

# Removing the Mask: Can We Lift Our COVID-19 Related Restrictions in the Workplace?

By **Julie Levinson Werner** and **Lauren M. Hollender**

As of today, the answer to whether a business can lift its COVID-19 workplace restrictions is “maybe”, depending upon what federal, state, or local legal authority ultimately calls the shots on the issue. The good news is the majority of states with restrictions, and the federal government, appear ready to follow the updated guidance that the Centers for Disease Control (“CDC”) released on May 13, 2021 easing restrictions – if not immediately, then in the near future. While the CDC has provided crucial medical information and guidance to the public, it does not have formal legal authority over the workplace.

According to the CDC, **fully vaccinated people** can:

- Resume activities—both indoors and outdoors—without wearing masks or physically distancing, except where required by federal, state, and local law, including local business and workplace guidance.
- Resume domestic travel and refrain from COVID testing or self-quarantine before or after travel.
- Refrain from COVID testing before and after international travel, except as may be required by the other destination.
- Refrain from COVID testing following a known exposure, if asymptomatic, with some exceptions for specific settings.
- Refrain from quarantine following a known COVID exposure if asymptomatic.
- Refrain from routine screening testing.

For now, the CDC guidance provides that **fully vaccinated people** should continue to:

- Get COVID tested if experiencing COVID-19 symptoms.
- Follow CDC and health department travel requirements and recommendations which include wearing a mask on all planes, buses, trains, and other forms of public transportation traveling into, within, or out of the United States, and in U.S. transportation hubs such as airports and stations.

Although this CDC guidance does not mandate that employers change their mask or social distancing

policies, it is extremely persuasive authority. As a result, earlier this week, New York Governor Andrew Cuomo **announced** that effective May 19, New York State will adopt the **CDC’s Interim Public Health Recommendations for Fully Vaccinated People** for most businesses and public settings, allowing vaccinated individuals to avoid wearing masks in most situations. Businesses should continue to refer to the State’s **Reopening** New York Industry Guidance for their particular industry.

As previously announced, also effective May 19, New York State will remove most business capacity limitations. Businesses only will be limited by the space available for patrons to maintain six feet of required social distancing. However, in light of the new CDC guidance that fully vaccinated individuals do not need to maintain social distance, businesses may eliminate the six foot social distancing requirement, and therefore increase capacity, only if all patrons within the establishment – or a separately designated part of the establishment – present proof of full vaccination status. Patrons can provide proof of full vaccination status through paper form, digital application, or the State’s **Excelsior** Pass App.

To date, New Jersey Governor Phil Murphy has not indicated that New Jersey will adopt the revised CDC mask and social distancing guidelines, although Murphy separately announced the end of New Jersey’s travel advisory that previously required individuals traveling out of state to quarantine upon return to New Jersey.

In California, the Health and Human Services Agency **announced** that current COVID-19 health guidelines, which currently include a mask mandate for everyone, will continue until June 15, when California will switch over to the new CDC recommendations.

At this juncture, employers who wish to relax workplace COVID-19 restrictions should consider the following:

- Check state and local laws and orders. Employers must follow all applicable state and local laws regardless of the CDC’s revised

guidance. Some states, including California, have their own emergency rules or recently enacted laws such as New York's **Hero Act**. Rather than adopt a patchwork of policies across multiple locations, an employer may want to continue restrictions until those restrictions are lifted in all company locations.

- Continue to comply with U.S. Occupational Safety and Health Administration ("OSHA") **guidance**. OSHA was not particularly aggressive in enforcing COVID restrictions under the prior administration, but the new administration has expressed a desire to be more proactive. OSHA last updated its COVID safety guidance on January 29, 2021. The OSHA guidance still requires employees in the workplace to wear masks and to remain physically distant even if vaccinated. This aligns with OSHA's general duty clause that requires employers to keep their workplace free of serious recognized hazards. However, the OSHA guidance is under review and just yesterday, OSHA has announced that employers should refer to CDC guidance for information on measures appropriate to protect fully vaccinated workers. This vaguely worded **language** on the OSHA website supportive of the CDC guidelines should give employers some comfort, although is not completely dispositive authority, that vaccinated employees can be present in the workplace without wearing a mask. A more formal update to the OSHA guidance is expected by the end of May.
- Consider whether employees will feel safe and be willing to return to the office if you eliminate the mask mandate and relax social distancing requirements. An employer remains free to adopt policies that are more restrictive than current guidance. On the other hand, eliminating

the mask mandate for vaccinated employees may motivate unvaccinated employees to get vaccinated.

- If you choose to eliminate the mask mandate, consider requiring proof of vaccination from employees, rather than relying upon the honor system, to determine who no longer requires a mask. Inform vaccinated employees that they are still permitted to wear a mask even if no longer required.
- If the company decides to eliminate the mask mandate for vaccinated patrons and guests, determine whether you will require proof of vaccination. Asking guests for proof of vaccination varies by jurisdiction. Some states have already begun enacting laws that prohibit "vaccine passports" as pre-requisites for business entry.
- Consider whether to require employees to be vaccinated in accordance with **EEOC guidance**, and subject to certain medical and religious exceptions.

The COVID-19 legal landscape is rapidly changing. Lowenstein Sandler's Employment Law Practice Group remains available to help answer your company's questions to ensure compliance with COVID-19 related legal requirements.

***To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).***

## Contacts

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