

## VACCINATIONS AND MASKS IN DEALERSHIPS: WHAT'S OLD IS NEW AGAIN

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The CDC's [recent recommendation](#) that people in geographic areas with substantial or high COVID transmission rates wear masks indoors, regardless of vaccination status, has added a new wrinkle in the already challenging world of vaccinations and mask wearing for dealerships across the country. Although the CDC's recommendations standing alone are not legal requirements, federal workplace safety authorities (OSHA), workplace bias policymakers (EEOC), and other government agencies often rely on these guidelines for establishing and determining compliance with legal obligations and requirements. It remains to be seen what actions these government agencies will take based on the CDC's recent recommendation that would force dealerships into action.

With the surge in COVID-19 infections due in large part to the highly transmissible Delta variant that is the basis of the CDC's recent recommendation, and indications that unvaccinated persons are at a higher risk of contracting and thus transmitting the Delta variant, many dealerships are revisiting their employee vaccination and mask-wearing policies and requirements. Often reluctantly, many dealerships are contemplating less of a "carrot" and more of a "stick" approach to getting their employee vaccination numbers up.

For those contemplating their next move, the following information addresses some of the common vaccinated-related questions.

### **Can you ask your employees if they are fully vaccinated?**

Yes. The question should be framed in a simple "yes" or "no"

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format preceded by a “warning” to the employee that you do not need or want any additional information from the employee. Eliciting information about possible medical conditions would invoke federal and state disability laws.

**Can you ask why an employee is not vaccinated? Yes, *but only*** when the questions are “job-related and consistent with business necessity.” The EEOC has said that an employer meets this standard if it has a reasonable belief, based on objective evidence, that an employee who is not vaccinated would pose a direct threat to their health or the health of others. This can be a complex and challenging hurdle to clear based on individual facts and circumstances and could create legal risks for the dealership. We strongly recommend that you seek legal counsel *before* making these inquires.

**Can you require your employees to show proof they have been fully vaccinated? Yes.** If you require proof of vaccination, you should ask the employee to present documentation for inspection, showing manufacturer of the vaccine, the provider who administered it, and the date(s) of administration. To avoid potential legal issues related to this process, you should not make additional inquiries beyond your request to provide the documentation with first conferring with counsel. In most situations, you should affirmatively inform employees that they do need to nor should they, provide any additional personal or family medical information. If you believe that you need more information than the documentation described, we recommend that you consult with legal counsel before making the request. In all circumstances, you should treat the vaccination information as a confidential medical information.

**Can you require your employees to be fully vaccinated as a condition of employment or continued employment?**

Generally, yes, subject to certain federal and state limitations and the terms of a collective bargaining agreement should your employees be subject to one. For example, if your dealership implements a policy that requires all employees to be vaccinated as a condition of employment, you cannot automatically refuse to hire or employ anyone or exclude employees from the workplace or certain activities if they cannot be vaccinated for certain medical or religious reasons. Rather, in those circumstances, you will be responsible to determine whether you can provide a reasonable accommodation (absent undue

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hardship) that would eliminate or reduce the safety risk posed by unvaccinated employees in the workplace to an acceptable level. This determination involves engaging in a flexible interactive process with the applicant or employee to determine if a reasonable accommodation exists. This process is likely to include obtaining supporting documentation about the employee's disability or religious belief and considering the possible options for accommodation given the nature of the workforce and the employee's position. You should consult your Fisher Phillips attorney in developing the proper inquiries or a protocol for responding to requests for accommodation.

The EEOC recommends that those managers responsible for communicating with your employees about compliance with your vaccination requirement should know how to recognize an employee's accommodation request. You should also train your managers about the process they should follow to refer accommodation requests through the proper confidential channels for consideration. While the EEOC's guidance does not mention this, you should strongly consider providing details about the accommodation request procedure in writing to all your employees (whether in hard copy, electronically, or both).

Finally, the EEOC reminds employers that it is unlawful to disclose that an employee is receiving a reasonable accommodation, just as it is a violation of federal law to retaliate against an employee for requesting an accommodation. Likewise, you should not reveal or openly identify which employees have or have not been vaccinated.

**If being vaccinated is a condition of employment, do my employees have the legal right to refuse being vaccinated?**

Yes, under the circumstances described above, based upon certain medical or religious reasons.

**Who should communicate with employees about these issues?** Only employees who have been trained on how to do so, *i.e.*, those who know what they can and cannot ask and can recognize possible requests for accommodations. In most situations, the person who handles human resources issues for the dealership will be the best choice. These communications should also be treated as confidential.

**Can you require employees who are not vaccinated to wear masks if you do not require employees to be vaccinated?**

Yes, you can implement and enforce masking requirements,

providing the above-referenced process for employees who are unable to wear a mask for medical or religious reasons. In those situations, you should engage in the interactive process described above to determine if a reasonable accommodation (that will not create an undue hardship) is available.

**What's Next?** To be determined. We will monitor these developments and provide updates as warranted. Make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney or any member of our [Automotive Dealership Industry Practice Group](#).