



## Alerts

### Frequently Asked Questions Employers Have About the New CDC COVID-19 Guidelines

May 18, 2021

*Insights for Employers*

The Center for Disease Control (CDC) [issued guidance](#) on May 13, 2021, regarding the resumption of pre-pandemic activities for those who are fully vaccinated. Although helpful for individuals, the revised guidelines raise more unanswered questions for employers already preparing for or implementing return-to-work strategies. We review and analyze these questions, along with the guidance of the CDC and other regulatory agencies, below.

#### Updated CDC Guidance

The CDC said that fully vaccinated individuals may resume activities "without wearing a mask" or "physically distancing," except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance. An individual is considered fully vaccinated two weeks after their second dose in a two-dose series, such as the Pfizer or Moderna vaccines, or two weeks after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine.

Many employers have not imposed mandatory vaccination policies but instead are encouraging all their employees to get vaccinated. While many employers who implemented voluntary work-from-home programs have not yet mandated a return to work, they are slowly reintegrating their employees back into the workplace. With that process, employers are grappling with questions of mandatory disclosure of vaccination status, workstation spacing, respect for individual liberties, and consistency in accommodating individual requests based on disability and religious practice.

It is now well established that an employer may poll its employees to determine vaccination status. Of course, there are acceptable methods and less than acceptable methods for obtaining this information. Sometimes, the method of asking for and maintaining the information may expose an employer to liability.

Employers also may require proof of vaccination by asking employees for a copy of their vaccination records. These are not considered medical exams under the Americans with Disabilities Act (ADA), and most employers are not HIPAA-obligated in the first place. Employers should continue to survey employees about their vaccination status and, at a minimum, keep encouraging vaccination as a critical component of a return-to-work strategy. Employers must be mindful of their accommodation obligations not only under the ADA but

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also under Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on religion.

## Frequently Asked Questions

Since the beginning of the pandemic, employers have had to contend with a series of difficult workplace issues. We explore a series of frequently asked employer questions associated with navigating returning to work. Our analysis is based on current federal standards and without regard to pending legislative initiatives at the state or local level. *Please note, the following is not intended to and does not constitute legal advice, recommendations, mediation, or counseling under any circumstance; see our [Disclaimer](#) for more information.*

**Q: May an employer require non-vaccinated individuals to wear masks in the workplace?**

A: The answer is yes in most instances. Employers have the right to set safety standards; for example, non-vaccinated individuals can infect other non-vaccinated individuals.

**Q: May employers mandate disclosure of vaccination status?**

A: Disclosure of vaccination status properly done is not a medical exam or a medical inquiry prohibited by the ADA.

**Q: May employers circulate the vaccination status of their employees?**

A: Publication of the fact of vaccination could cause disruption and work disputes in the workplace. Most employers, as a matter of good human resources practices, are not taking this step. The information is collected and used for staffing and worksite spacing purposes.

**Q: May an employer require or obligate vaccinated employees to self-identify their fully vaccinated status by various means, including placing a note in a company roster or an identifying tag on employee badges?**

A: This is not recommended for the reasons outlined in response to the prior question. Moreover, certain accommodations may need to be kept confidential. Such steps might signal to third parties that an individual has a medical condition or a religious belief he or she might want to keep confidential.

**Q: May employers segregate vaccinated employees from non-vaccinated employees?**

A: The answer is that employers may do so in limited circumstances. However, employers will want to avoid the appearance of retaliating against those who requested reasonable accommodations under the ADA or Title VII. If this path is taken, there should be a strong factual and business necessity basis for the action. It would be a limited exception to the rule.

**Q: Can retail employers establish separate rules for employees who deal with the general public and those who do not?**

A: Yes. Safety precautions can always vary with the job requirements.

**Q: CDC guidelines aside, can a retail employer institute a "no shirt, no shoes, no mask, no service" policy for customers?**

A: We have not seen a case on this precise point, but this should be okay. No shoes, no services rules are generally implemented to keep customers from injuring themselves on the premises and for general hygiene and cleanliness purposes. The mask satisfies one of these purposes, and that should be enough. That said, it is recommended that retail employers examine their county, city, and state requirements.

**Q: May employers require employees fully vaccinated employees who deal with members of the public to continue wearing a mask?**

A: Yes. Employers can establish their own safety rules.

**Q: May an employer establish a more conservative policy than what the CDC recommends?**

A: Yes. As stated above, employers can establish their own safety rules. This includes creating policies.

**Q: May an employer prevent non-vaccinated employees from re-entering the workplace?**

A: Subject to the duty to accommodate under federal, state, and local laws, an employer could establish such a rule. However, an employer will also have to consider and implement reasonable alternative accommodations for employees



identifying religious, disability, or other pregnancy or health issues with the vaccine.

**Q: If so, what exposure is there to individuals who have requested and been granted an accommodation from getting the shot?**

A: Failure to consider or implement reasonable accommodations could subject an employer to all of the remedies under the ADA and Title VII, including back pay, compensatory and punitive damages, and attorneys' fees if the employee prevails.

Each of these questions has answers, which in some cases are driven by established law. For others, they are driven by sound human resources practices and common sense.

## Legislative Initiatives

Employers must also consider state and local legislative initiatives on this point. There are several states with pending bills to restrict employers in general from mandating the vaccine or requiring proof of vaccination. In Illinois, for instance, there is a bill pending on this point, as well as a bill pending to make vaccination mandatory for certain health care providers. Florida now prohibits vaccine "passports" for businesses, schools, and governments. While that law may not apply to private employers, employers need to consider local law and restrictions which may change a specific answer to any of the questions above.

For example, with those cautions in mind, an employer could require non-vaccinated employees to wear a mask at all times in the workplace, and this is not without precedent. In pre-pandemic times, when individuals refused the influenza shot, many health care providers considered constant mask-wearing to be a reasonable accommodation for the refusal. It is interesting to recall that such measures were considered punitive in the past, while today, they are deemed prudent.

## Other Guidelines

In implementing return-to-work strategies, employers should be sensitive to employee concerns while balancing them with business needs. Employers may survey their workforce and establish workspace assignments to minimize the risk of transmission between those vaccinated and not vaccinated. In this regard, employers must be mindful of their responsibilities under the Occupational Safety and Health Administration (OSHA) guidelines which address workplace safety.

OSHA's last guidance on the topic was published approximately three months ago and still recommends strongly face coverings as a means of reducing exposure to infection in the workplace. Although OSHA has not updated its guidance following the CDC's pronouncement, OSHA's guidance generally refers to the CDC, and their respective recommendations are seen as complementary.

For many employers, vaccination rates still are below 50%, with some reporting vaccination rates of less than 20%. The revised CDC guidance is fine for individuals but raises unanswered questions for employers as to how they will permit those vaccinated and those not vaccinated to work together in the workplace.

Employers also have to balance the accommodation requirements above under Title VII, ADA, and the Pregnancy Discrimination Act. One simple solution for employers is to require social distancing and mask usage for employees who require an accommodation, refuse to disclose their vaccination status, or simply refuse to get vaccinated. Concerning that latter group of employees, should employers choose to take this more aggressive action, employers can restrict them from re-entering the workplace altogether.

Any return-to-work strategy must answer the questions identified above. The answers may vary based on the specific context of the situation in your workplace.