helps with training employees on your programs.

2. **Mandate Masks in Areas of High Community Spread.** Employers in areas of high COVID-19 community levels of transmission should consider keeping mask requirments in place or reinstating mask mandates. For national employers, this may mean different policies in different locations which can create logistical and communication issues. Recognize that you could open yourself up to an OSHA inspection (<u>which you can track here</u>) or a General Duty Clause citation if you fail to have a mask mandate too quickly or in an inopportune setting.

3. **Engage with your Employees**. The companies that thrived during the COVID-19 pandemic are those that communicated with, listened to, and engaged their workforce. Ask non-managers for feedback on company policies, listen and address their concerns through tasks like safety committees, audits, and safety improvement projects, and provide a transparent workplace where their concerns are considered.

4. **Clean the Workplace**. Employees are happier, feel safer, and more productive in a clean work area. Workers take pride in a clean facility. OSHA inspectors will believe you have the proper management policies in place and spend less time looking for safety violations. The COVID-19

pandemic has demonstrated how important sanitation is to the workplace. Employees will rightfully demand it going forward.

Conclusion

We will continue to monitor these developments and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact the authors of this Insight, your Fisher Phillips attorney, or any member of our Workplace Safety Practice Group.

Related People

Todd B. Logsdon
Partner
502.561.3971
Email

Service Focus

Workplace Safety and Catastrophe Management

Trending

COVID-19/Vaccine Resource Center