

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

Insights

June 24, 2021

This is an update from the client alert on [May 28, 2021](#).

Employers are starting to make big decisions on returning to the workplace, especially with the changing guidance from the Centers for Disease Control and Prevention (“CDC”), including that fully vaccinated people do not need to wear masks indoors, and various states.

On June 15, New York hit their 70% vaccination milestone and Governor Andrew Cuomo lifted state-mandated COVID restrictions across commercial and social settings, effective immediately. Businesses in New York have discretion to lift their restrictions or require masks within their establishment, regardless of vaccination status.

After weeks of uncertainty in California, California’s Division of Occupational Safety and Health (“Cal/OSHA”) voted on June 17 to adopt [revised COVID-19 Prevention Emergency Temporary Standards](#), stating employers may allow fully vaccinated employees to not wear face coverings indoors, but must document their vaccination status. Governor Newsom issued an [executive order](#) to make the amended standards effective immediately.

If an employer has an office in a state that lifts mask requirements for those who are fully vaccinated, how does such employer handle the situation? In states where documentation is not required, should an employer put employees on the “honor

system” and tell them they don’t need to wear a mask if they are fully vaccinated or should the employer ask for proof of vaccinations as a prerequisite for allowing employees not to wear masks? Moreover, how will California employers tackle the new vaccination documentation requirement?

What are some of the COVID-19 related considerations?

The timing of the changing guidance by the CDC and various states has employers asking many questions, and the standards for how to deal with the new guidance in an office building context will evolve over the coming weeks and months.

It is important to note that despite the CDC’s guidance, there are still state and local ordinances that must be followed and in some states, despite many restrictions being lifted, some health guidelines remain in effect. For example, while a majority of restrictions were lifted in New York, masks are still required for unvaccinated individuals and “in certain settings,” which **New York has stated** includes large-scale indoor event venues, pre-K to grade 12 schools, public transit, homeless shelters, correctional facilities, nursing homes and health care settings per CDC guidance.

At this time, most employers are encouraging, but not mandating, that employees be vaccinated. However, the lifting of indoor mask requirements increases concerns of workplace outbreaks and potential liability. Employers may want employees to either provide proof of vaccination or attest that they are vaccinated in connection with a return to the workplace. In connection with that request, employers can let employees know that with that certification comes the privilege of not wearing a mask indoors once local requirements follow suit. In California, vaccination proof will be required, although the revised standards do not specify a particular method. The employer “must record the vaccination status for any employee not wearing a face covering indoors and this record must be kept confidential.” Some acceptable options for compliance with the California 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.

The revised standards do not prevent an employer in California from requiring all employees to wear a face covering in lieu of having a documentation process.

Maintaining separate COVID-19 safety protocols for unvaccinated or partially-vaccinated workers—as well as for others who decline to specify their vaccination status or whose vaccination status can't be determined—is acceptable and appropriate. Of course, establishing a practical way of distinguishing without stigmatizing individuals incapable of vaccination due to legally protected reasons (such as disability or religion) will also be an important part of the balancing act, and how an employer prepares for the return to in-person work will be essential to making it successful.

The CDC has cautioned that its latest guidance does not supersede “federal, state, local, tribal or territorial laws, rules, and regulations, including local business and workplace guidance.” This remains a fluid situation. Bills are being introduced in state legislatures that would prohibit employers from requiring proof of vaccination. Currently, the Equal Employment Opportunity Commission (the “EEOC”) has approved the collection of this information and some states are mandating it under certain circumstances. Please check with your Gunderson attorney for additional information specific to your jurisdiction.

What are some tips for bringing employees back to the workplace?

Below are five tips for returning to the workplace as an employer is preparing and evaluating the best options for its workforce.

1. Understand that it won't be “back to normal” from day one

Consider a phased approach that evolves over time into a long-term “new normal.” 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.

1. Anticipate employee anxiety about coming back

Clear communications with employees can help everyone address the inevitable anxiety. Offer employees plenty of advance warning about plans to return to the workplace and plans to keep the workplace safe. Think about appropriate team-building events.

1. Develop a special plan for “new” employees who started during the pandemic

Most will likely need special attention to welcome them onboard in person.

1. Develop vaccine & mask guidance

This is a rapidly-evolving area, so employers should develop clear policies that balance safety and privacy concerns ... and be ready to update them as necessary. Follow CDC and state guidelines, whichever are more restrictive. (See FAQs below.)

1. Be prepared for and open to flexible working requests

The quarantine drove many changes. Some tasks/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.

Vaccine & Mask FAQs

May an employer ask if employees are vaccinated?

Yes, although it is fine to ask employees whether they've been vaccinated, avoid asking employees *why* they are not vaccinated. Asking why an individual did not receive a vaccination may elicit information about a disability and would be subject to the pertinent Americans with Disabilities Act (the "ADA") standard that they be "job-related and consistent with business necessity."

What if an employee declines to share this information?

An employer can generally treat employees who decline to share their vaccination status as if they are unvaccinated.

Should an employer require proof of vaccination? If so, how should such employer store the proof?

As noted above, in California, employers will need to record the vaccination status for any employee not wearing a face covering indoors. Asking for proof of vaccination itself does not trigger legal concerns. However, follow-up inquiries may implicate the ADA because a question of *why* someone does not have proof may elicit information about a disability. Per the EEOC: "If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA."

Furthermore, the answers may include private medical information that must be protected.

Proof of vaccination should be treated the same as other employee medical information. Federal or state law requires an employer to handle the employee's response as a confidential medical record. Regardless, employers should maintain the information in a separate, confidential medical file and limit access to those with a legitimate business need to know.

May an employer separate vaccinated and non-vaccinated employees' workspace within the office? May an employer require non-vaccinated employees to wear a mask in the office?

Yes and Yes. It is okay for private employers to subject unvaccinated employees to more rigorous safety standards (e.g., required testing, temperature and symptom-screening) than vaccinated employees, even if that tends to reveal who is and isn't vaccinated or asking to work in a different workspace. Though we don't advise stickers proclaiming who is and is not vaccinated, some things that tend to reveal vaccination status are inevitable and not inherently problematic. For example, an employer might consider having two different lines for employees entering the building – one for the vaccinated and one for the unvaccinated. Although legally permissible, an employer should also consider the impact on the morale and cohesiveness of employees and teams when differentiating between vaccinated and unvaccinated employees.

May (or should) an employer issue a company-wide vaccine mandate? Is there a legally valid business reason?

We still do not recommend mandating any vaccine that is only authorized for use under the FDA's "Emergency Use Authorization." Even after receiving full FDA approval, employers need to consider accommodations for employees with disabilities and/or religious beliefs that may conflict with vaccination. The EEOC's December 16, 2020 guidance on a COVID-19 vaccination did not take a clear position on whether an employer should mandate a COVID-19 vaccination.

Most employers are waiting for FDA approval before mandating vaccination and, even once that approval is obtained, the vast majority are not planning to mandate except in situations where the return to work is voluntary. If an employer does choose to issue a company-wide vaccine mandate, it should only prohibit an employee requesting an accommodation due to a disability or religious belief from returning to the workplace if the employee who cannot be vaccinated would pose a direct threat at the workplace.

If an employer permits non-vaccinated employees to work 100% remotely, should the employer also permit those who are vaccinated to work 100% remotely?

As with most other employment related decisions, be prepared to demonstrate legitimate business reasons behind the decision and apply such business reasons evenly to all similarly situated employees.

How does an employer handle company-wide offsite events (conferences, happy hours, business travel)?

Regardless of vaccination status – follow the safety precautions recommended by the CDC as well as state and local laws. While we do not recommend securing waivers for company-related events (and OSHA would likely ignore those in any event) if the company-wide offsite events are truly voluntary, an employer can consider issuing a waiver to attend, again, while still abiding by CDC and local guidelines. As for business travel, employers should continue to consult the CDC's website: [Coronavirus Disease 2019 Information for International Travel and Coronavirus and Travel in the United States](#) for up-to-date travel notices concerning risk. The CDC recently updated its COVID-19 entry strategy for international air passengers, and also issued updated "Travel: Frequently asked Questions and Answers."

Should an employer still require health screening (health questionnaire) every day? For both vaccinated and unvaccinated?

Follow the reopening guidelines which vary by jurisdiction. An employer should follow CDC recommendations, as well as state and local ordinances. For example, a number of states, including California, Connecticut, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, Virginia and Washington still require that employers have a process for health screening employees and a plan for responding to employees exhibiting COVID-19 symptoms. A number of states continue to recommend that employers continue health screening.

Does an employer need to store that info?

Store or destroy. If stored, it should be maintained in a separate, confidential medical file and access must be limited to those with a legitimate business need to know.

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