



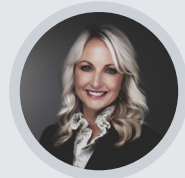
# Updated CDC Guidance, Government Mandates and More

*What Employers Need to Know*

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Earlier this year, a strong motivating factor to encourage or incentivize employees to get the COVID-19 vaccine was the prospect of not having to wear a face mask any longer. That reprieve for many was short-lived in light of the Delta variant. Now, the Centers for Disease Control and Prevention (CDC) recommends that safety measures lifted earlier this year be reinstated as this variant circulates in the U.S. Although the CDC's guidance does not have the force of law binding employers to implement the new recommendations, many states and localities have issued mandates requiring employers to make adjustments in the workplace consistent with CDC recommendations yet again in response to the high transmission rates seen around the country.

*According to the CDC, there is evidence suggesting that fully vaccinated people who do become infected with the Delta variant can spread the virus to others.*

The Delta variant is expected to complicate employer return to the office strategies due to its extremely high ability to infect anyone not vaccinated at much higher rates than any prior variant. What is new and unique with the Delta variant is its ability to also infect individuals who have already been vaccinated, albeit at a much lower rate.

### TO REDUCE THE POTENTIAL SPREAD OF THE VIRUS, THE CDC RECOMMENDS THAT FULLY VACCINATED PERSONS:

- Wear a mask in public indoor settings if they are in an area of substantial or high transmission.
- Regardless of the level of transmission, fully vaccinated people might choose to wear a mask if (i) they are immunocompromised or at increased risk for severe disease from COVID-19, or (ii) if they have someone in their household who is immunocompromised, at increased risk of severe disease or not fully vaccinated. People who are at increased risk for severe disease include older adults and those who have certain medical conditions, such as diabetes, obesity or heart conditions.
- Get tested if experiencing COVID-19 symptoms.
- Get tested three to five days following known exposure to someone with suspected or confirmed COVID-19 and wear a mask in public indoor settings for 14 days after exposure or until a negative test result.
- Isolate if they have tested positive for COVID-19 in the prior 10 days or are experiencing COVID-19 symptoms.
- Follow any applicable federal, state, local, tribal, or territorial laws, rules, and regulations.



[The updated CDC guidance can be found here.](#)

Even before the CDC updated its recommendations, several localities reinstituted mask mandates for vaccinated persons. Others quickly followed suit. Check your applicable state and local laws for further guidance.

**LOCKTON COMMENT:** The CDC does not define “public indoor settings.” For non-healthcare employers, it is unclear whether the revised recommendations apply to their workplace settings. The Occupational Safety and Health Administration (OSHA) has not weighed in on this issue. Some opine that the new recommendation applies to all indoor workplaces not already covered by OSHA’s Emergency Temporary Standard (ETS) while others believe only “common” areas on an indoor workplace would qualify as public. Consult with your attorney for further guidance.





## Next steps for employers

**GIVEN THE RECENT CDC GUIDANCE, EMPLOYERS SHOULD REVISIT THEIR PROTOCOLS FOR EMPLOYEE EXPOSURE TO COVID-19.** For those with policies that do not address testing for vaccinated employees with a known exposure to COVID-19, consider implementing the CDC’s recommendation that all fully vaccinated persons who have a known COVID-19 exposure take a COVID-19 test three to five days after exposure and wear masks in public indoor settings for 14 days or until receiving a negative COVID-19 test.

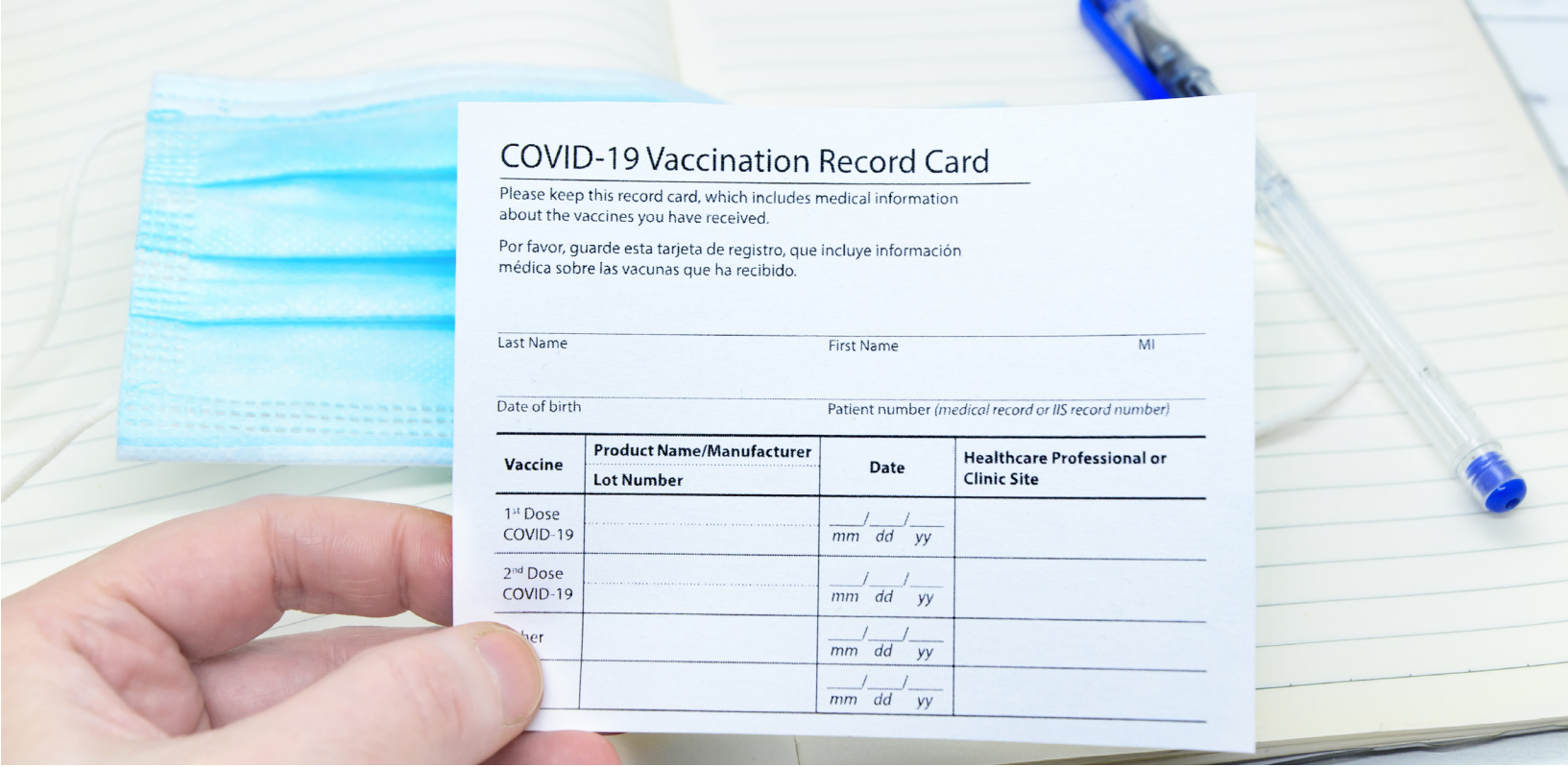


### REGARDING MASKS, DEPENDING ON APPLICABLE LAW, PRIVATE EMPLOYERS HAVE OPTIONS TO ENSURE THE SAFETY OF EMPLOYEES WHICH INCLUDE:

- Requiring masks indoors for all employees regardless of vaccination status or location
- When feasible, permitting employees to work from home until the CDC releases further guidance lifting the mask recommendation for vaccinated persons or transmission rate/case counts drop to moderate or low risk levels at employer work sites
- Focusing on a site-specific approach based on CDC data and ensuring that employees comply with the CDC guidance regarding mask usage in those areas

To date, the Occupational Safety and Health Administration (OSHA) has not revised its guidance for non-healthcare workplaces. Under the OSH Act, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm. The recently revised CDC guidance likely conflicts with thoughtfully implemented plans at many workplaces. Employers should ensure safety measures beyond testing and mask mandates are taken to protect employees from the spread of COVID-19. These include social distancing, hand hygiene stations, and routine cleaning and disinfecting. Further, employers should review state or local laws requiring a comprehensive exposure prevention plan in the event of another designated outbreak (for instance, [New York’s HERO Act](#)).

**LOCKTON COMMENT:** Similarly, with respect to the [COVID-19 Healthcare ETS](#), OSHA confirmed that after review of the recent CDC guidance, it “determined that neither CDC’s guidance on healthcare settings nor the underlying science and data on COVID-19 in healthcare settings has materially changed in a way to necessitate changes in the health and safety requirements contained in the ETS released on June 10, 2021.” While OSHA concluded that no changes to the ETS are necessary at this time, employers should continue to monitor this for developments.



## The shift toward vaccine mandates may be a step available to some, but not all, employers

**VACCINE MANDATES MAY BE THE NEW GO-TO TOOL FOR SOME EMPLOYERS TO GET THROUGH THIS LATEST WAVE AND AVOID FURTHER PROBLEMS IN THE MONTHS TO COME.** President Joe Biden announced on July 29, 2021, that the federal government will require all federal employees to receive the COVID-19 vaccine or submit to regular testing. These requirements only apply to federal government employees and contractors with personnel at federal government installations. The Biden administration is drafting a plan to extend these vaccination and testing requirements to all federal government contractor employees.

Even prior to President Biden’s announcement, some states, as well as localities, began issuing vaccine mandates or routine testing for unvaccinated employees; California and New York are leading the way. [California](#) is the first state to require all state workers and workers in healthcare and high-risk congregate settings (e.g., adult and senior residential facilities, homeless shelters and jails) to either show proof of vaccination or be tested at least once per week. New York quickly followed suit when Gov. Andrew Cuomo announced on July 28 that all state-employed, patient-facing healthcare workers must be vaccinated by Sept. 6, and all other state employees must either be vaccinated or must submit to weekly testing. Similarly, [New York City](#) will require all health workers at city hospitals and clinics to be vaccinated against COVID-19 by Sept. 1, or submit to regular COVID-19 testing, and other city employees have until Sept. 13 to be vaccinated or submit to weekly testing.

**LOCKTON COMMENT:** In terms of bearing the cost of routine COVID-19 testing, each federal agency is tasked with developing a plan for the respective costs and procedures of the testing, which may vary depending on the number of unvaccinated persons they will be monitoring. As of now, states have not identified who will bear the cost of the mandated testing. Federal law requires insurers to fully cover the tests when ordered by a healthcare provider. Routine tests likely fall outside the scope of this requirement.



#### **SOME PRIVATE COMPANIES ALREADY REQUIRE ROUTINE COVID-19 TESTS FOR UNVACCINATED EMPLOYEES.**

The protocol for paying for these tests ranges from the company bearing the full cost, to employees paying a copay, to requiring employees bear the full expense. Regardless of who pays for the test, employers need to be certain that employees are paid for time spent being tested to avoid a wage and hour issue. On-site testing may make it easier to ensure compliance in this regard. Don't overlook the accommodation issue for employees with an approved exemption from the vaccine. They can be subject to testing but consider carefully the charges you assess these employees and whether doing so implicates any any federal, state or local law.

On the minds of many is what has precipitated this shift in the government at all levels to mandate the vaccine or impose a routine testing requirement. This change appears to be guided in part by the [recent opinion](#) from the Department of Justice (DOJ) relating to the Emergency Use Authorization (EUA) status. The DOJ explained "[W]e conclude the Food, Drug, and Cosmetic Act does not prohibit public or private entities from imposing vaccination requirements, even when the only vaccines available are those authorized under EUAs."

The DOJ opinion may provide private employers contemplating a vaccine mandate the assurance they were looking for. While the [EEOC guidance](#) indicates vaccine mandates are permissible as long as employers offer appropriate accommodations under the ADA and Title VII, the EEOC expressly stated that, "[i]t is beyond the EEOC's jurisdiction to discuss the legal implications of EUA or the FDA approach." This led private employers to hold back on vaccine mandates with some openly stating they would not mandate the vaccine while it had EUA only. This DOJ opinion coupled with the favorable outcome (for employers) of recent legal challenges to vaccine mandates may put employers otherwise hesitant to mandate the vaccine at ease.

Even with the EUA issue now addressed by the DOJ, employers contemplating a vaccine mandate must ensure no state or local law prohibits this action. For nationwide employers, there is likely no "one size fits all" approach to the issue. While a number of states have issued guidance indicating private employers have the discretion to implement a vaccine mandate, other states are considering or have enacted legislation that would prohibit employers from mandating vaccinations.

**LOCKTON COMMENT:** For instance, Montana HB 702 prohibits private businesses from mandating "any vaccine whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials." There are exemptions for licensed nursing homes, long-term care facilities and assisted living facilities. Given the recent DOJ opinion on the EUA issue, it is unknown whether Montana will change its position.

Employers should also review the [COVID-19 Vaccine Employer Checklist](#) for additional issues to consider when contemplating a vaccine mandate and consult with legal counsel regarding the potential implications of a mandate for your workforce.

## *How to navigate through the options during these uncertain times*

At the start of 2021, many employers were hesitant about mandating the vaccine for a wide variety of reasons. Over the last several months, employers have tried to balance the desire to keep employees safe in the workplace with providing employees the freedom of personal choice when it comes to being vaccinated. Despite efforts to encourage and incentivize employees to get the vaccine, substantial portions of the workforce at many employers remain unvaccinated nearly five months after the vaccine has been widely available.

With the recent CDC recommendations and mandates at all levels of government, employers hesitant at the beginning of the year may now be considering a vaccine mandate for employees working on-site and restricting workplace access to those who are fully vaccinated. There are many options. Examples of what other large companies are doing include:



#### VACCINE MANDATES:

- Disney (for all salaried and nonunion workers, and all new hires)
- Walmart (for all corporate staff and regional managers)
- Google (for all employees returning to offices)
- Facebook (for all employees returning to offices)
- Tyson Foods, Inc. (for all workers)
- United Airlines (for all U.S. employees)



#### MASK MANDATES FOR ALL EMPLOYEES REGARDLESS OF VACCINE STATUS:

- Eli Lilly & Co.
- Citigroup Inc.
- Publix Super Markets, Inc.
- General Motors Co.



#### DELAYING THE RETURN TO OFFICE:

- Uber Technologies, Inc.
- Twitter

At this point, given the large number of unvaccinated persons (despite the fact that the vaccine is readily available) and the increased transmission of the virus via the Delta variant, employers need to evaluate options moving forward to ensure the safety of the workforce while being mindful of the CDC guidance, applicable state and local laws, and the evolving legal guidance. Many options exist with some less intrusive than others.



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