



# Caging the Kraken: 4 Steps for Employers to Curb the Spread of COVID's Most Contagious Mutation

Insights

1.11.23

As we enter the new year, and the fourth year of the pandemic, the COVID-19 virus continues to mutate. Two new Omicron subvariants, known as XBB and XBB.1.5 – unofficially nicknamed “Kraken” by some scientists – have emerged as the most transmissible strains to date. The Center for Disease Control and Prevention (CDC) estimates that these new strains account for close to 50% of current COVID-19 infections and are leading to a familiar spike in infections as we’ve seen the last two winters. While thankfully they have not been accompanied by a significant increase in death rates, employers should still review their COVID-19 policies to mitigate the spread of infection (and avoid scrutiny from federal and state workplace safety regulators). What do you need to know about the Kraken – and what are the four steps you should take to cage it?

## CDC’s Guidance on Masks and Isolation Remains Intact

Some of you may have been lulled into a false sense of security and not kept track of the latest CDC guidelines when it comes to testing and isolation. The good news is that the guidance provided by the CDC in August 2022 remains relevant for employers seeking to promote best COVID-19 practices. [You can read a full summary here](#), but the high points include:

- Employees, regardless of their vaccination status, should remain isolated for at least five days after testing positive for COVID-19.
- Employees with no symptoms may end isolation five days after testing positive, but they should continue to wear a high-quality mask (when indoors and around others) and avoid high-risk individuals for at least eleven days after the positive test.
- Symptomatic employees must isolate for at least five days after testing positive, and they must continue to isolate until their symptoms improve and they are fever-free for 24 hours (without the use of fever-reducing medication). Additionally, employees who suffered shortness of breath or difficulty breathing, were hospitalized, or have a weakened immune system must isolate until the tenth day after testing positive, regardless of whether their symptoms are improving. They must continue to wear a high-quality mask and avoid high-risk individuals until at least the eleventh day after the positive test. Some masks, like N95 and KN95 respirators, offer greater protection than others, like standard cloth masks. Employers should beware that requiring employees to use N95 or KN95 masks means they must comply with [additional OSHA requirements](#).

- As recently as December 16, the CDC estimated that more than 44% of U.S. counties were experiencing medium-to-high COVID-19 community levels. Now, more than 60% of counties are at those levels. If you are in one of those counties, the CDC advises implementing a number of mitigation strategies, like wearing high-quality masks when indoors in public and testing individuals who have household or social contact with someone at high-risk of getting very sick. In high-risk counties, the CDC recommends universal mask-wearing.

## **OSHA Remains Aggressive in Doling Out Penalties for COVID-19 Related Violations**

After the Occupational Safety and Health Administration (OSHA) saw its Emergency Temporary Standard (ETS) knocked back by the Supreme Court early last year, U.S. Secretary of Labor Marty Walsh issued a statement that OSHA wouldn't rest. Instead, it would use its existing powers, including its authority under the General Duty Clause, to enforce workplace standards relating to the transmission of COVID-19. This turned out to be no bluff.

By November 30, the agency had issued close to 20,000 COVID-related complaints to employers it found in violation, assessing \$7.9 million in penalties. Those complaints were filed for a wide variety of reasons, like an employer's failure to provide adequate PPE, not sending home employees exposed to COVID, and lack of social distancing.

And the agency is showing no signs of slowing down. Fisher Phillips is closely monitoring OSHA's activity through its first-of-its-kind OSHA Inspections Tracker, where you can delve into the data to find information relevant to your industry and area. While the inspection trends are broad, pandemic-related inspections remain one of OSHA's highest priorities.

## **What Should Employers Do? 4-Step Plan**

It is clear that COVID-19 is not going away – and neither is OSHA. Though most of our day-to-day lives more resemble pre-pandemic times than those dark restrictive and isolated days, employers should not grow complacent when it comes to the oversight of their workplaces. There are four primary ways you can limit the spread of these new variants and, simultaneously, avoid penalties for COVID-related violations.

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. **Engage with your Employees.** The companies that thrived during the 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.

3. **Clean the Workplace.** There are several benefits to keeping a clean workplace. A sanitized workplace will not just help mitigate the transmission of COVID-19, it will keep employees feeling happy and safe. It may also lead OSHA inspectors to spend less time looking for violations.
4. **Consider Masking Policies in Areas of High Community Spread.** Employers in areas of high COVID-19 community levels of transmission should consider revisiting mask policies. There is a risk of an OSHA inspection ([which you can track here](#)) or a General Duty Clause citation if you fail to implement an appropriate mask policy in such an area. While your workforce may be resistant to a mask mandate depending on your circumstances, there may be other ways to implement a policy that offers some level of protection (requiring masks at certain areas or times of day, for example).

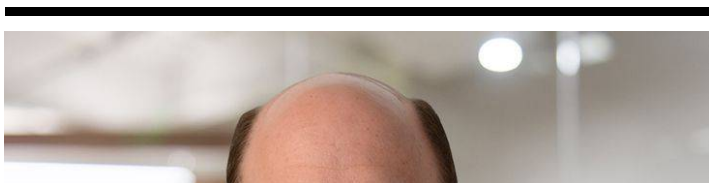
## Conclusion

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](#).

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