

# Preparing for a Return to the Workplace, Employers Are Making Big Decisions

Insights

May 28, 2021

Employers are starting to make big decisions on returning to the workplace, especially with the fast-changing announcements from the Centers for Disease Control and Prevention (CDC). The CDC recently announced that fully vaccinated people do not need to wear masks indoors. Assuming states where the Company has offices lift mask requirements for those who are fully vaccinated, how do employers handle the situation? Should we put employees on the “honor system” and tell them they don’t need to wear a mask if they are fully vaccinated? Or should we be asking for proof of vaccinations as a prerequisite for allowing employees not to wear masks?

## What are some of the COVID-19 related considerations?

The timing of the CDC change has employers asking many questions, and the standards for how to deal with this new recommendation in an office building context will evolve over the coming weeks and months.

There are still state and local ordinances to follow – for example, on June 3, 2021, California’s Division of Occupational Safety and Health (“DOSH” or “Cal/OSHA”) readopted Cal/OSHA’s revised COVID-19 prevention emergency temporary standards. The **revised standards** include several notable changes, including:

1. Face Coverings – Indoors: fully vaccinated workers that do not have COVID-19 symptoms do not need to wear face coverings in a room *if everyone else is fully vaccinated and not showing symptoms*. But, if there are a mixture of vaccinated and unvaccinated people in a room, all workers will continue to be required to wear a face covering. Outdoors: while fully vaccinated workers that do not have COVID-

19 symptoms do not need to wear face coverings, outdoor workers who are not fully vaccinated still need to do so when they are less than six feet away from someone.

2. Exclusion from the Workplace – Fully vaccinated workers no longer need to be excluded from the workplace after a close contact if they do not have COVID-19 symptoms.

You can find additional notable revisions listed [here](#). The revised emergency standards, if approved by the Office of Administrative Law, are expected to go into effect no later than June 15, 2021 (with some provisions going into effect starting July 31, 2021).

Most employers are encouraging, but not mandating, that employees be vaccinated. However, with the lifting of indoor mask requirements comes increased 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.

Some places, like Santa Clara County, California, are not leaving these decisions up to employers. Santa Clara created a template form [Certification-Vaccination-Status-Form.pdf \(sccgov.org\)](#) to help employers track this information. Until the employer ascertains a worker's (be they employees, independent contractors, or volunteers) vaccination status, the individual must be treated as not vaccinated. While not required, businesses are strongly encouraged to collect this information even if a worker is only working remotely. If vaccination information is collected, and the employer is subject to the California Consumer Privacy Act, the employer must provide notice of collection of the information. [Click here for a sample notice form.](#)

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 come into our workspace 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 a Company prepares for the return to in-person work will be essential to making it successful.

The CDC has cautioned that its announcement 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. We will keep an eye on those, but for now the EEOC has greenlighted collection of this information.

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

Below are five tips for returning to the workplace as you are preparing and evaluating the best options for your 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 your 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 you need to develop clear policies that balance safety and privacy concerns ... and be ready to update as necessary. Follow Center for Disease Control 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**

### **Can we 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 ADA standard that they be "job-related and consistent with business necessity."

### **What if an employee declines to share this information?**

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

### **Should we require proof of vaccination? If so, how should we store the proof?**

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 you to handle the employee's response as a confidential medical record. Regardless, our recommendation is to maintain the information in a separate, confidential medical file and limit access to those with a business need to know.

### **Can we separate vaccinated and non-vaccinated employees' workspace within the office? Could non-vaccinated employees be required to wear a mask in the office?**

Yes and Yes. It is okay 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, we have concluded that some things that tend to reveal vaccination status are inevitable and not inherently problematic. For example, you might consider having two different lines for employees entering the building – one for the vaccinated and one for the unvaccinated. Although legally permissible, you should also consider the impact on the morale and cohesiveness of your employees and teams when differentiating between vaccinated and unvaccinated employees.

**Could we/should we 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 we accommodate non-vaccinated employees to work 100% remotely, what about those who are vaccinated who want 100% remote work?**

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

**How do we 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, we can think about 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.”

### **Do we still require health screening (health questionnaire) every day? For both vaccinated and unvaccinated?**

Follow the reopening guidelines which vary by jurisdiction. The company 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.

### **Do we 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.

## **Related Services**

Employment & Labor

Executive Compensation

## **Featured Insights**

### **FIRM NEWS**

Gunderson Dettmer Commemorates 2025 Asian American and Pacific Islander Heritage (AAPI) Month

### **CLIENT NEWS**

Brazilian Carbon Capture Company Mombak Announces \$30M Financing

### **CLIENT NEWS**

Africa B2B OmniRetail Announces \$20M Financing

### **CLIENT NEWS**

Glacier Announces Series A Financing to Expand Robot Recycling Fleet

#### CLIENT NEWS

Dataminr Announces \$100M Investment Led by Fortress Investment Group

#### CLIENT NEWS

Omnidian Announces \$87M Series C for Renewable Energy Performance

#### INSIGHTS

Splitting the Pie: How Savvy Founders Divide Ownership and Navigate Other Founder Equity Decisions

#### CLIENT NEWS

Chainguard Announces \$356 Million Series D Led by Kleiner Perkins and IVP

#### INSIGHTS

Client Insight: California AI Transparency Act

#### INSIGHTS

Client Insight: Prepare for BE-10 Benchmark Survey of US Direct Investment Abroad

#### INSIGHTS

Tech Brew Interviews Aaron Rubin in “Where the legal battle stands around copyright and AI training”

#### CLIENT NEWS

Latin America Fintech Belvo Announces \$15M Funding