

New York Clarifies Rules Governing CDC Guidance Adoption

New York State has issued new guidance on its adoption of the Centers for Disease Control and Prevention (CDC)'s recent recommendations concerning Covid-19 prevention measures for vaccinated individuals. The State's new guidance resolves some initial confusion over the extent to which the CDC's recommendations were being adopted as State policy. Under the new guidance, New York clarified that businesses which do *not* congregate patrons, or which congregate patrons but do not operate above the State's social gathering limits (currently 250 attendees indoors, or 500 outdoors), may now follow CDC guidance and dispense with masking and physical-distancing requirements for fully-vaccinated individuals. (Unvaccinated individuals must continue to observe existing masking and physical-distancing requirements.) Alternatively, such businesses may continue to maintain previous state guidance, requiring masks and distancing of all individuals, regardless of vaccination status; or apply CDC guidance only to a separate, designated parts of their establishments.

Businesses electing to follow the CDC guidance, and relax masking and distancing requirements, may choose to require proof of vaccination status (in paper form, through digital application, or via the State's Excelsior

Pass), or may allow patrons to self-report their vaccination status, on an "honor system" basis.

Businesses which *do* congregate patrons and operate above the 250 indoor / 500 outdoor social gathering limit (such as catering and convention halls, or sports venues), may also relax masking and physical distancing requirements within assigned sections. These businesses, however, may not rely on "honor system" self-reporting, and must require proof of vaccination status (or, for certain indoor events, proof of a recent negative Covid-19 test result) if they seek to implement fully-vaccinated sections where masking and physical distancing are eliminated. Unvaccinated individuals, and individuals with an unknown vaccination status, must still observe masking and physical-distancing requirements in their assigned sections of such businesses. (Masking for unvaccinated individuals or individuals with unknown vaccination status is optional in such establishments when outdoors, seated, and socially distanced.)

For all businesses, capacity is now limited only by the space available to practice physical distancing in those instances where distancing is required (for example, in the "unvaccinated" sections of a large congregating business; or where a business opts not to follow CDC

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guidance, and leaves previous masking and distancing guidance in place).

Notably, the State's guidance continues to place masking and distancing restrictions on certain specific types of establishments, including Pre-K to 12 schools; public transit; homeless shelters; correctional facilities; nursing homes; and healthcare settings.

Impact on Employers Remains Unclear

While the State's most recent guidance materials offer some clarification to businesses, especially concerning patrons, employers continue to face potential issues arising from the implementation of the new guidance concerning *employees*. As a previous Bolaños Lowe Alert observed, employers who intend to follow the new guidance with regard to their employees—including managers responsible for Covid-19 prevention-measures enforcement—may be required to know which employees are and are not vaccinated, in order to properly implement the guidance. While December 2020 guidance from the Equal Employment Opportunity Commission suggests that employers may ask employees about their vaccination status, provide proof of vaccination, and possibly even require vaccination as a condition employment or return to employment, it is important to note that there is little recent additional legal guidance on the subject, and employer vaccination inquiries and requirements should be carefully considered in light of their potential to conflict with State and federal disability- and religious-discrimination law, as well as laws

and regulations governing the collection and handling of employee medical information.

Moreover, despite the State's clarifications, it continues to remain unclear how the new CDC and State guidance may interact or conflict with guidance issued in January 2021 by the Occupational Safety and Health Administration (OSHA) on mitigating and preventing the spread of Covid-19 in the workplace, which included OSHA's masking and distancing recommendations for maintaining employee and workplace safety and health. (OSHA's official website advises that it is reviewing the CDC's recent guidance, and will update its own materials accordingly.)

Employers seeking information about the most recent guidance from the State, CDC, or OSHA, or its potential impact on their current or planned health and safety compliance measures or employee policies, may contact Bolaños Lowe with any questions at (585) 643-8440 or www.bolanoslowe.com.

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