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New CDC guidance for fully vaccinated people has employers asking “What do we do on vaccinations?”

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Recently, on May 13, 2021, the Centers for Disease Control and Prevention (CDC) issued [new guidance for employers outside of health care further delineating between the “fully vaccinated”](#) and all others. Employers around the country are grappling with the impact of this increasing gap in treatment between the two groups as more and more people are eager to return to work and their normal lives.

Significantly, the CDC now recommends that “[fully vaccinated](#)” people:

- *no longer need to wear masks or maintain social distance in any setting, except as required by applicable law or by their workplace or local businesses; and*
- *are exempt from testing following a known exposure with limited exceptions for residents and employees in correctional and detention centers and homeless shelters.*

Fully vaccinated people who are experiencing symptoms of COVID-19, however, should continue to follow isolation protocols until they are tested to confirm that they do not have COVID-19.

After this latest update, employers will have questions regarding what rules and recommendations they should follow and what policies are best for their workplaces. Many employers are considering more seriously and rethinking whether to mandate vaccinations given the stark contrast in treatment between the fully vaccinated and all others.

Because all employers are subject to occupational safety and health (OSH) laws, the following considerations are important to analyze before implementing changes to workplace restrictions or vaccination programs based on the latest CDC guidance:

- The CDC provides recommendations and best practices based on scientific and medical data and analysis, but it does not make laws or set legally binding standards. In many cases during the pandemic, however, states and local authorities have relied on CDC guidance and incorporated it into state and local orders, regulations, and/or ordinances. The CDC guidance may also be incorporated into Fed/OSHA’s general duty clause and form the basis for enforcement through that clause.

- Moreover, Fed/OSHA and state plans often incorporate CDC guidance in their standards, regulations, and enforcement. Review and stay informed of any changes to guidance and regulations issued by Fed/OSHA and applicable state plans. Be aware of *current* compliance requirements with federal and state workplace safety regulations as many states (including California) are considering revisions to their COVID-19 regulations, if any.
- State and local public health departments may adopt (or depart) from the CDC guidance, so monitor any such state and local guidance.
- If requiring vaccination to work at the workplace and if providing remote work or work from home as a reasonable accommodation to unvaccinated employees with certain religious beliefs or medical conditions that prevent them from receiving the vaccine, consider any immediate or near-term negative impacts on unvaccinated employees on employment decisions, such as hiring, work performance, promotional opportunities, and compensation.
- For those workers who cannot perform their essential functions remotely, consider other accommodations for religious beliefs or medical conditions. The latest guidance from the CDC does not preclude unvaccinated workers from the worksite, but it does require various restrictions (masking, social distancing, etc.). Any such interactive process to determine reasonable accommodations should take into account a variety of legal and practical factors that will depend on a case-by-case analysis.
- Be aware of your state’s privacy laws (including any laws regarding confidentiality of medical information) and how they impact requiring proof of vaccination. Also consider how you will delineate between vaccinated workers and others in the presence of third parties (guests, customers, patrons, vendors, etc.).
- Consider what changes will be necessary to your policies regarding third parties visiting your workspace and what, if any, documentation of vaccination you may require.
- If requiring vaccination to work at the workplace, consider the impact of a requirement in the workplace and potential challenges to enforcing such a requirement for all employees, including high level employees and those deemed critical to the business or a project.
- Put a plan in place to ensure consistency, avoid confusion, and follow all related rules and regulations (e.g., creating a COVID-19 Prevention Plan in California). Employers can always err on the side of being more cautious than the recommended guidance while ensuring compliance with current COVID-19 regulations that exist in certain states.

Can employers require employees to provide proof of vaccination?

Yes. The [EEOC has stated](#) that employers may require employees to show proof of being vaccinated against COVID-19, but should not ask follow-up questions that might elicit information about a disability and then would be subject to the ADA “job-related and consistent with business necessity” standard. State agencies (such as the California Department of Fair Employment and Housing) have yet to affirm this approach as California typically has departed from the EEOC in requesting medical information for accommodation purposes.

Can employers keep copies of employees’ proof of vaccination?

Employers should be cautious about requiring employers to provide a copy of their vaccination card or other documentation showing vaccination status. Where maintaining a copy, as opposed to viewing the document but not taking a copy, is necessary for a business purpose, then employers

should maintain the documentation in a separate file as it would with any medical information under the ADA. Employers should be aware of any state or local requirements regarding documentation of vaccination status and consult counsel with any questions or concerns as they navigate the federal and state requirements.

Can employers allow fully vaccinated employees to not wear masks and not maintain social distance, but require that unvaccinated employees wear masks and maintain social distance?

Generally, employers may have any workplace policy they need for business purposes so long as the policies do not discriminate based on membership in a protected class. Therefore, employers *may* have different requirements for vaccinated and unvaccinated employees so long as those policies take into account and make reasonable accommodations for employees who cannot be vaccinated because of a disability and/or religious beliefs. In preparing these policies, however, employers should consider both what is permitted and also the impact of new policies on employee morale and productivity.

There are considerations such as: (1) employee comfort level working with and near others who are not wearing masks; (2) employees' ability to work effectively in groups with vaccinated and unvaccinated individuals where there are different requirements for the groups, etc. Some employers have convened task forces that include employees from all levels in the business and who represent different positions on vaccinations to help develop workable policies and education for employees as businesses adjust to the "new normal" with COVID-19. OSHA (federal and state) tend to support efforts to involve employees in the discussion for "what makes sense" for their workplace.

Can employers require that employees display or disclose their vaccination status to other employees if they will not be wearing a mask?

It is unclear whether an employer can require an employee to disclose their vaccination status to other employees, such as by labeling badges for vaccination status. While being able to differentiate between the vaccinated and all others would streamline enforcing mask and other requirements for unvaccinated people in the workplace, such requirements might implicate employees' privacy interests in their medical information and decisions and could stigmatize those who are not able to get vaccinated, raising potential ADA issues for persons with disabilities or certain religious beliefs. Employers should consider the business necessity for such a policy, whether the policy is consistent with that necessity, and what, if any, reasonable accommodations may exist.

This employment alert is just part of the overlapping web of issues facing businesses as a result of the COVID-19 pandemic. Our Nixon Peabody team will continue to provide [updates](#) on other issues facing employers and solutions to assist them in navigating these quickly evolving times.

To learn more about the latest CDC guidance changes and what to expect from OSHA as well as state OSH laws and regulations, please register for our webinar "[Impactful Solutions: Understanding New COVID-19 Guidance and Rulemaking Impacting Workplace Safety](#)" on June 16, 2021, at 10:30 a.m. PST (1:30 p.m. EST).

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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