

Insights, News & Events

EMPLOYERS MAY BE ABLE TO SCRAP MASK MANDATES FOR FULLY VACCINATED WORKERS: A 7-STEP BLUEPRINT TO OVERCOME RISKS AND HURDLES

Insights
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The announcement yesterday from the CDC that fully vaccinated people no longer need to wear a mask or physically distance in any non-healthcare setting was a welcome relief for all Americans and a hopeful sign that we have turned a significant corner with the COVID-19 pandemic. But the announcement included an important caveat – that the guidance did not overrule federal law, workplace guidance, local business restrictions, or state, local, or other similar regulations. And because [the CDC's announcement](#) offered no specific guidance for employers, many workplaces may feel unsure how to proceed. The good news is that the new rules seem to offer a path forward for those employers that want to proceed to a mask-less workplace – but such a path involves some risks to consider and hurdles to overcome. There's a seven-step blueprint for employers to get to that point.

[Ed. Note: The blueprint below has been updated based on OSHA's May 17 announcement.]

The CDC's Announcement in a Nutshell

Before you take any action, you should make sure you understand what the Centers for Disease Control and Prevention (CDC) announced yesterday. In a nutshell, [the May 13 announcement](#) indicates that **fully vaccinated people** can now resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance. **To make clear, the CDC's announcement states that some business**

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settings may choose to continue to require masks and social distancing. Those in healthcare settings, however, have no choice: they need to continue to [follow previous guidance](#) regarding masks and social distancing regardless of vaccination status.

Further, fully vaccinated people can refrain from being tested or quarantining following a known exposure to a COVID-19-positive person (assuming the vaccinated person remains asymptomatic) and can be excluded from routine screening tests. Finally, they can resume domestic travel without testing or quarantine periods, and can travel internationally without any U.S.-based requirements before or after their trip.

According to the CDC, a worker is considered fully vaccinated two weeks after they have received the second dose in a two-dose series (Pfizer-BioNTech or Moderna) or two weeks after they have received a single-dose vaccine (Johnson and Johnson/Janssen). Also, there is [currently](#) no time limit on “fully vaccinated” status (although this may eventually change if research determines that booster shots are necessary).

What Risks Remain? The Not-So-Magnificent 7

For employers considering relaxing or eliminating your mask mandates and social distancing protocols for those who are fully vaccinated, there are at least seven considerations to take into account before proceeding:

- Local laws and regulations may still require you to enforce such rules regardless of vaccine status.
- The federal Occupational Safety and Health Administration (OSHA) has not yet relaxed its COVID-19 standards for workplaces.
[Ed. Note: See [blueprint below](#) for adjustments based on OSHA's May 17 announcement.]
- States with their own OSHA equivalents may also have different standards to consider and these state agencies could step in as necessary.
- If you choose to mandate the vaccine, there remains an outside risk of a lawsuit from someone hesitant to get inoculated.



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- Even if you do not mandate the vaccine, you would need to inquire about and probably track the vaccine status of your workers to determine whether someone is fully vaccinated, which could raise privacy and disability discrimination concerns.
- Some of your workers may have legitimate medical or religious reasons for abstaining from the vaccine, requiring you to take their accommodation status into account when developing business-wide policies.
- Workers who are unvaccinated and thus required to continue wearing masks and maintain social distancing could have a claim for retaliation if they are harassed or discriminated against in violation of federal safety laws or other legal principles.

Your 7-Step Blueprint for a Mask-Less Workplace

Given that those risks and hurdles will present themselves for the foreseeable future, here is a seven-step blueprint if you want to eliminate mask mandates and social distancing rules at your workplace.

1. **Get a Gauge on Your State and Local Regulations.** Before you even think of ditching masks and six-foot spacing rules, you need to assess whether the state or local government in which you operate maintains any sort of mandate. The CDC guidance is just that – guidance. It explicitly states that it does not override rules instituted and enforced by your local governments (usually by executive order signed by the governor). While many state and local health authorities immediately followed the CDC's lead and began relaxing their own standards, you need to operate under their compliance purview until things change in your area.
2. **Understand the Risk You Face From OSHA.** The CDC sets standards for the American public to follow. The standards do not regulate workplace safety requirements and the CDC cannot find you in violation of safety rules and issue citations – but OSHA can. So while it is heartening to see the CDC take this momentous step, savvy employers are waiting for OSHA to follow its lead before they fully celebrate. OSHA has not changed its [guidance on mask usage and social distancing since January 29](#) and has not yet reacted, formally or otherwise, to the CDC's pronouncement. Whether you



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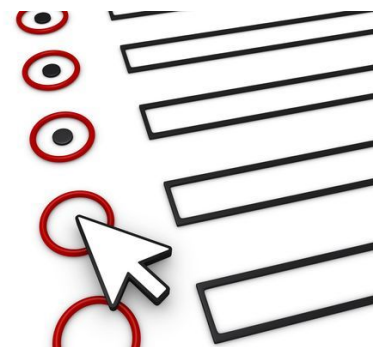
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want to bear the risk of a possible OSHA citation for not following heightened safety protocols is an individual decision you need to make in consultation with your safety attorney, although you should have good support for any such decision thanks to the CDC's announcement.

[Ed. Note: In response to the CDC's announcement, OSHA provided a brief announcement on May 17 to note that employers should follow the CDC's guidance for information on measures appropriate to protect fully vaccinated workers. This update provides employers with a measure of comfort knowing that adopting policies consistent with CDC guidance should not lead to OSHA compliance issues. The agency also indicated it would soon update its guidance in more detail.]

3. And Understand Your State OSHA Plan Requirements. In those states that maintain their own OSHA equivalent, you need to carefully review and consider any stricter standards set and maintained to determine whether you can proceed. Again, these state OSHA agencies could follow the CDC's lead, but you need to assess the full lay of the land before changing your policies.

4. If You Mandate the Vaccine, Bear the (Slight) Risk of a Lawsuit. Employers that require vaccines for their workforces seem to stand on solid legal footing (so long as they also offer accommodations as necessary and don't violate any new state laws that ban mandatory vaccinations) – but that hasn't stopped the lawsuits from coming. Fueled by a bit of uncertainty caused by the current Emergency Use Authorization status of the vaccines, several employees across the country have filed lawsuits or threatened litigation against businesses requiring the vaccine for their workforce. If the CDC's announcement has caused you to reconsider your stance and consider mandating the vaccine for your workers, make sure you understand the risks of a lawsuit – however slight – and talk with your attorney so you go into the process with your eyes open.

5. Tracking Vaccine Status Raises Privacy and Other Concerns. To provide mask and social-distancing relief to your fully vaccinated workers, you need to figure out which of them are actually fully vaccinated. It's probably not the best policy to simply go on the honor system, so some level of certification will be necessary. What do you and your managers need to know about asking your employees about their vaccine status?

- While it is permissible to ask for vaccine documentation, you should affirmatively inform employees that they do not need to provide any additional medical or family history information.
- You should treat the documentation you receive as a confidential medical record.
- You may want to avoid retaining copies of any actual vaccine card, as that could trigger safety recordkeeping obligations that you'd rather avoid. Simply create a confidential spreadsheet noting employee name, type of shot received, and date of the last dose.
- Refrain from asking follow-up questions – such as an employee's reasons for not being vaccinated – that could trigger Americans with Disabilities Act (ADA) or Genetic Information Nondiscrimination Act (GINA) obligations.
- Despite your natural curiosity, don't ask how your employees fared after their vaccine (especially the dreaded second dose). As harmless as it might seem, some questions could reveal disability status that you would rather not know.
- If your business is subject to California's broad data privacy law – the CCPA – you need to recognize that collecting information from employees about their vaccination status triggers the "notice at collection" requirement. While you may not have to provide a different or new CCPA notice every time you ask for or receive such information, you may need to ensure that the broader notice you have already provided to all employees (i.e., the notice to inform the employee of all categories of personal information your company collects about or from the employee, along with all the business purposes for which the information is used) covers this type of data collection. Check with your legal counsel to ensure you comply with California law.

6. Offer Religious and Medical Accommodations. Your workers may be entitled to accommodations preventing them from receiving the vaccine, and therefore may remain subject to mask-wearing and social-distancing protocols for some time regardless of the CDC guidance.

You obviously remain obligated to exclude them from any vaccine mandate, and should take them into account when instituting any sort of company-wide policies or practices that involve a relaxation of COVID-19 rules.

- 7. Protect Masked Workers from Mistreatment.** Finally, for those workers who are excluded from vaccine mandates for legitimate medical or religious reasons, or for those who continue wearing masks because they choose not to get vaccinated (in non-mandated work environments), you need to make sure they do not face illegal mistreatment at the hands of supervisors or coworkers. OSHA continues to state that unvaccinated employees should not be treated differently than vaccinated employees. Make sure your workers know that retaliation, discrimination, and harassment will not be tolerated, and include this prohibition in written policies distributed to all workers.

Additional Issue: What About Guests?

While the CDC's announcement included [an accompanying chart](#) indicating that many day-to-day activities are considered "safest" – including dining at an indoor restaurant, visiting a hair salon, shopping at an uncrowded retail store, seeing a movie at a theater, and more – the chart is designed with the vaccinated visitor in mind and not for the business actually hosting those guests. The key question left unanswered: how can a business determine whether its guests are fully vaccinated and cleared for a mask-less experience?

There is no easy answer at this time. Asking your guests for information about their vaccine status or proof of vaccinations is a risky proposition fraught with legal peril, which can vary by jurisdiction. You should coordinate with your legal counsel if you want to pursue such a course of action, but there are critical discrimination and privacy concerns to overcome. For more information, you can visit [our recent Insight discussing vaccine passports](#) – essentially, documentation demonstrating proof of vaccination – and recognize that state laws have already begun to spring [up prohibiting such passports in various areas](#).

What's Next?

For those employers that want to chart the most conservative course and maintain the status quo, there remains virtually no legal risk at this time. You could choose to sit and wait for more clarity to emerge from the EEOC, OSHA, and state and local authorities before implementing any changes. The CDC announcement expressly states that employers and business can continue to maintain a mask mandate and social distancing policy. Of course, as things progress and some of your competitors begin bearing the risk and eliminating their mask and social-distancing policies, you may end up losing some of your workers who would rather work in a loosened environment. While you may not want to be first to adjust to the CDC's new guidance, you don't want to be the last.

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