

NY STATE WILL NOW FOLLOW THE CDC GUIDANCE ON MASKING - WHAT THIS MEANS FOR YOUR WORKPLACE

Q: Does the CDC's new guidance for vaccinated people impact state and local orders or rules that may still require mask wearing and social distancing?

A: No. As noted, the CDC's guidance is just that – *guidance* – and the CDC does not have authority over state or local governing bodies that may impose stricter public health rules.

Q: What is New York State's Guidance?

A: See Below:

<https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-state-adopt-new-cdc-guidance-mask-use-and-social-distancing>

Business Mask Rules

Given that the CDC has advised that fully vaccinated individuals do not need to wear masks and over 52 percent of New Yorkers over the age of 18 are fully vaccinated, the State will authorize businesses to continue to require masks for all in their establishments, consistent with the CDC guidance. In most settings, vaccinated individuals will not be required to wear a mask. Unvaccinated individuals, under both CDC and state guidance must wear masks in all public settings.

The NYS Department of Health strongly recommends masks in indoor settings where vaccination status of individuals is unknown. Mask requirements by businesses must adhere to all applicable federal and state laws and regulations.

This recommendation will apply across commercial settings, including retail, food services, offices, gyms and fitness centers, amusement and family entertainment, hair salons, barber shops and other personal care services, among other settings.

Business Capacity Rules

As previously [announced](#), most business capacities — which are currently based upon percentage of maximum occupancy — will be removed on May 19. Businesses will only be limited by the space available for patrons or parties of patrons to maintain the required social distance of 6 feet.

However, given that the CDC has advised that fully vaccinated individuals do not need to maintain social distance, businesses may eliminate the 6 feet of required social distancing, and therefore increase capacity, only if all patrons within the establishment -- or a separate designated part of the establishment -- present proof of full vaccination status. Proof of full vaccination status can be provided by patrons through paper form, digital application, or the State's [Excelsior Pass](#).

For areas where vaccination status of individuals is unknown and for patrons who do not present proof of full vaccination status, the required social distance of 6 feet still applies until more New Yorkers are fully vaccinated. This change will apply across all commercial settings, except the exempt settings outlined by the CDC.

Employer Inquires and Confidentiality Requirements

Q: If I want to allow vaccinated employees to drop the mask, how can I verify vaccination status? What can I ask for?

A: The [EEOC has expressly stated](#) that employer inquiries into employee vaccination status is not a prohibited medical inquiry under the Americans with Disabilities Act. Moreover, requesting proof of an employee having received a COVID-19 vaccination, such as by providing a copy of the completed CDC-issued vaccine card or a printout of vaccination status from a health care provider that administered a vaccine, is permissible. This is because such a request, by itself, is not likely to elicit information about a disability and is thus not a prohibited disability-related inquiry. If you ask for proof of vaccination from employees, you should develop a written protocol for collecting such information and keeping it confidential except for those limited managers who have a legitimate business need to know.

Q: But, doesn't the CDC-issued vaccine card contain confidential information?

A: All that is contained on the CDC-issued vaccine card is the individual's name, birth date, the vaccine administered, and the date on which it was administered. It does not contain medical diagnoses, medical history, genetic information, or other personal identifying information that employers do not otherwise already have as to each of their employees. So, while it is a best practice to limit access to information indicating who has, and who has not, submitted proof of vaccination status, there is no confidential information contained on CDC-issued vaccine cards that employers do not otherwise have. That said, if you are requiring proof of vaccine status to implement a new mask policy in line with updated CDC masking guidance, you should warn employees (in writing) not to provide any medical information as part of their documentation to avoid implicating the ADA's prohibitions on medical inquiries.

Q: If an employee reveals they have not received a vaccine and/or do not intend to be vaccinated for COVID-19, can I ask them why?

A: Yes, but be **very** careful. There may be many reasons why an employee chooses not to get vaccinated. If they state a reason based upon their religious beliefs (which under the law is very broadly interpreted) or based upon a claimed disability, the employee may be entitled to a reasonable accommodation. Management's outright rejection of a claimed religious or disability basis for not getting vaccinated may lead to claims of discrimination. Thus, it is strongly recommend that only those managers who are knowable about the laws on religious and disability discrimination have that detailed of a discussion with an employee.

Q: How do I maintain an employee's vaccine status as confidential if I am expected to enforce a mask policy that allows only fully vaccinated individuals to go mask-free in the workplace?

A: This is certainly a challenge that employers will face in enforcing revised masking and distancing policies in light of the CDC's new guidance for vaccinated individuals. Limiting who has access to information regarding employees' vaccination status is advisable. For example, only individuals in HR who are charged with enforcing workplace conduct or health and safety protocols should be given

access to employees' vaccine status information; and, such information should only be provided for the limited purpose of enforcing the policy against violators who are not vaccinated. Inevitably, individuals who can remove masks indoors because they are vaccinated will, simply by the act of doing so, reveal their vaccine status. Those who are not vaccinated, and thus are required to continue wearing masks, may likewise reveal their status by wearing masks (though it is likely that individuals who are vaccinated and could otherwise drop their mask, will continue doing so for the time being, thus making it difficult to obviously distinguish between those who are not vaccinated and those who are but are choosing to continue mask wearing). The risk is not so much in these practical revelations of who is vaccinated, but rather in how they are treated; management and supervisors should be trained to not exclude masked individuals from meetings, projects, business travel, and other employment opportunities, because doing so may inadvertently trigger disability, religious or disparate impact liabilities.

Health and Safety Rule and Regulatory Impact

Q: Does the CDC's new guidance for vaccinated people impact [OSHA](#) (the Occupational Safety and Health Administration) and State OSHA rules and regulations?

A: No, and then again, yes – to an extent. As noted above, the CDC's new guidance is only *guidance*, and does not trump the federal or state health and safety rules and regulations. However, where those federal or state health and safety rules and regulations incorporate or rely upon CDC guidance – which is the case for many – the new guidance will have an impact. *See more on this below.*

Q: Are there specific [OSHA](#) rules or regulations that require mask wearing? Does the CDC's new guidance affect these rules and regulations?

A: Initially, there are NO federal health and safety rules or regulations that specifically dictate or require mask wearing – that is, there are no mask regulations; at least not yet. There are new emergency regulations proposed by OSHA that had [recently passed vetting](#) by the White House, and were expected to be released last week; however, this did not occur. Many believe that these emergency rules may now need to be re-written or scrapped entirely due to the CDC's new guidance.

However, the OSH Act does contain a "[General Duty Clause](#)," which requires employers to provide their workers with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. OSHA has interpreted this Clause as necessitating employers to require their employees to wear masks in the workplace in order to [suppress the spread](#) of COVID-19 in the workplace. This means suppressing the spread was based on a lack of evidence reflecting the effectiveness of COVID vaccinations in suppressing spread (as opposed to enhancing safety for the vaccinated from harm). The CDC new guidelines, however, note that there is a [growing body of evidence](#) (though not yet complete) that "that fully vaccinated people are less likely to have asymptomatic infection and potentially less likely to transmit SARS-CoV-2 to others." As such, the new guidelines may affect OSHA's use of the General Duty Clause for failures employers to mandate mask wearing in the workplace.

Mandatory Vaccination Programs – Are These Legal? Does CDC New Guidance Change the Answer?

Q: Are mandatory vaccination programs legal under federal law?

A: Yes – for the most part. Currently, no federal law would prohibit or bar an employer from implementing a mandatory vaccination program. However, there are few “exceptions” that must be respected: (i) for employees who have a disability that prevents them from being vaccinated (the Americans with Disabilities Act prohibits discrimination in this circumstance), (ii) for employees who have a sincerely held religious belief or practice wherein being vaccinated is contrary to that belief or practice (Title VII of the Civil Rights Act prohibits discrimination in this circumstance); and (iii) for employees who are represented by a Union (depending on the applicable collective bargaining agreement, the employer may need to bargain over a mandatory vaccination program before implementation). These exceptions are not automatic, as we discussed in prior Employment Law Perspective Articles ([Article 1](#), [Article 2](#)). In addition, just because a mandatory vaccination program may be legal under federal law, does not mean it is legal under state law, and does not mean it is a “good” idea: two additional topics explored below.

Q: Are mandatory vaccination programs a “good” idea?

A: It depends. There are many variables that should be considered before implementing a mandatory vaccination program. One of the primary considerations, however, continues to be whether an employer will be liable for adverse reactions suffered as a result from mandating a vaccination that has only received Emergency Use Authorization – which continues to be the case for all three vaccinations available in the U.S. And, every employer should always take the temperature (pun intended) of its employee population (how will such a mandate “fly”) before implementing, as this can lead union organizing and other considerations.

Q: Does the CDC’s new guidance affect an employer’s right to implement a mandatory vaccination program?

A: No. There is nothing in the new guidance that changes or affects an employer’s right to create or implement a mandatory vaccination program. However, the new guidance does seem to suggest a greater benefit now to having such a program.

The Science—Why Did the CDC Guidance Change?

Q: Why did the CDC loosen its guidance on masking and social distancing?

A: Because of mounting evidence that COVID-19 vaccines are very effective. Studies show that vaccines prevent severe COVID-19 illness and death. Studies also show that vaccines prevent vaccinated people from spreading the virus. Most recently, studies have shown that vaccines effectively protect against new variants of the virus and against both symptomatic and asymptomatic cases of the virus. Although it is possible for someone who is fully vaccinated to get infected with COVID-19, it is incredibly rare and, when it does happen, the symptoms tend to be mild. Now that vaccination rates are increasing, COVID-19 cases and deaths are declining. The CDC may alter its guidance again if new variants of the virus emerge that the vaccines do not effectively protect against, but at this time, the effectiveness of the vaccines makes masking and social distancing unnecessary for vaccinated people.

Q: What does the new CDC guidance mean for people who have not yet been vaccinated or fully vaccinated?

A: People who have not yet been vaccinated, or who have only received one dose of the Pfizer or Moderna vaccines, must still wear facemask indoors and socially distance, according to CDC guidance. The CDC guidance has only changed for people who are fully vaccinated. The new guidance is a response to the effectiveness of the vaccines, which means people who are not fully vaccinated—and are therefore not protected against COVID-19—must continue taking the same precautions.

Best Practices for Masking Policies

Q: Should I create one mask policy for all employees?

A: Not necessarily. A mask policy should be catered to a particular workspace. Many employers have multiple different types of workspaces—for instance, an employer may have some employees who work in an office setting, some employees who work in a factory setting, and some employees who work in an agricultural setting. When creating a masking policy, employers should consider each unique workspace separately, and should decide who can take their masks off, when they can take their masks off, and where they can take their masks off.

Q: If I do not feel comfortable lifting the mask mandate at my workplace now, when is the safest time to do so?

A: Nothing in the new CDC guidance prohibits an employer from keeping a place a mandatory masks in the workplace requirement. An abundantly cautious approach to masking would be to require masks until the CDC announces national herd immunity. Under this approach, an employer would require its employees to wear facemasks until the CDC announces that everyone in the country—vaccinated or not—can begin taking their masks off indoors.

Q: What should I do to prevent conflict in the workplace related to mask wearing?

A: Employers should expect some employees to have strong opinions about mask wearing. Employers can take steps to prevent conflict. First, employers should communicate to their workforce that employees are not allowed to confront one another about mask wearing. In other words, whatever opinion an employee has about his coworkers' mask wearing habits, he should not take matters into his own hands. The employer should have a clear policy in place about how an employee can report mask wearing issues and it should not involve employee-to-employee communication. Second, employers should implement a policy that bans employees from asking one another about their vaccination statutes. The policy should clearly state that an employee who does ask a coworker about their vaccination status will be disciplined.