

A NEW ERA IN FLORIDA: WHAT EMPLOYERS NEED TO KNOW ABOUT VACCINE PASSPORT BAN AND UPDATED MASK REQUIREMENTS

Insights
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Declaring that the state is “no longer in a state of emergency,” Florida Governor Ron DeSantis signed a bill on Monday banning vaccine passports while issuing two executive orders immediately suspending and invalidating local government COVID-19 restrictions, including mask mandates. But the news doesn’t necessarily mean you should rush to ease up on your facemask requirements for workers or visitors, nor impact your decision to mandate vaccines for your workers. Below is a summary of the implications for Florida businesses.

Vaccine Passports Banned

As the vaccine rollout progresses, businesses and employers nationwide have been wondering if a “vaccine passport” – an official document certifying that an individual has been vaccinated against COVID-19 – can lead to a path back to normalcy. A Florida law now prohibits businesses operating in Florida from implementing those measures with respect to customers. The new law does not come as a surprise to most Floridians. On April 2, Governor DeSantis signed [Executive Order 21-81](#) prohibiting vaccine passports. This new law, however, solidifies the ban and provides more guidance for businesses.

Specifically, [the new law](#) says that “business entities,” including for-profit and not-for-profit entities, cannot require that *patrons* or *customers* provide documentation certifying that they received the COVID-19 vaccine or certifying that they have recovered from the virus to enter or receive a

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Ilanit Fischler

Partner

[954.847.4723](tel:954.847.4723)

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service from the business. Licensed health care providers are exempt from this provision.

The law also provides that educational institutions, including both public and private schools, cannot require students or residents to provide documentation certifying that they received the COVID-19 vaccine or have recovered from the virus.

Importantly, the law does *not* prohibit private businesses from requiring that their own employees show proof of vaccination or certification that they recovered from the virus. Of note, recent guidance from the Equal Employment Opportunity Commission clarifies that it is generally permissible for employers to ask employees about whether they have been vaccinated, but [employers should avoid further inquiries](#).

Further, the new law permits covered entities to continue to use screening protocols (such as temperature checks) in accordance with state or federal law to protect public health.

Governor Eliminates Current Local Restrictions After Florida Surgeon General Discourages Masks

On April 29, Florida State Surgeon General Dr. Scott Rivkees issued a [Public Health Advisory](#) rescinding prior public health advisories. Notably, the advisory states that fully vaccinated people should no longer be advised to wear face coverings or avoid social and recreational gatherings except in "limited circumstances." Those limited circumstances are not defined, but the advisory appears to cover masking both indoors and outdoors.

Noticeably, the Surgeon General's advisory is less restrictive than CDC guidance. Although the CDC recently announced that fully vaccinated people can forego masks in certain situations (for example, if they are indoors with other vaccinated people, indoors with unvaccinated people from the same household, or outdoors in spaces that are not crowded), the CDC generally recommends that fully vaccinated people continue to wear masks or face coverings in other scenarios.

To follow the Surgeon General's advisory, Governor DeSantis issued a pair of executive orders on May 3 [suspending](#) and [invalidating](#) local government COVID-19 restrictions, including mask mandates. These orders

effectively eliminate all existing coronavirus-related restrictions imposed by *local governments*. This means that local orders requiring, among other things, masks, sanitizing, and capacity limits are no longer effective. The orders do not affect restrictions issued by school districts.

Noticeably, the governor's orders only prohibit local governments from issuing and enforcing COVID-19 restrictions using their emergency procedures. They specifically allow local governments to enact ordinances under regular enactment procedures. Thus, it is possible that local governments will counter the governor's orders by enacting ordinances continuing to require such measures as masking and distancing.

However, the state's guidance does not mean that private businesses cannot – or should not – enforce their own policies. The orders only prohibit local governments from issuing and enforcing restrictions on individuals or businesses using emergency powers. Local governments may still enact such procedures using regular procedures. Businesses can still generally enforce their own measures, including mask mandates, if they choose to.

What Should Employers Do Now?

Pushing forward to a new normal, Florida employers should be aware of how to proceed. Despite the state's guidance, you should continue to enforce safety measures.

Florida recently passed a new [COVID-19 liability protection law](#) for businesses. Although very favorable to businesses, the law requires that businesses make a "good faith effort to substantially comply with authoritative or controlling government-issued health standards" to gain its protection. If there are different sources of guidance in effect, a business may follow any of them. This means that although they are different, a business can likely be protected from liability by following either Florida or CDC guidance. However, an employer may have stronger defenses and be able to undercut possible claims earlier by following CDC guidance, which takes a more conservative approach than current Florida guidance.

Further, OSHA requires that employers maintain a workplace free of recognized hazards. COVID-19 is such a recognized hazard. By not following CDC guidance, a Florida employer

may open themselves to exposure under OSHA's General Duty Clause, even in the absence of a state mandate.

Employers should also consider the business realities of having unmasked employees. Among other things, customers and vendors may not feel comfortable entering your business if they see employees unmasked, even if they are vaccinated.

Finally, because the Surgeon General's recommendations only apply to fully vaccinated people, your business may have an inconsistent patchwork of some employees wearing masks while others are not. This may result in a situation where different standards apply to different employees depending on their vaccination status. Employers should avoid this, as OSHA has issued guidance stating that businesses [should not treat unvaccinated employees differently than vaccinated employees](#). Additionally, inconsistency among employees wearing masks may inadvertently reveal who is and is not vaccinated, which may be disruptive and may unintentionally single out employees who do not get the vaccine, including for medical or religious reasons.

Conclusion

As Florida rapidly pushes toward a new normal, employers should keep up to date with the rapidly changing developments. We will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information, and check out our [FP Vaccine Resource Center For Employers](#) for more information. For further information, contact your Fisher Phillips attorney or any attorney in any of our [Florida offices](#).