The Winter of Discontent? California Brings Back Indoor Masking for All – Regardless of Vaccination Status

Insights
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Hopefully you didn't throw away those face coverings quite yet. Responding to the emerging Omicron variant and an anticipated winter COVID-19 surge, the California Department of Public Health (CDPH) just issued an updated Guidance for the Use of Face Coverings which re-institutes indoor masking for all, regardless of vaccination status. This new mandate – it is in fact a requirement despite the use of the term "guidance" – is in effect from December 15 through at least January 15, 2022. What do California employers need to know about this new requirement?

Does This Requirement Apply to Private Workplaces Not Open to the Public?

The CDPH mandate requires masks for all individuals in all "indoor public settings" regardless of vaccination status. Unfortunately, this term is not defined and has led to confusion about whether the requirement applies only to businesses open to the public (restaurants, retail stores, etc.) or also applies to private workplaces and offices not otherwise open to the public. ***A conservative and prudent course of action is to assume the new indoor mask requirement applies to all workplaces unless CDPH or Cal/OSHA state otherwise.***

In late summer, when several large California counties re-instituted indoor masking for all regardless of vaccination status, similar uncertainty existed. However, most (if not all) of those counties subsequently confirmed – either by amending their local orders or issuing further guidance – that the mask rules applied to private workplaces as well. Essentially, the counties took the position that "public" means anywhere outside your own household.

CDPH has issued FAQs that answer some questions about the new mandate, but unfortunately do not clearly and directly answer this question. However, the agency has verbally told stakeholders that the intent is for the rule to apply to private workplaces where other employees are present.

This is clearly a significant issue for employers. This requirement is a departure from the current Cal/OSHA ETS, which only requires workplace face coverings for employees who are not fully vaccinated (but allows fully vaccinated employees to remove face coverings). Hopefully the state agencies will further clarify this issue as soon as possible. However, it seems clear that the intent of the requirement is to cover private workplaces. We'll monitor this issue and provide updates should more clarity be achieved.

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Ed. Note: On December 15, CDPH confirmed that the mask requirement applies to private workplaces not open to the public with the publication of the following FAQ:

> ***Does this guidance apply to all workplaces?***
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> *Yes, the guidance applies to all workplaces, regardless of whether they serve the public, or are open to the public. Masks may be removed, per the exemption noted below, if the workplace consists of a single employee, or may be removed while an employee is alone in a closed office or room.*

What Does the New Requirement Entail?

The language of the new CDPH rule itself is fairly brief and states that masks are required for all individuals in all indoor public settings, regardless of vaccination status.

The mandate notes that surgical masks or higher-level respirators are recommended. In addition, the mandate provides that no person can be prevented from wearing a mask as a condition of participation in an activity or entry into a business.

Are There Any Exemptions?

The CDPH guidance itself states that the following individuals are exempt from wearing masks at all times:

- Persons younger than two years old. Very young children must not wear a mask because of the risk of suffocation.
- Persons with a medical condition, mental health condition, or disability that prevents wearing a mask. This includes persons with a medical condition for whom wearing a mask could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a mask without assistance.
- Persons who are hearing impaired, or communicating with a person who is hearing impaired, where the ability to see the mouth is essential for communication.
- Persons for whom wearing a mask would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines.

In addition, the FAQs subsequently issued by CDPH provides for additional exemptions that apply in the following circumstances in specified settings:

- Masks may be removed while actively eating or drinking.
- Persons who are working alone in a closed office or room.

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- Persons who are actively performing at indoor live or recorded settings or events such as music, acting, or singing. If performers do not wear a mask indoors while performing, CDPH strongly recommends that individuals undergo screening testing at least once weekly. An FDA-approved antigen test, PCR test, or pooled PCR test is acceptable for evaluation of an individual's COVID-19 status.
- Persons who are obtaining a medical or cosmetic service involving the nose or face for which temporary removal of the face covering is necessary to perform the services.
- Workers who wear respiratory protection, per Cal/OSHA requirements.
- Persons who are specifically exempted from wearing masks by other CDPH guidance.

How Do We Verify if a Customer or Guest Meets a Masking Exemption?

Employers can address potential exemptions above that may apply to **employees** through their normal process for dealing with employees who may need a reasonable accommodation by engaging in the interactive process. But how does a business handle customers or other non-employee guests that may claim an exemption?

The FAQs issued by CDPH state the following:

> *Businesses may deem a customer, guest or attendee to have self-attested that they have met an approved masking exemption, if the business has prominently displayed signage prior to entry explaining the masking requirements for all individuals to wear a mask and the individual enters the business premises without wearing a mask.*
>
> *No person can be prevented from wearing a mask as a condition of participation in an activity or entry into a business.*

How Does This New Rule Interact with Local Mask Mandates?

As mentioned above, many large counties (covering about half of the state's population) enacted indoor mask requirements in late summer that applied to all persons regardless of vaccination status. So how does the new CDPH statewide requirement impact those local mandates? CDPH has answered this question in its FAQs as follows:

> *The updated CDPH guidance only applies to those local health jurisdictions that do not already have an existing indoor masking requirement in public settings that applies irrespective of individuals' vaccine status. For local health jurisdictions that had pre-existing masking requirements irrespective of vaccine status, in indoor public settings, prior to December 13, 2021, those local health orders continue to apply. Local health jurisdictions must either follow current CDPH guidance, or adopt a local order described above that was in effect prior to December 13, 2021.*

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Therefore, the bottom line is that you will continue to follow that local requirement without any additional changes if you are in a jurisdiction that adopted a face covering requirement regardless of vaccination status prior to December 13. The new CDPH requirement will apply to you only if you are in a location without such a masking requirement already in effect. ***The combined effect of these pre-existing local mandates and the new CDPH requirement is that the entire state is now covered under an indoor masking requirement.***

Some bay area counties including Alameda, Contra Costa, Marin, and San Francisco already had mask mandates in effect when the CDPH mandate was issued. These ordinances included an exemption for "stable cohorts" or groups of 100% vaccinated people in certain settings like gyms and offices. These local mandates still apply, according to CDPH, as do their exemptions for "stable cohorts." This means that in limited settings where all individuals are fully vaccinated, face coverings may be removed.

> **Alameda:** In Alameda, masking requirements are relaxed in in controlled spaces not open to the general public. This includes offices, gyms and fitness centers, employee commuter vehicles, and organized gatherings in other indoor settings where a group gathers on a regular basis.
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> **Contra Costa:** Contra Costa will retain limited exceptions for offices, gyms, college classrooms, and other organized gatherings that are not open to the general public and where everyone is vaccinated. Additional control measures must be in place including maintaining a list of individuals present and posting signage.
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> **Marin:** Marin's mask mandate carves out exceptions for gyms, fitness centers, office settings, employee commuter vehicles, religious gatherings, and college classes that are not open to the general public. Individuals in these settings may remove their masks if the employer or organizer has verified that all individuals are fully vaccinated and there are no more than 100 people present. Employers or organizers must maintain a list of all the individuals present.
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> **San Francisco:** San Francisco will maintain its exemptions for stable groups of fully vaccinated individuals from its Safer Return Together Health Order. This means all people in office spaces, indoor gyms, fitness centers, indoor classes, lectures and other similar gatherings may remove their face covering if all people are fully vaccinated subject to additional requirements by the employer, organizer or host.

When Will the CDPH Mask Requirement End?

The new CDPH requirement runs through January 15, 2022. However, as we have all experienced during the pandemic, "temporary" measures are often extended depending on circumstances and new developments with COVID-19 transmission and spread. Therefore, it is entirely possible that CDPH could extend the requirement beyond January 15. Employers should monitor developments closely but (for now) the CDPH mandate is set to run for the next four weeks.

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In addition, pursuant to different CDPH requirements, face coverings are required at all times in certain settings (such as public transportation and health care settings). These requirements will not expire on January 15.

Keep in mind that employers in local jurisdictions with an indoor mask requirement will need to comply with those local mandates beyond January 15, depending on the terms of those local ordinances. Most of those ordinances provide that they are in effect until further modified or rescinded by the local public health department.

We will monitor these developments and provide updates as events warrant. 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, the authors of this Insight, any attorney on our FP Vaccine Subcommittee, or any attorney in our California offices.

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