



## **EMPLOYERS FACE ANOTHER CROSSROADS**

### **VACCINES, MASKING, AND CHANGING WORKPLACE STANDARDS**

With changing CDC guidance and the lifting of mitigation orders in Pennsylvania, employers must again decide how they are going to proceed with COVID-19 mitigation measures. Employers and businesses still may elect to impose more stringent standards, but those standards may come with legal consequences.

#### **WHAT ACTUALLY IS CHANGING AND WHEN?**

- **MASK REQUIREMENTS**
  - CDC guidance – see [cdc.gov](https://www.cdc.gov) for complete information
    - 5/13/21 – Fully vaccinated individuals do not need to wear masks outside and in most indoor settings or socially distance. Exceptions can be made by local law, rules, regulations.
      - Workplaces and businesses still can require masks
      - Masks still required on planes, buses, trains, public transportation traveling into, within, or outside of U.S., and related transportation hubs (i.e. airports, train stations)
      - Revised recommendations do not apply to healthcare settings
  - Pennsylvania – see [pa.gov](https://www.pa.gov) for complete information
    - CDC guidance above went into effect immediately because on 3/16/21, Pennsylvania amended its mask order to add language deferring to CDC guidance for masking
    - On 5/4/21, Pennsylvania announced that masking order will be lifted in its entirety once 70% of all adults aged 18 or older are fully vaccinated
  - Philadelphia – see [phila.gov](https://www.phila.gov) for complete information
    - Mask requirements still in place
  - New Jersey – see [nj.gov](https://www.nj.gov) for complete information
    - Mask requirements still in place



- MITIGATION ORDERS RE: CAPACITY RESTRICTIONS, TESTING
  - Pennsylvania – see pa.gov for complete information
    - All mitigation orders other than masking are lifted on 5/31/21
      - Requirements for testing and reporting of new cases remain in place for hospitals and long term care facilities
      - CDC guidance still should be followed
      - Municipalities and schools still can require stricter mitigation measures
      - Disaster Emergency declaration remains in place
  - Philadelphia – see phila.gov for complete information
    - Mitigation orders other than masking are lifted on 6/11/21
  - New Jersey – see nj.gov for complete information
    - Capacity restrictions modified to allow for larger gatherings and increased business capacity on 5/19/21

## **WHAT STANDARDS ARE EMPLOYERS PERMITTED TO IMPOSE?**

Even if the CDC, states, and municipalities relax COVID-19 mitigation orders, employers may still require mitigation measures as employers deem appropriate for their workplaces. Employers may continue to require masking, social distancing, and testing/time out of the workplace after a known exposure to COVID-19. Employers also can modify their prior restrictions (i.e. masks indoors only when no social distancing possible, reduce distancing to 3 feet, etc.). That workplace “flexibility” sets up the traps for employers discussed below.

## **WHAT ARE THE LEGAL “TRAPS” WAITING FOR EMPLOYERS?**

The “elephant in the room”: a significant part of the population and presumably any given workforce remains unvaccinated. Employers must decide how if at all to reduce their mitigation measures with the understanding that some portion of their workforces may not be vaccinated at any point in time. Some employers may consider changing protocols according to vaccination status, while others are deciding whether to mandate vaccines in the workplace. The debate rages over whether to require vaccines but whatever decision is made, employers must be



mindful of two overarching concepts which affect vaccination programs: HIPAA and anti-discrimination laws.

- HIPAA
  - HIPAA is the federal privacy law which protects all communications, storage, and use of health information. Employees cannot be required to provide private health information unless certain exceptions apply (i.e. the employee requests a reasonable accommodation due to a serious health condition). Throughout the COVID-19 pandemic, employers were permitted to require testing, etc. on the basis that the employer was required to eliminate a “direct threat” in the workplace. With regard to vaccines, there is no law or guidance to date which requires an employee to disclose “medical information” to prove to an employer that the employee was vaccinated. The CDC confirms that standard on its page related to workplace vaccination programs. This standard is very difficult to apply in practice because employers who decide to mandate vaccines and proof of vaccination are in the precarious position of not being allowed to require “medical information” about vaccinations but neither the CDC or any other agency has provided clear guidance on what exactly is “medical information” and what is not. Some argue that any confirmation of vaccination in any form is by definition providing medical information. Unfortunately, federal and state agencies have not provided clear information on the issue.
- Anti-discrimination laws – the Americans with Disabilities Act (ADA) and Civil Rights Act
  - The ADA protects the rights of individuals with disabilities and in the context of vaccine and mask mandates, the ADA requires employers to make reasonable accommodations for employees who cannot get the vaccine or wear masks for medical reasons. Employees requesting accommodations can be required to give limited medical information to justify the need for the accommodation. Employers who get that information now are on “notice” of an employee’s disability and must ensure that employees are not treated any differently due to that disability. In effect – the more information an employer acquires about an employee’s condition, the further an employer opens a door to claims when difficulties arise regarding any aspect of an employee’s employment.
  - The Civil Rights Act protects individuals from discrimination on the basis of, among other characteristics, their sincerely held religious beliefs and practices. Employees may request exemption from vaccine mandates on the basis of such a belief or practice and employers must make accommodations on that basis unless



the employer can prove that making the accommodation would create an undue hardship – another standard which is unclear at best.

## **SO WHERE DOES ALL OF THAT LEAVE EMPLOYERS?**

The above “guidance” leaves employers exactly where most employers do not want to be – able to establish any standard the employer wants to establish but with unclear “rules” and all of the liability. The outline above focuses solely on legal standards, but employers certainly must deal with workplace morale as well. Even the CDC on its page related to Workplace Vaccination Programs concludes with a quote of the EEOC policy on flu vaccination programs: “Generally, ADA-covered employers [15+ employees] should consider simply encouraging employees to get the flu vaccine rather than requiring them to take it.” That “guidance” does not necessarily answer the COVID-19 question, but that is the best advice that CDC is giving right now. Bottom line – employers need to make the business decision as to where their comfort level is with risk of transmission, continued reasonable safety precautions, and employee privacy concerns. There is no “one size fits all approach.” If you want to discuss your company’s policies and concerns, please contact ELDI founder Kimberly Russell at (610) 941-2541 or [krussell@kaplaw.com](mailto:krussell@kaplaw.com).