

# Managing Workplace Mask Requirements as Restrictions Are Lifted

By Lisa Nagele-Piazza, J.D., SHRM-SCP

May 18, 2021

**T**he U.S. Centers for Disease Control and Prevention (CDC) recently relaxed ([www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Workplace-Experts-Advise-Cautious-as-CDC-Lifts-Mask-Recommendations.aspx](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Workplace-Experts-Advise-Cautious-as-CDC-Lifts-Mask-Recommendations.aspx)) many of its COVID-19 safety recommendations for people who are fully vaccinated—which raises complicated questions for employers about whether to revise their mask requirements and social-distancing policies.

According to the CDC, fully vaccinated employees can safely work indoors in many situations without wearing masks, social distancing or undergoing COVID-19 screening procedures. "Of course, CDC guidance is not legally binding and only tells employers what behavior CDC thinks is safe based on [the agency's] expertise with contagious infections and diseases," explained Pierce Blue, an attorney with Morgan Lewis in Washington, D.C. Employers that are located in a state or municipality that continues to mandate masks and social distancing must follow those orders, he noted.

Employers that aren't subject to more-stringent local laws will have to choose whether to drop mandates or keep stricter rules in place. Brooke Schneider, an attorney with Withers in New York City, said business leaders should stay focused on worker and customer safety in their specific work environment.

Employers also should note that Occupational Safety and Health Administration (OSHA) rules (<https://www.osha.gov/coronavirus/faqs>) require workplaces to be free from known hazards. OSHA recently said it is reviewing the CDC's guidance and will update its materials accordingly. "Until those updates are complete, please refer to the CDC guidance (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>) for information on measures appropriate to protect fully vaccinated workers," OSHA said on its website (<https://www.osha.gov/coronavirus/safework>).

## Reviewing the Rules

The CDC has said fully vaccinated people "can resume activities without wearing a mask or staying 6 feet apart, except where required by federal, state, local, tribal or territorial laws, rules and regulations, including local business and workplace guidance."

Notably, the guidance does not apply in every industry (<https://www.nytimes.com/live/2021/05/13/world/covid-vaccine-coronavirus-cases>). People must cover their faces and practice physical distancing when they go to a doctor, hospital or long-term-care facility; when they travel by bus, plane, train or another mode of public transportation; while they are in transportation hubs, such as airports and bus stations; and when they are at a prison, jail or homeless shelter.

Additionally, employers still need to follow state and local mandates. "The CDC's guidance is in fact just that—it's guidance," Schneider said. Employers need to be careful about making swift changes until they verify state and local requirements, she explained.

Maryland and Virginia lifted their mask mandates for fully vaccinated people following the CDC's announcement, while other states, such as California (<https://sacramento.cbslocal.com/2021/05/15/california-mask-mandate-end-june-15/>), have not lifted such mandates. Additionally, some large retailers announced that they will be lifting mask requirements (<https://www.usatoday.com/story/money/shopping/2021/05/14/mask-mandate-stores-change-fully-vaccinated-cdc-no-masks-indoors/5102169001/>) for fully vaccinated workers and customers in locations without mandates, and other big businesses said they are still reviewing their policies.

"We're still in a state of flux," Blue observed.

Jason Habinsky, an attorney with Haynes and Boone in New York City, said the safest approach for an employer—particularly a business operating in multiple jurisdictions—is to apply the most restrictive and protective guidelines across the board. "As the directives become more clear and more consistent across the board, an employer can then relax protocols more uniformly."

### Determining Vaccination Status

Employers also need to grapple with asking employees if they've been vaccinated ([www.shrm.org/hr-today/news/hr-news/pages/coronavirus-faqs.aspx](http://www.shrm.org/hr-today/news/hr-news/pages/coronavirus-faqs.aspx)). The CDC's relaxed requirements, as well as many updated state rules, apply only to people who have been "fully vaccinated," which means two weeks have passed since they received a single-shot vaccine or the second dose of a two-shot vaccine authorized by the U.S. Food and Drug Administration.

So can employers that want to loosen their mask mandates have different rules for vaccinated and nonvaccinated employees? Should they be tracking vaccination status or requiring proof?

"Each workplace will be a little different depending on the employer's given workforce," said Adam Pankratz, an attorney with Ogletree Deakins in Seattle. In general, he said, if an employer permits vaccinated employees to work without masks, the employer should trust but verify. "By that, I mean the employer will likely need to either see proof of the employee's vaccinations or have employees attest to their vaccination status."

Pankratz encouraged employers that do drop their mask mandate for fully vaccinated workers to monitor workplace conduct for bullying or other prohibited behavior related to vaccination status and mask use. Employers should enforce their policies to ensure a safe working environment for all employees, he said.

Blue noted that employers likely can use vaccination status to guide policies on employee access to buildings, workspaces and events. He cautioned, however, that employers should keep vaccination information confidential and ensure compliance with any privacy requirements imposed by state and local laws.

Habinsky recommended that employers only seek the bare minimum of supporting documentation—such as a vaccination card or a survey response—so they avoid seeking or receiving unnecessary medical or personal information.

Employers should continue to consider accommodation requests from employees who are unable to receive a vaccine due to a medical condition or sincerely held religious belief, Blue noted. Employees may be protected by the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964.

Although employers can have different safety standards and protocols for vaccinated and unvaccinated employees, Blue said, they need to ensure that vaccination status isn't used as an excuse to discriminate against workers based on a legally protected characteristic, such as age, disability status, race, religion or sex.

"It is also crucial that employers train managers on how to communicate with employees about vaccination status issues," he noted.

### More Guidance Forthcoming

Employers should look for updates from OSHA and the U.S. Equal Employment Opportunity Commission (EEOC) on evolving workplace guidelines related to COVID-19 safety and best practices.

The EEOC said it is currently reviewing the CDC's new guidelines to "considering any impact" on its COVID-19 technical assistance (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>).

"The CDC tells us that having separate policies for masking and social distance is safe, but OSHA has not yet given us more clear direction," Pankratz observed.

"As a practical matter, the new guidance represents a positive step toward resuming normal, pre-pandemic activities, but remember that the CDC guidance is for the general public," said Kevin Troutman, an attorney with Fisher Phillips in Houston. He also noted that OSHA has enforcement authority on workplace safety issues.

## HR DAILY NEWSLETTER

News, trends and analysis, as well as breaking news alerts, to help HR professionals do their jobs better each business day.

**CONTACT US ([WWW.SHRM.ORG/ABOUT-SHRM/PAGES/CONTACT-US.ASPX](http://WWW.SHRM.ORG/ABOUT-SHRM/PAGES/CONTACT-US.ASPX)) | 800.283.SHRM (7476)**

© 2021 SHRM. All Rights Reserved

SHRM provides content as a service to its readers and members. It does not offer legal advice, and cannot guarantee the accuracy or suitability of its content for a particular purpose.

