Unmasking the Challenges: 7 Options for Managing a Partially Vaccinated Workforce

Insights
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Now that most states, the CDC, and OSHA have (or may soon) lift mask mandates for *vaccinated* workers, what is an employer to do about revealing an employee's vaccination status? Under any relaxed masking guidance applicable to those who are fully vaccinated, customers, visitors, and co-workers are likely to draw their own conclusions about the vaccination status of everyone else in the workplace based upon whether or not they are wearing a mask. This Insight addresses some of the legal and practical considerations for employers dealing with a partially vaccinated workforce and provides seven options for you to consider as you navigate this rapidly evolving area.

The Push to Unmask

Anxious to get back to normal after more than a year of mask mandates and social distancing, employers and employees are ready to do away with COVID-19 restrictions. Employees in certain industries (such as health care workers and educators) will likely continue to be required to mask up and social distance for the foreseeable future. However, other employers are developing various approaches and policies to lift masking requirements for employees (and others) who are fully vaccinated following new CDC and OSHA guidance.

- For a summary of the CDC's guidance on scrapping mask mandates for fully vaccinated workers and a seven-step blueprint for employers to overcome risks and hurdles, click here.
- For a summary of the three options that employers have in light of OSHA's subsequent unmasking announcement, click here.

Unmasking Employees Based On "Proof" of Vaccination

"Proof" of vaccination status is and will continue to be a significant consideration for employers when lifting mask mandates. Indeed, many employees are under the mistaken belief that an employer cannot ask vaccine status. However, per the guidance of the EEOC and other state agencies, you are permitted to request vaccination status. In California, local health authorities such as in Santa Clara County, have already mandated that businesses and government entities ascertain the vaccination status of all employees, independent contractors, and volunteers who are or will be working at a facility or worksite in the county.

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Indeed, the inquiry may be *required* to determine which employees can and which employees cannot unmask. As an example, the Oregon Occupational Safety and Health Administration has already issued guidance that requires employers to "verify the vaccination status" of workers before permitting them to unmask. The CDC, OSHA, and many state authorities agree that only those employees who are fully vaccinated can follow relaxed COVID-19 protocols, while those who are not fully vaccinated must continue to observe safety protocols such as mask wearing and social distancing. During COVID-19 inspections, OSHA will likely require employers to show how they have documented or "verified" vaccination status where employees are permitted to work under the relaxed COVID-19 safety protocols.

In determining an employee's vaccine status, however, you must carefully limit any vaccine-related inquiry only to vaccination status and not inquire further, as such follow-up could improperly elicit information about an employee's medical disability or other family medical information. Given that this is likely considered medical information, such information should be kept separate and confidential. Additionally, employers subject to the CCPA in states such as California need to understand that collecting vaccine-related information triggers the CCPA notice obligation.

Navigating State Limitations on Requiring Proof of Vaccination Status

Even though some federal, state, or local agencies may require or request that employers track employee vaccine status, there is a growing move in some states to protect vaccine status as confidential, private information. States are literally all over the map when it comes to vaccine disclosure or use of so called "vaccine passports." Some states have adopted or are considering laws that promote vaccine passports. New York, for example, launched a COVID-19 vaccine passport initiative known as the Excelsior Pass that allows users to provide proof of vaccination where required. Other states, like Hawaii, have or are considering similar passport systems that promote vaccine disclosure to assist in safe reopening of business and public access.

However, many other states have gone in the opposite direction to protect individual privacy rights. These states have acted to restrict vaccine passports, with government entities and businesses barred from requiring proof of vaccinations. For example, Florida Governor Ron DeSantis recently signed into law a statute that prohibits the use of vaccine passports by government entities or businesses, stating that "in Florida, your personal choice regarding vaccinations will be protected and no business or government entity will be able to deny you services based on your decision." Other states such as Alabama, Arizona, Idaho, Indiana, Iowa, Georgia, South Carolina, South Dakota, Texas, and Wyoming have also restricted vaccine passports or requirements.

Arkansas and Montana have taken a more aggressive approach to address individuals' privacy concerns and limit disclosure of vaccination status. Governor Hutchinson signed into law a statute that prevents state and local government entities from requiring proof of vaccinations as a condition of employment or to access goods and services. The law provides some exceptions for state-owned medical facilities. Montana Governor Gianforte has signed into law a statute that provides even

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greater protections for the unvaccinated, generally prohibiting employers from requiring any of the current vaccinations.

Given the fluidity in this area, you should remain mindful of the need to monitor these developments and check with counsel before implementing any vaccine-tracking policies.

Additional Landmines if Fully Vaccinated Employees Unmask

Aside from the spate of state and local government restrictions and mandates, employers face other potential legal landmines and practical problems when tracking and/or disclosing an employee's vaccination status. As mentioned above, you should consider the legal privacy considerations in requesting and maintaining the vaccination status of employees.

As employers move to allow fully vaccinated workers to unmask employees, there will likely be legal, privacy, and employee morale issues related to any express or perceived disclosure of employee vaccination status. Indeed, even without an explicit disclosure, others will likely be able to decipher the vaccination status of employees. While employees are choosing to voluntarily disclose their vaccination status to their co-workers, you should not adopt such a casual attitude. You should consider the ramifications of disclosure of vaccine status without employee consent or as a result of a "company policy" or practice. Such practices could potentially give rise to exposure in areas of breach of confidentiality, privacy, discrimination, retaliation, and more.

Company disclosure of vaccine status may also inadvertently expose employees with legitimate disability issues or religious objections related to the vaccine. Employee morale could be compromised if employees believe they are being pitted against each other due to their vaccine status, especially if the company is somehow involved in the disclosures. Additionally, a policy of company-wide disclosure might even boomerang, potentially discouraging employees who do not want to be ridiculed or harassed by co-workers who are opposed to the vaccination.

What Should Employers Do? 7 Options to Address a Partially Vaccinated Workforce

How to relax restrictions for those who are fully vaccinated while maintaining confidentiality and a safe workplace for all? How to balance the possible exposure and potential federal and state safety agency fines if you don't get it right? While there are rarely clear answers, and legal liabilities remain unclear, below are some options employers have been adopting to deal with the dilemma of the partially vaccinated workforce.

1. **Continue to Mask Up**. As noted, most jurisdictions can ease up on the COVID-19 safety protocols for those who are fully vaccinated (with certain exceptions such as healthcare workers). Nonetheless, some employers are choosing to require the entire workforce to continue to follow COVID-19 protocols. The protocols for all workers will remain in place until further guidance is issued. For non-healthcare employers, this may likely be an unpopular choice. But this option

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avoids landmines and morale issues created by a workforce that is partially masked and partially unmasked.

2. **Vaccine Mandate**. In certain locations, you may have the option of adopting a vaccine mandate where permitted by state laws. Under this option, you would eliminate unvaccinated employees from the workplace and the remaining vaccinated workforce could unmask without concern. This option comes with increased legal risks and other practical issues in implementing the mandate, including exploring reasonable accommodations for those with protected reasons to remain unvaccinated. The mandates also create morale and employee defection issues. And your organization could be considered an outlier depending on your location and industry, as a recent FP Flash Survey revealed that fewer than one in 20 employers (4%) were mandating or considering mandating the vaccine.
3. **A Pure Honor System – Permit Fully Vaccinated to Unmask Without "Proof."** Employers who are choosing this option would not mandate the vaccination or require documentation to prove COVID-19 vaccination status. You would notify your workforce that fully vaccinated employees can ease up on COVID-19 safety protocols while all those who are not fully vaccinated are instructed to maintain the protocols and continue to mask up. This option comes with risk that employees who are not fully vaccinated will not appropriately follow the honor system. Without verification, this honor system may run afoul federal or state safety requirements. This option may also lead to employee morale issues and third-party liability concerns of those fully vaccinated workers, clients, or customers who do not trust the honor system. In addition, this is not a workable option in jurisdictions that require tracking of COVID-19 vaccination status.
4. **Employee Audits.** Under this option, you would advise your workforce that fully vaccinated employees can dispense with relaxed COVID-19 protocols – subject to random audits of those employees who have dispensed with the relaxed COVID-19 protocols. If an employee is subject to a random audit, the unmasked employee would be required to provide proof of COVID-19 vaccination status. Effective management auditing and policing would be a key variable. This will not be a workable option in jurisdictions that require tracking of COVID-19 vaccination status.
5. **Employee Self-Certification**. Another option is to allow employees to provide a self-certification of their COVID-19 vaccination status. Employees that self-certify they are fully vaccinated would be permitted to dispense with relaxed COVID-19 safety protocols. Those who certify that they are not fully vaccinated or decline to complete the self-certification would be required to maintain COVID-19 safety protocols. A template self-certification form may be found here. It is important to be mindful that self-certification may not be an acceptable form of "proof" in certain jurisdictions that have specific heightened criteria specifying what meets the verification or proof of COVID-19 vaccination standard.
6. **Requiring Certain "Proof" of Vaccination Status.** For some employers that want to choose to permit employees to unmask, the above options may not go far enough. You could instead choose to require that all employees provide certain documented "proof" that they are fully vaccinated to designated personnel. Based upon the response, the employer will permit those who have provided the required proof that they are fully vaccinated to dispense with relaxed COVID-19

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safety protocols. All others would be required to continue to follow COVID-19 protocols. Under this option, you would monitor and police employee violations. Obtaining proof and policing may limit liability concerns but also places a greater administrative burden on the employer.

7. **Requiring Proof *and Disclosing* Vaccine Status.** Under this final option, you would request "proof" of vaccine status (similar to that required under option number 6) but would provide a sticker, badge, or lanyard to fully vaccinated employee once they submit "proof" of full vaccination. Those who have the company-issued sticker, badge, lanyard, etc. indicating they are fully vaccinated would be allowed to dispense with relaxed COVID-19 protocols, while all others are required to follow safety protocols. Unlike option number 6, you would take an affirmative step to identify those who unmask as fully vaccinated. Though this option provides greater clarity in the verification process and compliance with the policy, it also comes with greater risk of breach of privacy and confidentiality concerns – as well as potential employee morale issues. You should proceed with caution and consider obtaining written authorization from employees to disclose their vaccination status. It is also important to remain cognizant that some states such as California impose specific legal requirements that must be followed when asking for an employee's consent to disclose confidential medical information such as vaccine status.

Conclusion

Each of these options come with some level of risk. You should explore the various paths available to you with your legal counsel before adopting any of them, especially in light of rapidly changing state and local laws in this area. Also, note that every option in which some employees are masked and some are unmasked includes the risk of employee conflict or harassment issues. This risk should be evaluated and addressed up front through training, ongoing communications emphasizing the importance of mutual respect in the workplace, adoption of written policies and procedures, and effective management oversight.

We will continue to monitor developments related to the COVID-19 vaccines and related workplace questions that arise. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our Vaccine Resource Center for Employers or contact your Fisher Phillips attorney or any of the authors of this Insight.

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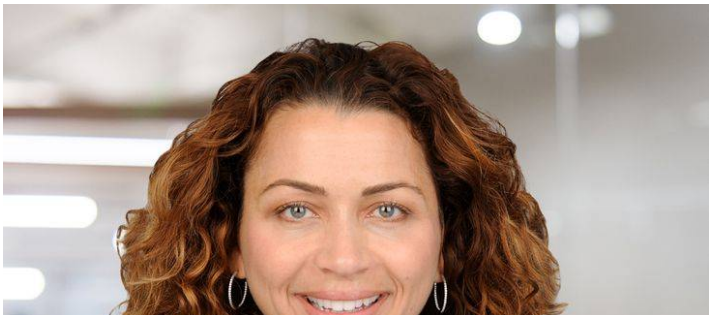

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