



Masks Off - Now What for Employers?



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June 2, 2021

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Introduction to OSHA and its Role in Reopening America

- Primary law governing worker safety
- Federal program and approved state programs

Introduction to OSHA and its Role in Reopening America *(cont.)*

- Standards and rules
- Guidance (including CDC guidance)
- “General Duty Clause”

The “General Duty Clause” under OSHA

- Section 5(c)(1) of the OSH Act
- Vague yet all-encompassing
- What it means during the Pandemic

The Role of the CDC and COVID-19 Guidance

- National Institute for Occupational Safety and Health
- Interplay between OSHA and CDC
- CDC guidance

Applicable CDC Guidance

- General guidance for employers responding to COVID-19
- Industry-specific guidance for COVID-19 Risks
- Guidance for cleaning and disinfecting workplaces

CDC Guidance on Masks

- February, 2020: masks not required unless sick or coughing
- April, 2020: masks required outside of homes
- April, 2021: masks not required outdoors
- May, 2021: masks not required for vaccinated individuals in most indoor settings

CDC Guidelines at a Glance *(excludes healthcare, correctional/detention, shelter workplaces)*

Guidance	Unvaccinated Staff	Fully Vaccinated Staff
Wear Mask (indoors)	✓	
Physical Distance (6' indoors)	✓	
Avoid crowds/poor indoor ventilation	✓	
Frequent hand wash/sanitizer	✓	
Disinfect high touch surfaces	✓	
Monitor daily health/symptoms	✓	
Following known exposure	Quarantine 14 days	Monitor for symptoms for 14 days (no quarantine)
COVID symptoms	Isolate from others (for at least 10 days since symptoms first appeared and at least 24 hours with no fever without fever-reducing medication and other symptoms of COVID-19 are improving), be clinically evaluated for COVID-19, and tested.	Same
COVID diagnosis/test positive	If asymptomatic, isolate from others for 10 days following test. If symptoms, see above.	Same
Domestic travel (wear mask during travel and monitor for symptoms)	Delay until fully vaccinated. If must travel: <ul style="list-style-type: none"> • Pre-travel: Viral test 1-3 days before departure • Post-travel: <ul style="list-style-type: none"> ○ Viral test 3-5 days after return ○ Quarantine for 7 days (even if test negative). If no test is done, quarantine for 10 days. ○ Avoid people at risk for severe illness for 14 days whether traveler is tested 	Resume normal travel (no testing or quarantine)
International travel (Before return to U.S., negative test result no more than 3 days before travel or documented recovery in the past 3 months)	Do not travel until fully vaccinated. If must travel: <ul style="list-style-type: none"> • Same as domestic travel 	<ul style="list-style-type: none"> • Same as domestic travel • Post-travel viral test 3-5 days after travel recommended (not required)

Exceptions to New CDC Policy

- Masks still suggested in healthcare facilities, for flying or public transit, and in shelters or jails
- No mention of unvaccinated COVID survivors
- No mention of schools

Exceptions to New CDC Policy

(cont.)

- New guidance does not override mask requirements imposed by states or local governments
- Businesses may still require masks
- Employers can require masks under OSHA

OSHA Mask Requirements

- Generally speaking, OSHA guidance has tracked CDC guidance
- Actual rules for certain occupational settings, eg., healthcare, deathcare, and emergency responders
- “Risk tier” approach to most industries
- General duty clause applicable to all others

OSHA Mask Requirements *(cont.)*

- January 29, 2021: New OSHA guidance emphasizes safety measures, including face coverings, hazard assessments, and COVID prevention plans
- OSHA to issue COVID-specific rules, which remain under review

OSHA Mask Requirements *(cont.)*

- May, 2021: OSHA points employers to updated CDC guidance on masks and distancing
- Prior OSHA guidance to be updated following review of CDC guidance
- Apparent conflict between new CDC guidance and existing OSHA guidance, but OSHA intentionally pointed employers to new CDC guidance

Effect on Employers

- Fully vaccinated employees working indoors without masks and distancing no longer an “unsafe workplace”
- For everyone else, previous requirements remain
- Employers need to protect unvaccinated employees from Covid

Steps for Employers to Take Going Forward

- Decide on risk mitigation strategy.
Options:
 - Continued mask and distancing policies
 - Remote work
 - Reconfigured workplaces
 - Mandatory vaccination policies
 - Vaccination incentives

Steps for Employers to Take Going Forward *(cont.)*

- Updated hazard assessments
- Updated safety protocols
- Risk mitigation measures for unvaccinated employees and contractors

Steps for Employers to Take Going Forward *(cont.)*

- Administrative/engineering protections
- Covid prevention plan
- Return to work communications and policies

Questions to Consider:

- Immunocompromised individuals
- Potentially infected individuals
- Unvaccinated contractors and guests
- Employee travel policies

Questions to Consider *(cont.)*

- Employers operating in jurisdictions with different mask requirements
- Determining vaccination status
- Employee anxiety: bullying; refusal to work with unvaccinated colleagues; employee resignations over mandatory vaccination policies

Beyond OSHA - Employment Law Considerations in Evaluating Options

- ADA, GINA (health inquiries, underlying health condition accommodation, vaccinations)
- Title VII (pregnancy and religious accommodation)
- ERISA, HIPAA (voluntary vaccine programs, incentives)
- FLSA (paid time for mandatory vaccine administration)
- NLRA (employee opposition, bargaining)

Lens for evaluating options

- Maintain safe workspace
- Minimize reasonable safety concerns
- Regain optimal productivity

“Now What” Factors to Consider

- Controlled (staff only) v. Uncontrolled (visitors, public) workspace
- #s of unvaccinated, vaccination status unknown
- #s of immunocomprised/higher risk (at work, home)
- Travel—onduty, commute, offduty
- Ability to mitigate risk—physical distancing, barriers, ventilation, remote work

Employers can still...

- Ask all seeking entry to workplace whether they have symptoms consistent with COVID, have been diagnosed with or tested for COVID, or had contact with anyone who had been diagnosed with or tested for COVID
- Take temperature checks/conduct COVID tests as condition to entry
- Require employees with COVID symptoms to stay home/go home
- Ask employees about travel location/activities
- Require employees to wear protective gear and observe infection control practices (e.g., masks, gloves, regular hand washing, social distancing protocols), but may have to consider modification request as reasonable accommodation

“Now What” Questions

- Do (and how do) we determine vaccination status?
- How/do we keep vaccine status confidential?
- Same/different treatment of vaccinated, unvaccinated and higher risk staff in workplace?
- Mandate, incent, encourage or stay neutral on vaccines?
- Do we maintain, relax or discontinue COVID protocols/precautions?

Following CDC guidance: Do (and how do) we determine vaccination status?

- Honor v. Ask v. Require proof?
- Employers can ask vaccination status and require proof, *but can't ask why not vaccinated**
- Best practice: Proof (advances safety and gives coworkers/visitors peace of mind)

**Some exceptions apply*

How/do we keep vaccine status (and related information) confidential?

- Employer can't disclose employee's vaccination status, health condition or reasonable accommodation status to others
- Exception: Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations

K.4. Is information about an employee's COVID-19 vaccination confidential medical information under the ADA? (5/28/21)

Yes. The ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination. Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

U.S. Equal Employment Opportunity Commission, Technical Assistance Questions and Answers - Updated on May 28, 2021

Same/different treatment of vaccinated, unvaccinated and higher risk staff in workplace?

- Differences in treatment should be limited to
 - bona fide safety protocols
 - reasonable accommodations
- Higher risk staff should be handled as
 - ADA reasonable accommodation, if requested by employee
 - under direct threat analysis, if employer has safety concern

Remember: Fully vaccinated with underlying medical condition may still need accommodation

Mandatory Vaccine Considerations

Legal guidelines evolving

- No federal or state law requirement for vaccines
- Restrictions on employer mandatory vaccination **requirements** are governed by federal (ADA, GINA, Title VII, NLRA) and state law (varies among states)
- Implementation requirements (FLSA)
- Employee opposition to program (NLRA, OSHA)
- Adverse reaction liability (workers comp)

Practical/Business

- Morale
- Willing to terminate? Ability to replace non-compliant employees?
- Cost and administration burden
- Distribution

Mandatory Vaccination Pros and Cons

Pros

- Advances public health/getting back to normal
- Reduces absenteeism and costs associated with sick employees
- Aids OSHA general duty clause compliance
- Minimizes potential civil liability to third parties

Cons

- Negative effect on employee morale
- Accommodation obligations and associated potential liability
- Business environment may not necessitate it
- Distribution challenges

Employers can mandate vaccination for entry to workplace, *but...*

ADA medical inquiries rules prohibit Employer (or third party provider with whom employer contracts) from administering vaccine*

Exception: A reasonable belief, based on objective evidence, exists that an employee who does not receive a vaccination will pose a direct threat to the health or safety of her or himself or others that cannot be mitigated by reasonable accommodation**

**Although vaccine is not a medical exam, pre-screening questions are medical inquiries triggering ADA inquiry restrictions*

***Although a person with COVID poses a direct threat, an unvaccinated person may or may not pose a direct threat in the workplace and must be decided on case-by-case basis*

ADA permits

Requiring employee to present proof of having received the vaccination from a third party who does not have a contract with the employer*

***Important:* Questions by employer as to why an employee has not received the vaccination cannot elicit medical information**

**Pre-screening questions by these third parties does not trigger ADA inquiry restrictions*

Mandatory Vaccination Reasonable Accommodation Rules

Even when mandatory vaccination requirement is permissible ...

- employees who do not receive the vaccination due to health conditions or religious beliefs must be provided reasonable accommodation unless
 - there is no way to provide a reasonable accommodation absent undue hardship that would eliminate or reduce the risk so that the unvaccinated employee does not pose a direct threat
- Unvaccinated because of pregnancy may be entitled (under Title VII) to accommodations to keep working, if the employer makes modifications or exceptions for other employees. These may be the same as the accommodations made for an employee based on disability or religion.

ADA Mandatory Vaccination Rules

Reasonable accommodation for health conditions requires the employer to:

- engage in an “interactive process” with the employee, and
- identify and assess potential modifications to the work, or to the work environment, or to how the work is done sufficient to mitigate the direct threat

Title VII Mandatory Vaccination Rules

Reasonable accommodation for religious belief/practice:

- Resolves the conflict between the vaccination requirement and the employee's religious belief/practice, and
- Is not required when it would impose more than a de minimis cost on the business or otherwise pose an undue hardship on the employer

Important Note: There has been a recent move to increase the employer obligation to accommodate religious beliefs to match the higher standard applicable to accommodation for health conditions

Reasonable Accommodation Examples

- Changes to work environment (including physical barriers, ventilation improvement)
- Masking (currently required by CDC unless fully vaccinated)
- Social distancing (currently required by CDC unless fully vaccinated)
- Modified shift
- Work remotely
- Periodic testing
- Reassignment
- Leave

Direct Threat Factors

- Medical knowledge (CDC information, community spread and individual HCP judgement)
- Work environment
 - whether the employee works alone or with others or works inside or outside
 - available ventilation
 - frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees
 - number of partially or fully vaccinated individuals in the workplace
 - whether other employees are wearing masks or undergoing routine screening testing
 - space available for social distancing
- Whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate threat of significant risk of substantial harm

Mandatory Vaccination Compensation Issues

- Cost of getting vaccination
- Time spent to get vaccination

Dealing with Employee Adverse Reaction to Vaccine

- Paid time off recover from symptoms?
- Workers compensation coverage will depend on determination by carrier
- Public Readiness and Emergency Preparedness Act ("PREP Act") may provide employers with protection from tort liability arising for an injury or illness experienced by an employee who takes the vaccine at the employer's direction

Dealing with Employee Opposition

EUA v. regular FDA approval

- Under EUA, any person taking the vaccine must be told (i) that they have the option to accept or refuse the vaccine and the consequences, if any, of refusing, and (ii) of any alternatives to the vaccine that are available and of their benefits and risks
- No current guidance suggests that the current EUA approval restricts employer mandatory vaccine requirements
 - It is beyond the EEOC's jurisdiction to discuss the legal implications of EUA or the FDA approach.
- A number of larger employers, including healthcare employers, have declined to mandate vaccines citing EUA in part as the rationale

Dealing with Employee Opposition

(cont.)

OSHA

- To date, no specific position on mandatory COVID vaccines
- Generally, has allowed employers to mandate flu vaccinations for employees
 - But recognizes exception for any employee who refuses a vaccine because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine)
- Unclear whether EUA v. regular FDA approval will play a role in OSHA position

Dealing with Employee Opposition

(cont.)

NLRA

- Non-supervisory/non-management employees have a protected legal right to discuss their dissatisfaction with a mandatory vaccination program among themselves or publicly protest or oppose such a program
- Unionized employers must bargain with the union over a mandatory vaccine program unless the union has waived that right

Mitigating Opposition

- **Best practices for communication**
 - Provide information to employees on the policy change in advance, so that they can meaningfully share their views
 - Clearly communicate the purpose of the requirement: employee safety and allowing a return to normal
 - Tie the vaccine mandate to concrete and visible changes (e.g., once the vaccine is in place, re-open formerly closed off recreation areas or office space)
 - Provide accurate and reader-friendly information on the vaccine
- **Limit mandate to high risk positions**

Employers can offer voluntary vaccine incentives

- **Upon proof of vaccination (not administered by employer or its agent)**
 - No limitation on amount of incentive
- **Vaccination administered by employer or its agent**
 - Amount of incentive “must not be so substantial as to be ‘coercive’”
 - Voluntary vaccine program must comply with group health plan rules, including ERISA plan document requirements and HIPAA nondiscrimination rules (if this is a health-contingent wellness program under HIPAA, that includes the requirement to provide a reasonable alternative standard and an incentive limitation of 30% of the total cost of single coverage under the employee’s benefit package)
- **Via raffle/lottery/sweepstakes/drawings for prizes**
 - Must comply with applicable state laws
 - In NC, employer must provide a “free alternative method of entry” other than vaccination. Official rules should be drafted and distributed.

Final Masks-Off Thoughts

- Encourage all to continue to wear mask if they feel more comfortable doing so
- Notify employees who encounter mask: physical distance and don't ask
- Require proof before allowing no mask
- Publicize no-mask exceptions (customer locations, excluded industries, traveling, etc.)
- Provide a designated reporting procedure for safety concerns (centralized reporting is best practice)

Final Masks-Off Thoughts *(cont.)*

Remind returning staff about:

- anti-harassment expectations (Chinese or other Asian national origin, including about the coronavirus or its origins, vaccination/mask)
- confidentiality of vaccine status, medical information and reasonable accommodations in the workplace

Remind managers to:

- be alert to demeaning, derogatory, or hostile remarks directed to employees
- maintain confidentiality of vaccine status, medical information and reasonable accommodations

Thank you for attending!



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