

Workplace Mask Requirements Post Vaccination

By Beth Deragon

As COVID-19 vaccination rates increase across New Hampshire and the state is no longer operating under a state of emergency, businesses are encouraging employees to work less from home and more from the office. While risk of COVID-19 transmission at the workplace is arguably lower than it was at the height of the pandemic, employers are still obligated to provide a safe work environment that requires understanding recent guidance from the CDC and OSHA.

Employers are grappling with the extent to which they can permit employees to work at the workplace without masks and the extent to which they can mandate vaccination for COVID-19. The CDC recently released guidance that individuals who are fully immunized from COVID-19 do not need to wear masks indoors or outside or to physically distance, except where required by federal, state, local, tribal, or territorial laws, rules and regulations.¹ In general, people are considered fully vaccinated two weeks after their second dose in a two-dose series, such as the Pfizer or Moderna vaccines, or two weeks after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine. The CDC also stated that fully vaccinated people have a reduced risk of transmitting COVID-19 to unvaccinated people. It is important to note that the CDC guidance does not have authority over local governing bodies. If local rules and regulations require stricter public health rules than the CDC guidance, the local rules and regulations must be followed. If local rules and regulations permit mask removal for fully vaccinated individuals, employers can choose to keep their existing mask mandate in effect or modify the mask mandate to apply to unvaccinated and/or employees not fully vaccinated.

In deciding whether to modify its existing mask mandate, an employer can ask its employees to disclose their vaccination status and is permitted to offer incentives to employees to do so. Disclosure can include requiring proof of vaccination, such as showing a copy of the completed CDC-issued Vaccine Record Card or a printout of vaccine status from a health-care pro-



vider who administered the vaccine. If the employer chooses to retain a copy of the Vaccine Record Card or other proof of vaccination, it must be kept in a separate confidential medical file, consistent with the requirements of the Americans with Disabilities Act. The best practice is for employers to develop a written protocol for collecting and storing this information in a secure file separate from employee personnel files and keeping it confidential except for those managers/supervisors who have a legitimate business reason to know. The written protocol should be provided to employees in advance of the collection of information and warn employees not to provide any further medical information to avoid the ADA's prohibitions on medical inquiries. If an employee reveals that he or she has not received a vaccine and/or does not intend to be vaccinated, the best practice is not to ask why. Asking why could elicit a reason that is protected under NH's antidiscrimination law or the ADA.

Similarly, if an employer decides to mandate COVID-19 vaccinations, it should tell employees in advance of implementing the policy and be prepared to offer accommodations to employees who do not want the vaccination based on medical or religious grounds. In the case of mandated vaccination, employees who tell their employer that they do not want the vaccine based on medical or religious grounds must be granted a reasonable accommodation by the employer, which would include allowing an exception to the vaccine mandate for those employees. It is strongly recommended that only managers who have been trained on this issue be permitted to engage in this type of discussion with an employee so that the business does not run afoul of the law.

While dropping the mask mandate for fully vaccinated employees could reveal who is vaccinated and who is not, that revelation, by itself, is not a risk to the employer. However, the way in which management handles that information could be. Managers/supervisors should be trained not to exclude masked employees from projects, meetings, and other employment opportunities because doing so could trigger disability, religious or disparate impact liabilities.

While the CDC has provided guidance on wearing masks, OSHA contains a "General Duty Clause" that contains a legal obligation for employers to provide their employees with a workplace free from recognized hazards that are causing or likely to cause death or serious physical

harm. OSHA has interpreted this clause to require that employers mandate that employees wear masks to minimize the spread of COVID-19 in the workplace. The mask mandate can be removed for fully vaccinated employees who are not otherwise at risk from COVID-19 exposure.² "At-risk workers" are those who have certain conditions, such as a prior transplant, as well as prolonged use of corticosteroids or other immune-weakening medications, that may affect workers' ability to have a full immune response to vaccination. See the CDC's page describing Vaccines for People with Underlying Medical Conditions, and further definition of People with Certain Medical Conditions.

Under the ADA, workers who cannot be protected through vaccination, cannot get vaccinated, or cannot use face coverings may be legally entitled to reasonable accommodations that protect them from the risk of contracting COVID-19. Employers should consider taking steps to protect these "at-risk workers" as they would unvaccinated workers, regardless of their vaccination status. In regard to unvaccinated employees, businesses must continue to provide a safe and healthy workplace. This includes physical distancing, face coverings, health screenings and providing notification to visitors to the workplace. The OSHA guidance also suggests "that unvaccinated customers, visitors, or guests wear face coverings, especially in public-facing workplaces such as retail establishments, if there are unvaccinated or otherwise at-risk workers in the workplace who are likely to interact with these customers, visitors, or guests. This could include posting a notice

or otherwise suggesting unvaccinated people wear face coverings, even if no longer required by your jurisdiction. Individuals who are under the age of 2 or are actively consuming food or beverages on site need not wear face coverings.

The CDC guidance changed the mask rules only for fully vaccinated people. Existing COVID-19 workplace policies and protocols are still in effect for employees who have not been vaccinated or who are not fully vaccinated or who are considered "at-risk workers." However, employers now have options as to how to approach the mask mandate issue. For example, they do not have to lift the mask mandate right now. Employers could wait until the CDC announces that everyone in the country – vaccinated or not – can take their masks off indoors. Alternatively, employers could decide to make a policy change based on the needs of the organization and should anticipate that there could be strong opinions and conflict about the new policy. When rolling out the new policy, employers should tell employees that they are not allowed to confront each other about mask wearing or vaccination status and if they do so, it could result in disciplinary action. Given the strong feelings about mask wearing, any changes should involve careful communications, including clear policies, and be reassessed on an ongoing basis due to the fluidity of government advisories.

1. <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>.
2. <https://www.osha.gov/coronavirus/safework>.

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