

Insights: Alerts

CDC Lifts Mask Restrictions for Vaccinated Individuals: What Does that Mean for Employers?

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Resource Center](#) page and/or your email for updates.

As changing guidelines have been perhaps the only constant throughout the COVID-19 pandemic, yesterday, May 13, 2021, the CDC altered its over year-long guidance regarding masks and social distancing for fully vaccinated individuals. It is important to note, however, that the change in recommended best practices does not apply to everyone. Rather, the changes to the mask and social distancing guidelines is limited only to **fully** vaccinated individuals. Specifically, the CDC has said that: “Fully vaccinated people can resume activities without wearing a mask or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.” Although the CDC has been clear that fully vaccinated individuals still need to follow guidance regarding masks and social distancing at their workplaces and businesses, its updated guidance is likely to cause some additional tension for employers as they navigate how to update their COVID-19 safety and prevention plans (if they change them at all).

The CDC has said that fully vaccinated individuals may resume activities that they did before the pandemic, but the guidance has not fully addressed the expectations for employers who are grappling with following state and local guidelines and mandates, as well as complying with the still-existing OSHA guidelines and the “general duty of care” requirement. More specifically, the General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), requires employers to furnish to each worker in “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.” Based on this requirement, OSHA has offered a number of guidelines and standards that apply to employers. These standards have not been updated yet to align with the CDC’s new guidelines. As of writing, OSHA guidance still recommends, among other things, that employers “implement physical distancing in all communal work areas,” “install[] barriers where physical distancing cannot be maintained,” “suppress[] the spread of the hazard using face coverings,” “use[] applicable PPE to protect workers from exposure,” “provid[e] the supplies necessary for good hygiene practices,” and, “perform[] routine cleaning and disinfecting.”

VACCINATIONS, MANDATES, AND VERIFICATIONS: WHAT DO EMPLOYERS NEED TO KNOW AS THEY MAKE A DECISION ABOUT NEXT STEPS?

As we navigate how this updated CDC guidance impacts employers, it is important to answer a few threshold questions that will guide employers as they consider updating and/or altering their COVID-19 workplace policies and practices.

For instance:

What does “fully” vaccinated mean? According to the CDC, people are considered fully vaccinated two weeks after their final dose of the vaccine. For Pfizer and Moderna vaccines, that is two weeks after the second dose. For Johnson & Johnson's Janssen vaccine, that is two weeks after the single dose.

May employers ask employees if they have been vaccinated? Yes. As a general practice, asking if an employee has been vaccinated is allowed. However, the EEOC has cautioned employers against asking too many follow-up questions. Specifically, the EEOC has said: “Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be ‘job-related and consistent with business necessity.’” Further, to the extent employers ask for proof of vaccination, they should be clear that they are not asking for any other medical information. For this reason, simply asking employees to provide a copy of their vaccination card is a recommended best practice.

May employers require employees to be vaccinated? Technically, the EEOC has signaled that due to the pandemic designation and the “direct threat” posed by COVID-19, that employers may require vaccinations. However, like many other things, just because employers can require COVID-19 vaccinations does not mean they should. Employers considering mandating vaccinations should talk to their legal counsel before implementing a policy. There are a number of factors to consider, including who pays for the vaccine (if there is a cost), whether the time spent getting the vaccine is compensable under the FLSA, whether the employer must provide time off to recover from the side effects, as well as the fact that the vaccines were given only Emergency Use Authorization (“EUA”) from the FDA. Employers will want to carefully examine these questions with legal counsel before moving forward on a vaccination mandate. And, employers should be comfortable with a certain degree of unknown risk. For example, although initial studies are very promising about the efficacy and safety of the EUA vaccines, there is still much that is unknown about the long-term impact, the efficacy against different coronavirus strains, the need for booster shots (and the timing of those), and other potential side effects. In fact, there is a pending case against a public employer in New Mexico that challenges the employer's ability to mandate vaccines passed with EUA authorizations, and similar lawsuits are likely to follow. Additionally, even if employers mandate vaccines, they must be prepared to consider reasonable accommodations for employees with sincerely held religious objections to the vaccines or disability related reasons not to be vaccinated. Additional considerations include the local laws applicable to employers. Although some states have already passed, and others are proposing legislation, that would prohibit employers from mandating vaccinations; other states, like California, still have mandatory mask mandates in place that would limit an employer's ability to alter their policies on masks even if the entire workforce were vaccinated.

For all these reasons, it is frequently the best available guidance for employers to encourage or incentivize vaccinations rather than mandating them. Of course many times this will be a fact specific determination

depending on the type of business the employer engages in. For example, employers operating in health care or residential settings where risk of infection far outweighs that of the traditional workplace, or even in settings where social distancing is not possible or mask usage is not practical, may have different considerations from an employer operating in an office setting. If an employer decides to incentivize vaccinations, they should be cautious to still comply with the guidelines regarding employee wellness plans under the ADA.

Are there different guidelines for different employers based on the CDC's new guidance? Yes. The CDC has been clear that the ability of fully vaccinated individuals to remove masks and not socially distance do not apply everywhere. Specifically, they do not apply in healthcare settings and individuals “will still be required to wear a mask on planes, buses, trains, and other forms of public transportation...” And, as noted above, the CDC has been clear that fully vaccinated individuals still must follow all “federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.”

SO, WHAT NOW? CAN EMPLOYERS TOSS OUT THEIR MASK AND SOCIAL DISTANCING GUIDELINES?

As much as we all want to return to normalcy, it may be too soon for employers to completely alter their existing COVID-19 safety and prevention policies, including mask mandates and social distancing requirements. There are a number of considerations employers should review before determining their next steps forward, including:

How will you ask about and confirm vaccination status? As a reminder, the updated CDC guidelines only apply to **fully** vaccinated employees. If an employee has not been vaccinated, or has not reached the required two-week marker after their final dose of the vaccination, the employee should continue to follow recommended prevention practices, like wearing a face covering/mask, socially distancing, and avoiding close contact with others. If employers want to follow new CDC guidelines and shed masks and do away with social distancing, they really should verify vaccination status first. The best way to do this would be to ask employees for a copy of their vaccination card, and to be clear that the employer is not seeking any additional medical information. Even though the EEOC has said that the act of getting a vaccination is not a medical exam (and asking for vaccination status alone is not a disability related inquiry), employers still want to be respectful throughout the process.

Can you follow the updated CDC guidance and still comply with any existing stricter requirements under state or local law, or OSHA guidance? As of today, the updated CDC guidance may not align with state or local requirements where the employer does business. And, for employers with business locations in multiple jurisdictions, there may not be a consistent standard that aligns with updated CDC guidelines. Without question, as of writing, the updated CDC guidelines are not congruent with those recommended by OSHA. Additionally, a number of states like California still have statewide mask mandates. So, employers must consider whether they can comply with all applicable requirements on their businesses and follow applicable best practices, if they relax social distancing requirements and allow vaccinated employees to remove masks and end social distancing requirements. And, on the other end of the spectrum, more than 30 bills have been introduced across at least 25 states that would prohibit certain vaccination mandates from employers or other service providers (like schools). Accordingly, as employers navigate what laws and guidelines apply to their businesses that may not align with updated CDC guidelines. It will be necessary for employers to make sure

that they consider all requirements before loosening standards.

How will you create (and enforce) different policies for vaccinated and unvaccinated employees?

Employers will need to consider if they want to have two different standards in their offices and worksites if the entire workforce has not been vaccinated. And, relatedly, whether they can reasonably enforce two different standards. Employers should consider not only their general duty of care requirements under the OSH Act, but also how having these two sets of policies will impact their workforce and its culture, and the administrative burden that two policies may create. As a general rule, if there is anything employers know, it is that they are not supposed to treat different categories of employees differently. Although vaccination status is not, on its own, a protected category or characteristic, employees who are not vaccinated for protected reasons under Title VII (deeply held religious beliefs) or the ADA (disability related reasons) will have certain protections from discrimination and retaliation under federal law. If employers decide to implement one set of policies for vaccinated employees and another for unvaccinated employees, they will need to ensure that this is not discriminatory or retaliatory against the employees protected by Title VII and the ADA, and that it does not create disruptive or dangerous tensions in the workplace. Further, if employers decide they want to allow fully vaccinated employees to stop masking and socially distancing, they will need to ensure that someone is monitoring the workforce to make sure that **only** the fully vaccinated individuals are unmasked and in close contact. Otherwise, the employer will be outside of both the CDC's updated guidance and the existing OSHA guidelines.

What are the important considerations in hybrid work environments? Without question, the type of work environment will impact decisions that employers make as they navigate whether to change their COVID-19 safety policies. For employers with some customer or public facing positions (that may be higher risk) and others that are in a more office like setting (which are likely to be lower risk), it may make sense to have stricter and looser policies based on the risk level (and existing guidance). In fact, it is possible that many employers may have already been using different policies throughout the pandemic based on the type of work being performed, the available guidance, and the associated risks for contracting or spreading COVID-19. As a best practice, employers should continue to check on OSHA's industry-specific guidelines, monitor state and local guidance, and determine their comfort level with the newly updated CDC guidance as it applies to their workforce and their business. The CDC is clear that employers and businesses may have different requirements from the updated guidance. When it doubt, the most conservative practices are likely to create the least risk.

Now that travel restrictions are changing, should we reinstitute business travel? For sure, the CDC has included updated travel guidelines for fully vaccinated individuals. Specifically, for travel in the U.S., fully vaccinated individuals no longer need to get tested before or after travel, or self-quarantine after travel. This would apply to both personal and business travel domestically; however, the rules are likely to vary based for international travel. Given all the variables, employers should think carefully about whether travel is critical before instituting mandatory travel policies. And, again, the suggested practices for fully vaccinated individuals are different from those of non-vaccinated or not yet fully vaccinated individuals, and employers should keep that in mind in making business travel decisions.

CONCLUSION

Employers who decide to follow updated CDC guidance should do so carefully, and we recommend consulting with your trusted labor and employment counsel. Although we all share a desire to return to the pre-pandemic normalcy, there is still much about COVID-19 prevention and safety for employers to consider before shedding their mask mandates and social distancing requirements for vaccinated individuals. Employers with additional questions should reach out to the team at Kilpatrick Townsend or contact their employment law counsel with specific questions. As with all things COVID-19 related, we will continue to monitor the situation and update as new information becomes available.