

Preparing for a Return to the Workplace, Employers Are Making Big Decisions (UPDATED)

Insights

October 1, 2021

This is an update from the client alert on **June 24, 2021**.

Employers continue to make big decisions on returning to the workplace, especially with the Delta variant and changing guidance from the Biden Administration, the Centers for Disease Control and Prevention (CDC), and numerous states and localities. The standards for dealing with this new guidance in an office setting will continue to evolve.

Federal Laws and Guidance

On September 9, 2021, President Joe Biden released an updated **Path Out of the Pandemic plan** which, among other things, states that the Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule requiring that all employers with 100 or more employees either ensure their workforce is fully vaccinated or require any unvaccinated workers to produce a negative test result *at least* weekly before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement in the near future. This will impact over 80 million workers in private sector businesses.

As a part of President Biden's **plan**, OSHA is also developing a rule that will require employers with more than 100 employees to provide paid time off for the time it takes for workers to get vaccinated or to recover if they are under the weather post-

vaccination. As of the date of this publication, we are still waiting for the ETS to be published.

On September 9, 2021, the Equal Employment Opportunity Commission (EEOC) updated its [Technical Assistance Questions and Answers](#) on COVID-19 and the ADA, the Rehabilitation Act, and other equal employment opportunity (EEO) laws to state that “long COVID” may be a disability under the ADA and Section 501 of the Rehabilitation Act and note that additional guidance will be released in the coming weeks.

On July 27, 2021, the CDC revised its guidance for fully vaccinated individuals, recommending that all individuals wear a mask indoors in public if they live in an area of substantial or high transmission. Based on the [data](#) provided by the CDC as of date and time of this publication, this encompasses approximately 94% of the United States.

State Laws and Directives

Given the extensive number of state and local jurisdictions passing laws or issuing executive orders and other directives relating to COVID-19, this is not a comprehensive list of all developments. We are highlighting a few of the most recent laws that are most critical for our clients to be aware of. If you have any questions regarding specific laws that may apply to you, please reach out to your Gunderson attorney.

California

On August 18, 2021, the California Department of Public Health [announced](#) that beginning September 20, 2021, all individuals attending indoor gatherings of 1,000 or more participants must either: (1) show proof that they are fully vaccinated against COVID-19; or (2) provide a negative COVID-19 test within 72 hours of the event.

Many counties in California have issued [orders](#) or [recommendations](#) that everyone, regardless of vaccination status, wear masks indoors in public places.

Earlier this summer, California Occupational Safety & Health Board (Cal/OSHA) adopted [revised COVID-19 Emergency Temporary Standards](#) (ETS) and published [FAQs](#) addressing the modifications, which, among other things, requires employers to document employee vaccination status. The revised ETS do not specify a particular method for doing so, however some acceptable options for compliance with this requirement include:

- Employees provide proof of vaccination (vaccine card, image of vaccine card or health care document showing vaccination status) and the employer maintains a copy.
- Employees provide proof of vaccination and the employer maintains a record of the employees who presented proof, but not the vaccine record itself.
- Employees self-attest to vaccination status and the employer maintains a record of who self-attests.

Cal/OSHA also encourages employers to follow the [California Department of Public Health's guidance](#) recommending all individuals wear face coverings while indoors. More information on the COVID-19 Prevention Emergency Temporary Standards is available in [Cal/OSHA's Frequently Asked Questions](#).

New York

On July 7, 2021 New York established new requirements for employers under the New York HERO Act. We published a detailed alert outlining all of the new requirements, which you can access [here](#).

On September 6, 2021, Governor Kathy Hochul [announced](#) that the Commissioner of Health has designated COVID-19 an airborne infectious disease under the [HERO Act](#), requiring all employers to implement their workplace safety plans. This means employers need to **immediately** review and activate their safety plan, provide it to their employees along with training, include it in their employee handbook, and post it in a visible and prominent location within each worksite. As of the date and time of this publication, we are still awaiting additional guidance from the state regarding all of these requirements. Please reach out to your Gunderson attorney for assistance complying with the HERO Act.

General Tips for Bringing Employees Back to the Workplace

1. Develop and Communicate your plan.

Determine your company's overall strategy for safely returning to the workplace, taking into account any legal limitations that may exist. Be prepared to clearly communicate this to your employees and answer any questions. Your strategy should include details regarding your continued commitment to employee health and safety and how you will maintain a safe workplace. Develop a special plan for "new" employees who started during the pandemic, who will most likely need special attention to welcome them onboard in person. You should also explain

any expectations regarding employees returning to the physical workplace rather than working remotely.

1. Understand the applicable laws, many of which may be new.

Depending upon the number of locations you have, there may be multiple state and local laws to comply with, in addition to federal laws. Reopening your workplace after a public health emergency implicates multiple laws and guidance from governmental agencies, including the CDC (CDC: Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)), OSHA ([OSHA: COVID-19 Regulations](#)), the Department of Labor (DOL) ([DOL: Essential Protections During the COVID-19 Pandemic](#)), and the EEOC ([EEOC: COVID-19](#)).

1. Develop Vaccination & Mask Policies.

Employers should develop clear policies in compliance with applicable laws, enforce them consistently, and be ready to update them as necessary. For employers in states that require documented proof of employee vaccination, consider how you will handle this requirement and communicate this to your employees. As noted above, once we have the updated ETS, we will update you regarding drafting compliant vaccination and mask policies.

1. Be Prepared to Respond to Accommodation Requests.

Employees may request accommodations for disabilities or for religious reasons under federal or state laws. Employers should expect an increase in accommodation requests following their return to the workplace. Be prepared to communicate and administer the accommodation process appropriately and consistently in response to these requests.

1. Prepare for OSHA Inspections and Complaints.

This too will be further clarified with the issuance of the new ETS guidance.

1. Understand that it won't be "Back to Normal" from day one.

The impact of the pandemic requires all employers planning a return to the workplace to remain agile in what continues to be a fluid situation. Consider a phased approach that evolves over time into a long-term "new normal."

1. Anticipate Employee Anxiety about Coming Back.

Clear communications with employees can help everyone address the inevitable anxiety that will accompany return to the workplace. Offer employees plenty of advance warning about plans to return to the workplace and how you will maintain a safe workplace. If at all possible, consider how you may be able to offer your employees some flexibility.

1. Be Prepared for and Open to Flexible Working Requests.

The pandemic drove many changes, including the realization that some tasks and/or roles can be performed remotely with great effect. Be open to requests for remote work. Consider whether and when it is necessary to require physical presence for all meetings; blindly requiring travel to all events; or applying inflexible paid time off policies. Remember that this is a new world, so don't just fall back to the old way of doing things. Many employees appreciate the greater flexibility necessitated as a result of remote workplace adoption.

1. Have a Plan for addressing Noncompliance.

We anticipate the revised ETS will answer many noncompliance related questions, including what happens to an employee who does not get tested and what if employees refuse to get vaccinated and do not have a medical or religious accommodation.

1. Stay Tuned for Federal Vaccine & Mask Guidance

Stay tuned for upcoming vaccine and mask FAQs to be finalized once the ETS is issued. We anticipate the updated ETS will help to answer the following FAQs:

- How will the 100-employee threshold be counted?
- Will remote employees be covered?
- Will employers be required to collect proof of vaccination? If so, how should this be stored and for how long?
- What type of testing will be required?
- Who pays for the testing?
- Must employers pay employees for time spent getting tested?

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