

COVID-19 and Remobilization: Returning to the Construction Site Without Mandated COVID-19 Restrictions

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Who Needs to Know

Construction industry employers.

Why It Matters

This article summarizes the current landscape in Pennsylvania and California as COVID-19 restrictions are lifted, and highlights important considerations for employers in the construction industry in relation to vaccines and navigating a post-mask mandate world.

Nearly 15 months have passed since most states implemented restrictions to curtail the COVID-19 pandemic, which in some cases, included the complete shutdown of construction work. Since then, COVID-19 vaccination rates have risen steadily and many states have either already lifted, or soon plan to lift, mask-wearing mandates. This article addresses the current state of COVID-19-related restrictions in Pennsylvania and California; concerns and issues with returning to work, including mandatory vaccination programs; and suggestions for navigating a post-mask mandate world.

Current Restrictions in Pennsylvania and California

Pennsylvania. On June 28, the commonwealth lifted its [mask mandate](#). Both vaccinated and unvaccinated individuals will no longer need to wear masks unless businesses still require their employees to wear them. Even though Pennsylvania has lifted the mask mandate, employers and employees should follow CDC guidelines to prevent infection. This may include disinfecting shared workspaces and equipment, providing proper ventilation in buildings, sending home sick employees, and other safety precautions.

California. California officially re-opened on June 15. In the days following, California's Division of Occupational Safety and Health (Cal OSHA) met multiple times and [proposed revisions to its standards on COVID-19 protocols](#) to more closely parallel updated guidance from the Centers for Disease Control (CDC).

As of the posting of this article, the California Department of Public Health (CDPH) and Cal OSHA's guidance for the construction industry is no longer in effect. Instead, Cal OSHA directs readers to its COVID-19 Prevention Emergency Temporary Standards (ETS). On June 17, Cal OSHA updated the ETS to include notable changes,

such as:

Allowing fully vaccinated employees working indoors to forego masks or face coverings. Employees not fully vaccinated still must wear masks or face coverings while indoors unless eating or drinking, when alone in a room or vehicle, or subject to an accommodation.

Requiring employers to document vaccination status of employees. If an employee refuses to disclose his/her vaccination status, the employer must treat the employee as unvaccinated and cannot retaliate against him/her.

No longer requiring physical distancing except in the event of an outbreak.

Upon request, requiring employers to provide respirators (N95 masks) to any employee not fully vaccinated for voluntary use, free of cost.

Finally, requiring employers to offer free COVID-19 testing during paid time to employees under certain circumstances.

Employer Vaccine Protocols

Despite the rise of vaccination rates throughout the country, the construction industry has somewhat lagged behind. There appears to be a strong divide between those in favor and those opposed to receiving the vaccine. [A recent survey of contractors](#) revealed that 46% of those surveyed who had not yet been vaccinated are not inclined to do so. This places both employers and employees in difficult positions. The construction industry naturally leads to many individuals working closely together. Employees may have concerns about working with unvaccinated individuals, especially where masks are not required. Employers will have to navigate a potentially divided workforce, while ensuring their health and safety protocols do not alienate certain members.

To counteract these concerns, some employers may consider instituting a mandatory vaccine policy. The Equal Employment Opportunity Commission (EEOC) has made it clear that employers may do so. However, such a policy comes with numerous potential pitfalls. First, and most importantly, employers may lose substantial portions of their workforce, leading to staffing concerns, project delays, and ultimately, increased costs. This presents a particular concern for the construction industry given the significant percentage of workers who have expressed some hesitation to the vaccine and because the work cannot be performed remotely.

Employers must also ensure compliance with requests for reasonable accommodations for religious and disability exceptions required by Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). Other concerns include the disparate impact of mandatory vaccination policies and the confidentiality of medical information. To learn more, read Troutman Pepper's recently published article about EEOC guidance and the numerous issues and concerns with mandatory vaccine programs [here](#).

Navigating a Post-Mask World

Given the many potential pitfalls discussed above, both employers and employees alike will need to work together to ensure a safe and comfortable work environment, while respecting the individual's choice. However, since

these are not only intracompany concerns, it is critical to keep these issues in mind for current projects and when negotiating future contracts.

You may still incur COVID-19-related mitigation costs on current jobs. For example, in California, employers must provide N95 masks and free COVID-19 testing upon request. Employers also may incur additional costs to provide increased cleaning and sanitation at their facilities and on the jobsite. Also, remember that different countries may have different restrictions, and international travel may still come with its own restrictions and increased costs. While mask mandates are ending and states are removing COVID-19-related restrictions, you may still incur additional COVID-19-related costs. To ensure you have the proper support for any potential cost or schedule impact claim (if permitted by your specific contract), it is critical that you accurately and completely track them.

As for future contracts, remember to consider COVID-19-related issues and concerns when allocating risk. Some examples of items to keep in mind include:

- Should the owner or contractor bear extra cleaning and sanitation costs?
- Who should pay for N95 masks and free testing if required?
- What if an owner requires all on-site workers to be vaccinated, but the contractor has no such policy, or vice versa?
- What happens if the project is delayed due to a COVID-19 outbreak?
- What if certain material costs considerably increase or decrease during the project due to COVID-19-related supply chain interruptions?

The above points provide a small sample of the many potential areas you might want to consider in negotiating new contracts. But the import is clear: When entering into new engagements, you must think through these issues thoroughly to ensure you are adequately protected and that you take on only those risks you intend to accept.

The impact of the COVID-19 pandemic on the construction industry is well documented. Lessening restrictions and the increased proliferation of vaccines bring new issues to which there are no easy answers. But what is clear is that the COVID-19 pandemic will continue to impact the construction industry, and navigating these issues is a complex endeavor.

The information above is for informational purposes only and is not intended to serve as providing legal advice. If you have further questions or seek advice based on your specific situation, please contact any member of the Troutman Pepper Construction Group. You may also find additional information on the [Troutman Pepper COVID-19 Resource Center](#).

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