

Articles + Publications | May 17, 2021

What Employers Need to Know About the CDC's New Mask and Physical Distancing Guidance

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Who Needs to Know

All employers with employees currently working onsite or who would like to return their workforce to the office in the future.

Why It Matters

The CDC's most recent guidance is a big step forward in the long-awaited attempt to return to pre-pandemic life for fully vaccinated Americans. While many employers may assume they can relax their pandemic health and safety protocols accordingly, employers face special considerations, including a mosaic of state and local guidance impacting their operations.

The Centers for Disease Control and Prevention (CDC) announced on May 13 that individuals fully vaccinated against COVID-19 do not need to wear a mask or physically distance in most settings (excluding health care and certain travel settings). While this is welcome news for vaccinated Americans, most employers are left to determine how the CDC's updated guidance will impact their workplace policies and practices. Below, we address some of the main questions left open for employers in the wake of this new guidance.

Can employers lift a workplace mask mandate in light of the CDC's May 13 guidance?

Yes, for *fully vaccinated workers*, so long as doing so is consistent with applicable state and local requirements, which continue to apply beyond the CDC guidance.

The CDC clarifies that, for purposes of the guidance discussed below, people are considered fully vaccinated for COVID-19 two weeks or more after receiving the second dose in a two-dose series (Pfizer-BioNTech or Moderna) or two weeks or more after receiving a single-dose vaccine (J&J/Janssen). The CDC has not addressed how its guidance may be impacted if booster doses are later deemed necessary.

Further, state and local requirements continue to change frequently. While many states have not yet revised their guidance to relax mask mandates, some states have begun to react to the CDC guidance. For example, [Nevada](#) issued an emergency directive adopting the CDC guidance just hours after the CDC's announcement on May 13. Similarly, [Virginia](#) announced it will relax face mask and distancing requirements for vaccinated workers effective May 28. Also, while the Occupational Safety and Health Administration (OSHA) has not yet [updated its guidance](#)

to remove the suggestion that employees wear masks and social distance while working indoors, it has indicated that it is “reviewing” the recent guidance and will update its materials accordingly.

Thus, this most recent CDC guidance does not expressly change workplace safety measures. Further, the CDC’s recommendations are just that — recommended. While many state and local departments of public health and OSHA have looked to the CDC in preparing their own COVID-19 guidance and regulations, the CDC’s statements do not have the force of law. In recognition of this, the CDC’s “fully vaccinated” guidance explicitly states: “You will still need to follow guidance at your workplace and local businesses.” It further states that fully vaccinated individuals may “resume activities without wearing a mask or staying 6 feet apart, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.”

In sum, all this means that whether to lift mask mandates and physical distancing requirements depends in part on state and local requirements and considerations for exposure to persons whose vaccination status is unknown (e.g., for employers operating in public settings or for whose employees are working in other venues). The CDC’s [Considerations for Returning to Work](#) (to date, not yet updated to reflect the May 13 guidance) outline these requirements. It also requires an individualized safety assessment, which will depend on the type of workplace and workforce involved, as well as an employer’s control over the workforce, including whether the employer can maintain and reliably enforce a policy of verifying vaccination status, as discussed below.

Can employers inquire whether employees are fully vaccinated against COVID-19?

Yes, if allowed by applicable state or local laws and as long as done consistently with the requirements of the Americans with Disabilities Act (ADA). First, employers must consider whether state or local laws allow them to inquire about vaccination status since the CDC guidance applies only to fully vaccinated individuals (and thus employers would need to know which employees are fully vaccinated to know which employees are no longer subject to mask and physical distancing mandates). If applicable laws permit this inquiry, employers should consider developing processes to appropriately and securely confirm employee vaccination status for purposes of returning to the workplace only.

Employers must also tread carefully whenever asking for, using, and maintaining employee medical information. The U.S. Equal Employment Opportunity Commission (EEOC) has clarified in its guidance that employers may ask about vaccination status (See Question K.3. [here](#)): *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.” If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.*

However, despite the EEOC’s position on these types of inquiries, some states, such as New York, are considering legislation that would prohibit employers from requiring vaccination as a condition of employment, and from requiring any person to present evidence of vaccination status. As such, employers should carefully monitor

state and local guidance and consult counsel to determine any limitations on vaccination-related inquiries and requirements in their respective states of operation. Also, employers should be mindful of state privacy laws that may govern the collection of personal employee information, which could include vaccination status.

If allowed to inquire about vaccination status, what information should employers obtain and how should they record or maintain this information?

If state law permits the employer to inquire about vaccination status, the employer should designate a key contact — likely human resources — as the responsible party for obtaining, confirming, and verifying that information. Employers do not need to maintain a physical record (e.g., copy of a COVID-19 vaccination card), and in fact, the recommended approach is to not maintain any such records, other than a log indicating employee eligibility to be physically onsite, as vaccination records are arguably confidential medical information protected by the ADA.

What alternatives, if any, are there in determining eligibility for mask exemptions aside from vaccination status? Should employers still grant mask exemptions to employees who refuse to verify their vaccination status?

The most recent CDC guidance only addresses an exemption to mask requirements for fully vaccinated individuals. As such, the recommended approach is to rely only on vaccination status for purposes of determining whether an employee is eligible to work without a mask, unless otherwise provided for under state or local laws.

Although not explicitly addressed by the CDC, employee testing may be an alternative approach to assessing mask exemptions in appropriate circumstances where the workforce does not have extensive contact with the general public. Assuming that state and local laws align with the CDC guidance, an employer may consider lifting its mask mandate for locations where no state or local mask mandate is in place if the employer (1) has a vaccine program in place (whether incentivized or merely encouraged) that verifies vaccination status as a requirement for working onsite and/or (2) implements a testing regimen for unvaccinated workers. In other words, employers may consider allowing employees to work without a mask if they either (1) provide proof of vaccination status or (2) produce a negative COVID-19 infection test result from a health care provider at regular intervals established by the employer. Any employees who refuse to provide their vaccination status and/or submit a negative test must continue to wear a mask while in the workplace. However, employers should still require masks in the workplace for all individuals who are unvaccinated, refuse or prefer not to share vaccination status, or will not get tested.

Employers must also carefully establish enforcement mechanisms for their mask mandate and exemption policies to ensure that only employees eligible for mask exemptions may work without one, and that violations of mask policies are fairly enforced. Employers should be aware of the risk for workplace retaliation claims and be prepared to address concerns raised by workers over the administration of any new face mask policy or other changes to employer COVID-19 workplace protocols.

How does this CDC mask guidance impact existing vaccine programs? Should employers without a vaccine program implement one?

Employers with an existing program have an opportunity to re-emphasize the value of immunization to their workforce to spur receiving the vaccine by a certain date, for example, a deadline of July 31. The added value of

not having to wear a mask in the workplace may incentivize unvaccinated employees to now get the vaccine. For those employers still evaluating a vaccine program, there is now even more reason to develop a program, especially given the ample supply of vaccines and this updated CDC guidance.

Employers should continue to monitor news and regulatory updates from their respective localities to determine if and how their mask mandate and/or exemption policies are affected. It is also anticipated that OSHA will issue an emergency rule that addresses and may even depart from the new CDC guidance. Please consult with a [Troutman Pepper Labor and Employment attorney](#) if you have any questions about how this new development affects your workplace, or if you need assistance with your [COVID-19 vaccination policies or immunization programs](#).

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