
EMPLOYMENT LAW ALERT

Fully Vaccinated – No Mask! But what does that mean for the Employer?

After the much-anticipated meeting of the California Occupational Safety and Health Standards Board on June 17, 2021, Governor Gavin Newsom signed an executive order enabling revisions to the COVID-19 public health order. The executive order confirms the 5-1 vote, and bypasses the normal ten (10)-day legal review period, allowing fully vaccinated employees to cease wearing masks, in most instances, while at work. This new order applies to workplaces in California including offices, factories and retailers. Importantly, however, businesses maintain the option of requiring masks in their workplaces.

Great news, right? Sure, but it does not come without questions. How do employers manage collecting information regarding vaccinations? Do employers require proof that an employee has been vaccinated or is it an honor system? What can an employer do with vaccination information? What is an employer not allowed to do with vaccination information? These are just a few of the questions that California employers are now going to grapple with.

First, employers are entitled to obtain vaccination information without being concerned that it may be a HIPAA violation. Obtaining vaccination information in the context of whether or not an employee is required to continue to wear a mask is considered information contained in employment records obtained by an employer in its role as an employer. Thus, HIPAA does not apply.

Moreover, the Equal Employment Opportunity Commission (“EEOC”) and California’s Department of Fair Employment and Housing (“DFEH”) have found that asking employees about vaccination status is not a “disability related inquiry” and, thus, does not violate the Americans with Disabilities Act. However, this does not answer the question of whether an employer must keep vaccination status confidential under the ADA.

The EEOC has not specifically indicated that an employee’s vaccination status must be kept confidential. The DFEH, on the other hand, reminds employers that records of employee or applicant vaccination status must be maintained as a confidential medical record. So how do you implement a policy allowing employees who have been vaccinated to remove their masks and require those who have not been vaccinated to keep wearing their masks without disclosing who has and who has not been vaccinated? This is, of course, the million-dollar question.

At this point, it comes down to control. An employee who has been vaccinated may make a decision to stop wearing a mask, but may also decide to continue to wear a mask. Thus, one cannot assume that because an employee is wearing a mask he/she/they are not vaccinated. On the contrary, if an employer were to require an employee to broadcast their vaccination status, say on a nametag, hardhat or ID bracelet, the employer would be disseminating confidential medical information. So, what does an employer do?

There are a couple of options:

1. Continue to require all employees to wear masks in the workplace. An employer continues to maintain its ability to mandate masks.

2. Allow fully vaccinated employees to refrain from wearing masks on the honor system. Do not create a policy that requires an employee to broadcast vaccination status.
3. Allow fully vaccinated employees to refrain from wearing masks after providing an attestation to the employer confirming that they are fully vaccinated. In this case, if an employer sees an employee that has not provided the attestation that he/she/they is fully vaccinated, the employer may require the employee to continue to wear a mask until an attestation is provided. Where the employer collects information regarding the vaccination status of its employees, the employer is required to maintain the vaccination status of the employee as confidential information.

This continues to be a constantly changing landscape with new guidance being published all the time. We expect, as the executive order goes into effect, agencies to provide additional opinions on where they stand.

If you need assistance, please contact us or your designated employment counsel.



Author

[Tonya D. Hubinger](#)

T 925.944.9700

thubinger@brothersmithlaw.com

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2033 North Main Street, Suite 720
Walnut Creek, California 94596
T 925.944.9700 F 925.944.9701

www.brothersmithlaw.com

