

COVID-19 VACCINE AND MASK STRATEGIES POST-CDC GUIDANCE

The CDC recently released guidance that individuals who are fully immunized¹ 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.

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>. The CDC also stated that fully vaccinated people have a reduced risk of transmitted COVID-19 to unvaccinated people. With this new guidance in place, employers should evaluate their existing COVID-19 policies and practices.

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 not fully vaccinated employees.

If an employer decides to drop the mask mandate for fully vaccinated employees, it can ask employees to disclose their vaccination status. Disclosure can include requiring proof of vaccination, such as providing a copy of the completed CDC-issued Vaccine Record Card or a printout of vaccine status from a health care provider who administered the vaccine. While current EEOC guidance is that the information contained in the Vaccine Record Card is not

¹ In general, people are considered fully vaccinated: 2 weeks after their second dose in a 2-dose series, such as the Pfizer or Moderna vaccines, or 2 weeks after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine.

considered medical information, employers should develop a written protocol for collecting and storing this information in a secure files separate from employee personnel files and keeping it confidential except for those managers/supervisors who have a legitimated 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 they have 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. Likewise, if the employer decides to mandate COVID-19 vaccinations, it should tell employees in advance and be prepared to offer accommodations to employees who do not want the vaccination based on medical or religious grounds. In the case of mandates 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 may include allowing an exception to the vaccine mandate for those employees. It is strongly recommended that only managers who have been trained, engage in this type of discussion with an employee so that they do not run afoul of the laws.

While dropping the mask mandate for fully vaccinated employees will reveal who is vaccinated and who is not, that revelation is not, by itself, a risk to the employer, but how 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.

Remember that OSHA contains a "General Duty Clause," which requires 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 in the workplace to minimize the spread of COVID-19 in the workplace. Now that the CDC guidance suggests that fully vaccinated people are less likely to transmit COVID-19 to others, this might impact OSHA's interpretation of the Clause. As of the date of this article, OSHA has not revised its interpretation, but is expected to release a statement regarding the CDC guidance.

Employees who have not been vaccinated or are not fully vaccinated must wear masks indoors and socially distance, including in the workplace. The CDC guidance has changed only for fully vaccinated people only. Existing COVID-19 workplace policies and protocols are still in effect for employees who have not been vaccinated or who are not fully vaccinated. In other words, employees who are not fully vaccinated must still wear masks at work, socially distance and conduct regular health screening tests.

Employers do not have to lift the mask mandate right now. Employer could wait until the CDC announces that everyone in the country – vaccinated or not – can begin taking their masks off indoors. If an employer decides to make a change, it 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.

The bottom line is that while employers may feel pressure to change their current mask policy due to the CDC's guidance, there is no real imperative to do so and employers should do what they believe is best for their workplace to protect unvaccinated employees, customers, and vendors. 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.

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