

Shifting law on masks and physical distancing in workplace

By Dan Eaton

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The Centers for Disease Control and Prevention (CDC) recently issued welcome updated guidance that fully vaccinated people may safely perform most indoor and outdoor activities without wearing a mask and without physical distancing. The updated guidance is not a legal mandate.

CDC's limited legal authority

The CDC has limited legal authority under the Public Health Service Act to issue regulations “necessary to prevent the introduction, transmission, or spread of communicable diseases.” One federal judge recently observed that the law imposes “concrete limits” on CDC’s power. The CDC indisputably cannot license vaccinated individuals to go unmasked contrary to more restrictive state and local public health orders.



The Law at Work (San Diego Union-Tribune Community Press File Photo)

The CDC’s latest posting itself notes: “Fully vaccinated people can resume activities without wearing a mask or physically distancing, *except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.*”

State guidance and San Diego County Public Health Order

The San Diego County Public Health Order has the force of law. That order continues to require all county residents to follow the May 3, 2021 face-covering guidance of the California Department of Public Health. The CDPH has announced even fully vaccinated people must continue to wear masks when indoors with others outside of their households, with limited exceptions, until June 15.

Businesses — including local operations of national chains — may not unilaterally adopt policies less restrictive than county mandates. California Health and Human Services Secretary Dr. Mark Ghaly confirmed that at a news conference last week.

State workplace regulations

Earlier this month, Cal-OSHA updated its enforcement guidance on the emergency temporary standards related to COVID-19 issued late last year. According to the revised frequently asked questions, employers do not need to exclude from the workplace fully vaccinated employees exposed to COVID-19 who are asymptomatic.

On June 3, the Occupational Safety & Health Standards Board (OSHSB) will consider revisions to the emergency temporary standards themselves. Draft revisions were posted for consideration at the board's May 20 meeting, but were tabled at that meeting until June for further revision in light of the new CDC guidance. In the meantime, the existing temporary standards remain in force.

Among other things, the revisions the board tabled on May 20 would have dropped the requirement of face coverings where everyone in a room is fully vaccinated and has no COVID-19 symptoms. The draft revised standards defined a "fully vaccinated" employee as one for whom the employer has (1) documentation that the employee has (2) received, at least 14 days before, the required number of doses of a vaccine that has (3) either FDA approval or received FDA emergency use authorization. Fully vaccinated employees also would not have to wear face coverings when they are outdoors. Scarves and bandanas would be inadequate face coverings under the new rules as drafted.

Under those draft revisions, employers would have to provide respirators for voluntary use to all employees working indoors who are not fully vaccinated. Employers also would have to provide unvaccinated employees with respirators for voluntary use, and encourage use of the respirator, where the unvaccinated employees are in a vehicle with at least one other person for 15 minutes or more. Employers also would have to provide unvaccinated employees who have COVID-19 symptoms with free COVID-19 testing on paid time.

Worksites where all employees are fully vaccinated, except for those entitled to reasonable accommodation for religious objections or a health condition, also would be excused from the requirement that employees be separated by at least six feet where possible. The physical distancing exception would only apply where the employer provides respirators for voluntary use for employees who are not fully vaccinated and tests those employees for COVID-19 at least weekly during paid time at no cost to the employee.

OSHSB staff will post the further proposed revised emergency temporary standards by May 28. If adopted in June, the revised standards will remain in effect through December.

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