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By: [Adam P. Banks](#), Senior Attorney

Last week, the CDC released [new guidance for fully vaccinated individuals](#). The highly publicized, and in certain circles controversial, the guidance provides that fully vaccinated individuals are no longer required to wear a mask or socially distance in most settings. In short, if you are fully vaccinated, you can resume activities that you did prior to the pandemic—a welcome return to normalcy.

Shortly thereafter, North Carolina Governor Roy Cooper followed suit, lifting mask requirements and eliminating restrictions on mass gathering, capacity, and social distancing, in most settings ([Link to Order](#)). Certain restrictions remain for schools, childcare facilities, and public transportation. Governor Cooper's order is explicit in that it does not inhibit private businesses from requiring their employees or guests to wear masks.

Employers face an interesting decision. Do they require their employees to get vaccinated, so employees and patrons can both take their masks off? Considering only the CDC's most recent guidance, you might conclude "sure, why not." However, recent guidance from the Occupational Safety and Health Administration (OSHA) complicates that decision.

In April 2021, OSHA released three new [FAQs](#) for employers struggling with the decision of whether to require employees to get vaccinated. The FAQs mainly address whether an adverse reaction to the vaccine is a "recordable incident." Businesses in certain higher-risk industries are required to maintain a log of work-related injuries and all businesses are required to report workplace incidents that result in a fatality or hospitalization. Recordable incidents are used to determine a business's recordable incident rate—the lower the better. The OSHA guidance is as follows:

1. Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?

Yes, the adverse reaction is recordable if it is:

1. Work-related,
2. A new case, and

3. Meets one or more of the general recording criteria in 29 CFR 1904.7 (e.g., days away from work, restricted work or transfer to another job, medical treatment beyond first aid).

2. If an employer requires employees to receive the COVID-19 vaccine as a condition of employment, are adverse reactions recordable?

Yes, if an employer's vaccination requirement is work-related, then adverse reactions are recordable.

3. If an employer recommends but does not require, the COVID-19 vaccine, are adverse reactions recordable?

No, unless the adverse reactions to *recommended* COVID-19 vaccines

1. Work-related,
2. A new case, and
3. Meets one or more of the general recording criteria in 29 CFR 1904.7 (e.g., days away from work, restricted work or transfer to another job, medical treatment beyond first aid)

A reasonable employer may easily conclude that OSHA's April 2021 guidance disincentivizes employers from requiring vaccination. Why would the employer require vaccination when they are "on the hook" for adverse reactions? If an employer mandates the vaccine, and their employee has an adverse reaction, the employer is required to record that incident, resulting in a higher recordable incident rate. Higher incident rates can lead to higher workers' compensation costs, fewer bidding opportunities, and increased OSHA inspections. The new CDC guidance for fully vaccinated individuals clearly incentivizes vaccination but does not address the disincentives built into OSHA guidance for employers.

In what seems like an attempt to clarify conflicting messages, OSHA updated its [website](#) to instruct employers to follow the new CDC mask guidance for fully vaccinated individuals. OSHA further states that the agency is "reviewing recent CDC guidance and will update" materials on their website accordingly. Does that mean adverse reaction to an employer-mandated vaccination will not be recordable? We don't know. It remains to be seen how and if OSHA changes its guidance, and how those changes will impact North Carolina employers.

*** Update ***

On May 24, 2021, before the ink was dry on the previous post, OSHA updated its vaccine-related FAQ guidance ([Link](#)) replacing the previous three FAQs with the following:

Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?

Answer: DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require many employers to record worker side effects from COVID-19 vaccination through May 2022. We will reevaluate the agency's position at that time to determine the best course of action moving forward.

For now, OSHA has simplified its guidance and removed any recordkeeping distinction between employers that mandate the vaccine and employers that recommend the vaccine. In all likelihood, North Carolina employers should not expect a requirement to record adverse vaccine reactions.