

## Mask requirements in the evolving vaccination workplace

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This whitepaper is issued as a complement to our whitepaper, “The do’s and don’ts of mandatory COVID-19 vaccines.”

Employers who may have had very strict mask requirements in place in 2020 before vaccines became widely available may be rethinking those requirements. There are important legal and employee relations issues to consider when evaluating your workplace mask/face covering policy.

**5/17/21 Update.** Shortly after we published this whitepaper, the CDC revised its website and its position on mask wearing. On Friday 5/13/21, the CDC advised that individuals who have been fully vaccinated do not need to wear masks, indoors or outdoors, except where required by federal, state, local, tribal or territorial laws, rules, and regulations, including local business and workplace guidance. The CDC pronouncement has created controversy with some declaring that it was issued too soon given what remains unknown about the effectiveness of vaccines. We believe that the guidance provided in our original 5/10/21 publication is valid and, therefore, it remains unchanged, for now.

This content is not to be considered legal advice. We recommend that you speak with legal counsel specializing in labor and employment law about employment law issues related to COVID-19 vaccines.

### Overview of legal issues related to mask wearing

Many government agencies continue to recommend or require that individuals wear masks at all times while in public and/or to wear masks in the workplace unless they have a disability or other medical condition that adversely impacts their ability to wear a face covering. In that case, employers are required to provide an accommodation which can range from telework to clear face shields, relocation and heightened social distancing requirements. Some workplaces meet the definition of a “public” location while some do not. Therefore, requirements for both areas should be evaluated.



At the federal level, [OSHA](#) continues to recommend that workers wear masks in the workplace. On April 2, 2021, [the CDC issued guidance](#) advising that if individuals have been fully vaccinated they can gather indoors in a home or other private setting with other fully vaccinated individuals without wearing a mask. The CDC [updated its guidance on April 27, 2021](#) to indicate that masks were no longer needed outdoors by vaccinated individuals except in crowded circumstances, but they are still recommending the use of a mask indoors.

The CDC, however, also recommends that masks/face coverings and social distancing continue to be maintained even though more individuals are becoming vaccinated. As of 5/10/21 the [CDC website](#) identified the following as areas where more information and data are needed:



“What we are still learning

- We are still learning how well vaccines prevent you from spreading the virus that causes COVID-19 to others, even if you do not have symptoms.
- We’re also still learning how long COVID-19 vaccines protect people.
- We are still learning how many people have to be vaccinated against COVID-19 before most people can be considered protected (population immunity).
- We are still learning how effective the vaccines are against new variants of the virus that causes COVID-19.”

The CDC also states:

“Although COVID-19 vaccines are effective at keeping you from getting sick, scientists are still learning how well vaccines prevent you from spreading the virus that causes COVID-19 to others, even if you do not have symptoms. Early data show the vaccines do help keep people with no symptoms from spreading COVID-19, but we are learning more as more people get vaccinated.”

“For these reasons, people who have been fully vaccinated against COVID-19 should keep taking precautions in public places, until we know more, like wearing a mask, staying 6 feet apart from others, avoiding crowds and poorly ventilated spaces, and washing your hands often.”

Many state, county and municipal orders are still in place requiring or recommending that masks be worn in public and/or in the workplace. It is every important that you check the current requirements in areas where you have worksites.

**Legal risks**

Employers can be exposed to fines, penalties and other actions if they are found to violate federal, state and local laws that mandate mask and/or require employers to provide a safe workplace.

Even if government agencies “recommend” rather than “require” that masks be worn in the workplace, it may be advisable to require everyone to wear a mask or cloth face covering at work regardless of vaccine status. If someone becomes ill with COVID-19, they may be able to point to the workplace as being a cause, especially if they follow strict social distancing in all other aspects of their life. Employees who can prove they became ill from COVID-19 at work can be eligible for worker’s compensation and non-employees may be able to bring a lawsuit for negligence. Some states



have created laws that make it easier for employees to prove that they were exposed to COVID-19 at work and, therefore, become eligible for worker’s compensation benefits if they become ill. While some states have adopted laws providing certain immunity protection to businesses for COVID-19 related lawsuits, those laws typically exclude worker’s compensation claims as well as claims that involve reckless or willful misconduct.

As also noted in our whitepaper on vaccine mandates, there are a significant number of states that are considering adopting laws that make it unlawful to treat employees differently based on vaccine status and/or to require proof of vaccine status. Any rule related to face coverings that is based on proof of vaccine status could be deemed a violation of these laws, if they are ultimately passed.

**Employee relations issues**



Aside from the legal risk, there are important employee relations issues to consider. If an employer permits employees to remove their masks at work, either in whole or when in particular locations, this could create resentment and concerns about fairness. It is also possible that an employee could argue that such a rule is the functional equivalent of a vaccine mandate. If an employer is going to permit vaccinated individuals to remove their masks, it may be prudent to require actual proof of the vaccination rather than accept an attestation.

It is important for employers to bear in mind that employee relations issues can arise because of public perception of dangers associated with not wearing masks even though someone has been vaccinated. While studies of how effective the vaccines are in preventing the spread of COVID-19 **are underway**, medical professionals seem to agree that **not enough data** has been gathered to form clear conclusions. In addition, news reports continue to raise concerns about the new variants, including that they may be more contagious and more dangerous, and there are reports that it is **not clear yet** how effective the vaccines are against the new variants. There also have been news reports about how “booster” vaccines may be needed because it is not clear how long the immunity from the vaccines will last. At this point, public confidence in the vaccines and their ability to prevent transmissions has not yet been achieved.

Based on this, employers need to think carefully about relaxing rules requiring that masks be worn in the workplace. It is possible that until there is more data on the effectiveness of vaccines in preventing the spread of COVID-19, an ounce of prevention may be worth a pound of cure.



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