

MASK-FREE SCHOOLS BEFORE SUMMER? A 7-STEP ROADMAP FOR SCHOOLS THAT WANT TO DITCH MASK MANDATES FOR FULLY VACCINATED EMPLOYEES AND STUDENTS

Insights
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With less than a month left in the school year, yesterday's guidance from the Centers for Disease Control and Prevention (CDC) stating that fully vaccinated people no longer need to wear a mask or physically distance, was met with mixed emotions from school administrators. Like all Americans, schools no doubt view this as significant progress in conquering the COVID-19 pandemic. But [the CDC's announcement](#) came in the notorious "100 days of May" as schools sprint to the finish line of another trying academic year and offered no specific guidance for schools, leaving many educational institutions unsure how to proceed. The good news is that the new guidance may offer a path forward – albeit an aggressive one – for those schools wanting to allow vaccinated employees and students to go mask-less. Such a path involves some risks to consider and hurdles to overcome, however. We have developed a seven-step roadmap for schools to get to that point.

The CDC's Announcement in a Nutshell

Before your school takes any action, you should make sure you understand what the 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 announcement states that businesses may choose to continue to require**

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masks and social distancing. However, the CDC's guidance specifically regarding [masking in schools](#) remains unchanged. **Importantly, as noted below, schools must review any orders of their state and local departments of health and education, which may not follow CDC guidance and will control.**

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, an individual 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 schools 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:

- The CDC continues to [recommend masking in the school section of its website](#).
- Local laws and regulations, including your state Department of Education, may still require you to enforce masking or social distancing rules as well as surveillance testing regardless of vaccine status.
- The federal Occupational Safety and Health Administration (OSHA) has not yet relaxed its COVID-19 standards for workplaces, including schools; states with their own OSHA equivalents may also have different standards to consider and these state agencies could step in as necessary.



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Industry Focus

Education

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

Your 7-Step Roadmap for Relaxing Your Masking Protocols

Given that those risks and hurdles will present themselves for the foreseeable future, here is a seven-step roadmap if your school wants to relax mask mandates and social distancing rules on your campus.

1. **Get a Gauge on Your State and Local Regulations.** Before you even think of ditching masks and six-foot spacing rules for fully vaccinated individuals, you need to assess whether the state or local government, including your local and state health departments and your state's Department of Education, 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 (including 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. Some state and local health authorities also address schools differently than other businesses.
2. **Understand the Risk You Face From OSHA and state equivalents.** The CDC sets standards for the American public to follow and has been a standard of care against which many schools have measured themselves

throughout the pandemic. The CDC standards do not regulate workplace safety requirements and the CDC cannot find you in violation of safety rules and issue citations – but OSHA can. And OSHA applies to schools with more than 50 employees and even to the secular activities of religious schools. State OSHA laws similarly often apply to schools. So, while it is heartening to see the CDC take this momentous step, savvy schools are waiting for OSHA, or the state equivalents, to follow its lead before fully celebrating. 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. In short, OSHA continues to require masking and social distancing in workplaces and states that employers should not treat unvaccinated employees differently from vaccinated employees. Whether your school wants 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 school's attorney, although you should have some support for any such decision thanks to the CDC's announcement.

3. And Understand Your State OSHA Plan Requirements. In those states that maintain their own OSHA equivalents, 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 Risk of a Lawsuit. Schools that require vaccines for their employees [seem to stand on solid legal footing](#) (so long as they also offer accommodations as necessary) – 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 against schools](#) or [threatened litigation](#) against those requiring the vaccine for their workforce. [For students, many colleges and universities across the country have announced that they are or will soon require the vaccine.](#) However, in the K-12 student space, this area remains gray. States are still determining whether to mandate the vaccine for school attendance before individual independent and private schools will make similar decisions, and overall schools anxiously

await more information about whether children under age 12 will be vaccinated before the 2021-2022 school year, if at all. If the CDC's announcement has caused your school to reconsider your stance and consider mandating the vaccine for your employees or students, make sure you understand the risks of a lawsuit and talk with your school 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 employees and students, 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 administrators need to know about asking your employees and students (or parents for minors) about their vaccine status?

- While it is permissible to ask for vaccine documentation if an employee or student wants to be mask-free, you should affirmatively inform employees, students and their parents 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 or student name, type of shot received, and date of the last dose. Some schools might use their electronic health information platform such as Magnus to manage this information.
- Refrain from asking follow-up questions – such as an individual'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 or students 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 school is subject to California's broad data privacy law – the California Consumer Privacy Act (CCPA) – you need to recognize that collecting information about vaccination status may trigger the “notice at collection” requirement. Check with your legal counsel to ensure you comply with California law.

6. Offer Religious and Medical Accommodations. Your employees or students 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 school-wide policies or practices that involve a relaxation of COVID-19 rules.

7. Protect Masked Employees and Students from Mistreatment. Finally, for those employees or students 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 schools), you need to make sure they do not face illegal mistreatment at the hands of coworkers or peers. Make sure your employees, students, and their parents know that retaliation, discrimination, and harassment will not be tolerated, and include this prohibition in written policies distributed to all employees, students, and families.

Additional Issue: What About Campus Visitors?

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 or school actually hosting those guests. The key question left unanswered: how can a school determine whether its visitors are fully vaccinated and cleared for a mask-less experience?

There is no easy answer at this time. Asking your campus visitors, including parents, for information about their vaccine status or proof of vaccinations is a risky proposition fraught with legal peril, which can vary by jurisdiction. For

example, some states have passed or have pending legislation stating the schools cannot require proof of vaccination from certain constituents. Schools should be sure they understand whether the legal definitions in that legislation includes employees, students, visitors or some combination of the three. You should coordinate with your school's 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 schools that want to chart the most conservative course and maintain the status quo for what little remains of this school year, there remains virtually no legal risk at this time. You could choose to sit and wait for more school-specific clarity to emerge from the CDC, EEOC, OSHA, and state and local authorities before implementing any changes. Of course, as things progress and you plan for 2021-2022, you can further consider relaxing your requirements.

To ensure you stay up to speed with the latest developments, 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 further information, contact your Fisher Phillips attorney or any attorney in our [Education Law Practice Group](#).