



Earlier today, we issued an Advisory on NY State's decision to follow the CDC guidance on masking. We wanted to augment that Advisory with the further news that OSHA, responding to a huge looming question for employers, [just issued an announcement](#) referring businesses to the CDC's new guidance advising that fully vaccinated people no longer need to wear a mask or social distance in non-healthcare settings. But neither OSHA's May 18 announcement nor the CDC's May 13 release provide specific direction to employers about whether and how they should proceed when it comes to developing unmasking policies and procedures.

In light of the current state of the law, employers have three basic choices when it comes to masking policies for their workers: maintain full masking rules, require vaccinated workers to present proof of inoculation before being allowed to go mask-less, or ask employees to follow an honor system approach. What do you need to know about these three options?

What Did OSHA Say?

Although OSHA did not amend its January 29 guidance directing employers not to distinguish between workers who are vaccinated and those who are not, the agency's announcement seems to signal agreement with the CDC's recommendations. OSHA's May 17 announcement specifically directs employers to refer to CDC guidance "on measures appropriate to protect fully vaccinated workers." While OSHA says it is reviewing that guidance and will update its materials accordingly, this move may give employers a basis for permitting fully vaccinated employees to dispense with mask-wearing and social distancing. This development is important because OSHA – not the CDC – oversees and enforces federal workplace safety requirements.

On the twisting path through the COVID-19 pandemic, where guidance is sometimes unclear or inconsistent and always evolving, OSHA's tepid announcement is undoubtedly welcomed by those employers who have been hungry for more guidance since January. Immediately following last week's CDC announcement of broad new guidelines for the fully vaccinated, businesses and employers have been implementing various approaches to adjusting their operations. Welcoming visitors and customers back to their premises, many have announced that they will not require guests to show proof of vaccination but will ask them to respect the revised guidelines if they do not wear face-coverings or physically distance.

As for employees, companies seem to have taken more varied approaches, with some still requiring everyone to continue masking; others permitting workers to shed their masks with proof of vaccination; and still others allow employees to stop covering their faces and distancing without providing proof of receiving the shot(s). The latter group of employers will rely on an honor system to determine who meets the CDC criteria for dispensing with those precautions. Each approach carries different levels of risk and associated legal obligations.

Option One: Keep Your Masks On

The lowest risk option is continuing to require employees to mask and social distance. This approach will clearly not run afoul of OSHA, or state level, workplace safety requirements or be nearly as likely to trigger obligations under the Americans with Disabilities Act (ADA) or Title VII, or other laws prohibiting discrimination on the basis of disability or religious beliefs. But employees who have been fully

vaccinated and are eager to resume a more normal worklife may be unhappy with this approach, which could lead to increased turnover, negative attention, and workplace conflict. If you pursue this approach, you should ensure you launch a thorough and clear communication initiative so that employees understand why you are continuing with the status quo, and provide your managers with suggestions and direction on how they should handle possible conflicts that could erupt in the workplace over mask policies.

Option Two: Show Your Vaccine Card or Keep Your Masks On

The next option is more burdensome on employers and increases the risk of legal liability. Under this option, you can require workers to show proof of vaccination before allowing them to stop masking and distancing. This tactic would require you to collect and protect the privacy of workers' vaccination status. Even though employers can make such inquiries and require proof without invoking ADA requirements, these communications can easily place more legal duties on you by eliciting disability-related information. These inquiries will also inevitably lead to requests for accommodation of medical or religious reasons for employees unable to get vaccinated, who may want to work from home, attend meetings virtually, etc. This is a detailed and time-consuming process and once you collect such information, you must also safeguard the data. It is also less risky to keep a list of workers whose vaccination status has been confirmed rather than copies of the vaccination cards.

Now armed with this sensitive information, you must determine how to administer and enforce this policy. This raises questions about how to appropriately distinguish vaccinated from unvaccinated employees, especially in a large workforce, while protecting their confidential medical information. Some employers have suggested identifying workers with certain insignia, uniforms, or markers once proof of vaccination is provided (such as lanyards or pins) while others are policing mask-wearing based on their internal records. These practices may bring the workforce back to a sense of normalcy, but they are certainly not without potential legal risks.

In view of the diverse, strongly held opinions regarding the issue of vaccinations, you will also have to be alert to avoid the potential of discrimination, harassment, or even altercations based upon an individual's unvaccinated status – especially if that status is because of a disability or sincerely held religious belief. In short, the process of administering this approach will not be simple, in some ways possibly being more challenging than overseeing a mandatory vaccine program.

You should also confirm that allowing vaccinated workers to shed their masks is consistent with any applicable state or local law.

Option Three: Follow the Honor System

Even the third option of using an honor system to determine who has been vaccinated and can remove their masks carries some level of risk, including many of those discussed in the preceding section. You will still need a system for collecting and tracking who has been inoculated. Without tracking, you could run the risk of being cited for shirking your duty to maintain a workplace that is free from recognized hazards. Of course, this system would also include the likelihood that some employees may claim to be fully vaccinated when in fact they are not. That scenario would increase the likelihood of unvaccinated employees being exposed to each other without safeguards in place, thus potentially increasing infection rates in the workplace.

Whether you verify an employee's vaccination status or not, visitors, customers, and coworkers will believe that they can readily distinguish the vaccinated from the unvaccinated if your policy permits the fully vaccinated to dispense with masking and distancing. This not only raises potential privacy concerns, but may increase the likelihood of unpleasant conflicts or confrontations. You should consider these issues and what risks your business is able to tolerate before completely ditching masks.

Wrapping Up

Regardless of the approach you choose, there remains a chance that OSHA's guidance may not dovetail completely with the CDC, which could require adjustments to your policy. Although it appears unlikely, OSHA could even cite employers for any such disparities. Further, employers across the country remain uncertain about whether OSHA will issue an Emergency Temporary Standard (ETS) that could require you to revisit all of these issues once again.

In sum, even though the new CDC recommendations and OSHA's comments offer opportunities to move closer to normal operations in the workplace, alternate paths can raise various benefits and risks. We are continuing to monitor the guidance that is coming from both the CDC and NYS and will continue to update you as information becomes available.

Should you have any questions on this, please feel free to call me.

Ed

Edward Kowalski, Human Resources Director



845.204.6017 direct

845.204.6080 cell

edward@eaworkforce.com

