

# August 2021 COVID-19 Updates for Wisconsin Employers: Vaccine Approval, Mask Mandates and OSHA Guidance

Recently, there have been numerous developments pertaining to the COVID-19 pandemic. Here are a few key issues Wisconsin employers should be aware of related to the COVID-19 pandemic.

## Food and Drug Administration Approves Pfizer-BioNTech COVID-19 Vaccine

On August 23, 2021, the U.S. Food and Drug Administration (FDA) granted full approval to the Pfizer-BioNTech COVID-19 Vaccine. Previously, all COVID-19 vaccinations were approved under the Emergency Use Authorization (EUA) process. The EUA process allows the FDA to authorize unapproved medical products to be used in an emergency to treat or prevent serious or life-threatening diseases.

Throughout the pandemic, employers have been concerned about whether they can require employees to get vaccines that are subject to the EUA. With full approval of the Pfizer-BioNTech COVID-19 Vaccine, and full approval for other COVID-19 vaccines on the horizon, employers may feel more comfortable instituting mandatory vaccine program when there are options for employees to receive fully approved COVID-19 vaccines.

As discussed in Reinhart's previous alerts on vaccinations in the workplace, while employers can institute mandatory vaccination programs, the best route for most employers that are not in high-risk industries like health care may be a voluntary vaccination program. A mandatory vaccination program in lower-risk settings will likely result in an increased obligation to provide accommodations under the Americans with Disabilities Act (ADA) and Title VII as such employers have alternative accommodations that reduce the risk of an unvaccinated employee in the workplace. Another option for employers may be to require either vaccination or routine testing; however, this would also require pre-planning on the part of the employer to determine all the logistics surrounding the routine testing.

Even if an employer does not institute a mandatory vaccination or vaccination and testing program, it should still provide information and training on the benefits

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and safety of vaccinations from reputable sources such as the Center for Disease Control (CDC) as recommended by Occupational Safety and Health Administration's (OSHA) January 29, 2020, guidance on protecting workers from COVID-19, as updated on August 13, 2021.

## **OSHA Updates Its COVID-19 Guidance**

On August 13, 2021, OSHA updated its Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace to reflect the CDC's guidance on face coverings for fully vaccinated individuals. As of July 27, 2021, the CDC recommends that all individuals, including those who are fully vaccinated, wear masks indoors in areas of substantial or high COVID-19 transmission. Employers can find a more detailed description of the CDC's guidance in Reinhart's recent alert, [Keeping up With the CDC: Update to Mask Guidance for the Fully Vaccinated](#).

OSHA recommends, but does not require, that employers follow the CDC's July 27, 2021, guidance. While the guidance is not mandatory, employers are not free from risk. If an employer has had numerous positive COVID-19 cases in the workplace, OSHA could issue citations against the employer under the general duty clause if it finds the company has not instituted adequate COVID-19 protections, which may include a mask requirement.

The OSHA guidance provides additional recommendations for workplaces in a "heightened-risk" category. This category includes manufacturing; meat, seafood and poultry processing; high-volume retail and grocery; and agricultural processing settings. OSHA recommends these workplaces take additional steps to mitigate the spread of COVID-19 among unvaccinated or otherwise at-risk workers, including requiring all workers in areas of substantial or high community transmission to wear masks whenever possible, and encouraging and considering requiring customers and other visitors to do the same. OSHA's narrower guidance for workplaces in the heightened-risk category suggests there is greater risk of OSHA issuing a citation if a higher-risk workplace is in an area of substantial or high transmission and does not have an adequate mask policy.

## **Dane County Reinstates Its Mask Mandate**

On August 17, 2021, the local health department for the city of Madison and Dane County issued a Face Covering Emergency Order. The Order requires every individual age two and older to wear a face covering: (1) in any enclosed space open to the public where other people, except for members of the person's own

household or living unit, are present; or (2) driving or riding in any form of public transportation. The purpose of the Order is to require face coverings in most indoor situations in Dane County.

Under the Order, a "face covering" must meet the following requirements:

- Be made of a piece of cloth or other material with at least two or more layers of tightly woven, breathable fabric;
- Cover the nose and mouth completely when worn;
- Be secured to the head with ties, ear loops or elastic bands that go behind the head; and
- Fit snugly against the front and side of the face.

Face coverings do not include bandanas, single layer neck gaiters, face shields, goggles, scarves, ski masks, balaclavas, shirt or sweater collars pulled up over the nose or mouth, or masks with slits, exhalation valves or punctures.

The following groups are exempt from the Order:

- Children under the age of two;
- Individuals who are unconscious, incapacitated or otherwise unable to remove their face covering without assistance; or
- Individuals with medical conditions, intellectual or developmental disabilities, mental health conditions or other sensory sensitivities that prevent them from wearing a face covering.

For purposes of the Order, an enclosed space is "open to the public" if either a member of the public can enter the space or the space is subject to the ADA. Most commercial facilities, such as factories, warehouses or office buildings, are subject to the ADA's accessibility laws. Thus, most enclosed spaces in Dane County, excluding private residences, are subject to the Order.

Businesses covered by the Order are required to:

- Post a sign in a visible location that notifies the public that face coverings are required. Businesses can use the sign provided by Dane County; and
- Develop and implement a written protective measure policy and procedure that



ensures employees are provided with and wear face coverings when required.

The Order went into effect on August 19, 2021, at 12:01 a.m. and expires on September 16, 2021, at 12:01 a.m.

If you have questions about how this recent guidance impacts your workplace or if you need assistance updating your mask policies, please contact [Shannon Toole](#) or your Reinhart attorney.

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