



To Mask or not to Mask – Questions in Light of new CDC Guidance

On May 13, 2021, the Centers for Disease Control and Prevention (CDC) made a surprising [announcement](#): individuals who are fully vaccinated no longer need to wear masks or maintain social distance in most indoor spaces. Individuals are considered fully vaccinated two weeks after their second dose of the Pfizer or Moderna vaccine or two weeks after a single dose of the Johnson and Johnson vaccine.

Legal Considerations

States, counties, and municipalities may still require individuals to wear masks inside businesses and while at work, although many states, including Arizona, Kansas, Minnesota, and Texas, have lifted state-wide mask mandates in recent days and months. Masks are also still required within federal buildings, in health care facilities and certain other settings, and while traveling by plane, train, or bus. In addition, some states have issued permanent COVID-19 safety standards applicable to employers under state analogs to OSHA. Some states, like Kansas, have also implemented immunity statutes which protect businesses from negligence claims so long as the business is in “substantial compliance” with government health directives (local, state, and federal, including the CDC). While the CDC now says that masks and social distancing are not necessary for fully vaccinated individuals, it may take time for state and local health directives to catch up. Employers should carefully consider any applicable laws and ordinances before lifting their own mask and social distancing requirements.

Lifting mask and social distancing requirements in the workplace presents a minefield of difficult questions for employers. For instance, vaccination may not be

available or effective for immunocompromised individuals and employees with certain medical conditions. Under OSHA's general duty clause, employers have an obligation to maintain a workplace free from recognized hazards for all employees, including those individuals. Employers subject to the ADA and its state law equivalents likely have an obligation to engage in an interactive process to determine whether reasonable accommodations exist for employees who are unable to demonstrate immunity to COVID-19, such as continued remote work or permanent social distancing requirements. Employers should also be careful to ensure that such individuals are not subject to differential treatment, such as being excluded from work opportunities and events, because they remain unvaccinated.

Practical Considerations

In addition, there are many practical considerations for altering workplace guidelines governing social distancing and masking. Are most employees vaccinated or unvaccinated? Masks have become politicized over the course of the pandemic. Is removing a mask requirement likely to sow political division in the workplace? Are there populations in your workplace who are not vaccinated for religious reasons? Will your organization require employees to show proof of vaccination before ditching their masks? Will customers and visitors expect public-facing employees to keep their masks on?

Further, changes to workplace safety guidelines could expose an employer to discrimination complaints if not implemented and communicated correctly. Are supervisors or managers likely to draw conclusions about individuals who continue wearing masks? Are individuals who do not wear masks given different opportunities? Ultimately, although the new CDC guidance indicates that masks and social distancing are no longer necessary indoors for fully-vaccinated individuals, employers should carefully consider all of the employee relations and legal implications of changes in policy and workplace safety guidelines.

Key Takeaways

1. Employers should not rush to eliminate mask and social distancing requirements without first considering applicable federal, state, and local legal considerations.

2. Beyond legal requirements, there are many employee relations reasons for carefully considering revisions to policies governing mask and social distance requirements in the workplace.
3. The Spencer Fane Labor and Employment practice group is hosting a [complimentary webinar](#) on return-to-work considerations, including developments following this new CDC announcement, on Wednesday, May 19, 2021.

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