

Washington Employers Can't Relax After Reopening Under New COVID-19 Rules

By Sherry L. Talton and Jonathan M. Minear

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While Washington state reopened on June 30 with the new [Washington Ready](#) plan, under which most industries have returned to normal capacity and operations, this reopening has loosened, but not eliminated, COVID-19 safety and masking requirements for employees and customers.

New Masking Guidelines and Requirements

As part of the reopening plan, the governor issued [Updated COVID-19 Facial Covering Guidance for Employers and Businesses](#) and the Department of Labor & Industries (L&I) issued its own [requirements](#) and [guidelines](#) emphasizing the continuing dangers of workplaces with only partially vaccinated workforces.

Employers must ensure unvaccinated employees continue to wear a mask while working indoors. Fully vaccinated individuals (those who are at least two weeks out from their final dose of the applicable vaccination) no longer need to wear face coverings inside or outside, except when in healthcare settings, correctional facilities, homeless shelters, schools, and using public transportation. However, employers must require proof of vaccination if they choose to relax masking measures for fully vaccinated employees. Examples of the type of documentation allowed from employees are:

1. Proof of vaccination, such as the Centers for Disease Control and Prevention (CDC) vaccination card or a photo of it, which the employer is not required to keep a copy of;
2. A signed a hard copy or electronic document attesting to the employee's fully vaccinated status;
3. Documentation from a healthcare provider; and
4. A record from a state immunization information system.

Employers must be able to demonstrate they have verified vaccination status for workers who are not masked or physically distanced. Verification methods may include:

1. Creating a log of workers who have verified they have been vaccinated and the date of verification;
2. Checking vaccination status each day as workers enter a jobsite;
3. Marking a worker's badge or credential to show they are vaccinated; or
4. Other methods demonstrating an employer has verified worker vaccination status also may meet the standard.

Some of these recommended measures do not account for their impact on employee morale or possible compliance issues under other laws, such as the Americans with Disabilities Act (ADA). Overall, employers should consider keeping the vaccination status and information of employees private on a need-to-know basis and consult with counsel in developing a plan for vaccination verification.

L&I also has updated DOSH Directives [1.70](#) and [11.80](#) to implement the changes to masking requirement guidance from the state and CDC for vaccinated employees. For example, DOSH Directive 11.80 clarifies that an employer must have a demonstrable process to verify vaccination status but is not required to keep a copy of employee vaccination records, which may require secure and confidential handling as medical records.

Employers may even require vaccination as a condition of employment, except as prohibited by state or federal law (e.g., the Equal Employment Opportunity Commission, ADA, and so on). An employer's request for proof that an employee is vaccinated aligns with [Equal Employment Opportunity Commission guidance](#) that such a request is not a disability-related inquiry.

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Businesses may rely on the “honor system” to assume customers who are not wearing face coverings are fully vaccinated. Business owners and local authorities may continue to require employees and customers to wear face coverings in businesses. Local authorities and landlords may not prohibit businesses from requiring face coverings or from requiring customers to show proof of vaccination.

Under [SSB 5254](#), during a public health emergency, so long as an employer does not require employees or contractors to wear a specific type of personal protective equipment (PPE), the employer must accommodate employees or contractors’ voluntary use of gloves, goggles, face shields, face masks, and other protective devices or equipment. Employees and contractors may not use such devices or equipment if doing so:

1. Introduces hazards to the work environment;
2. Interferes with the employer’s security requirements; or
3. Conflicts with safety standards set by L&I or the Department of Health.

Employers also have the right to verify that voluntary use of PPE meets all applicable workplace health and safety requirements.

Additional Protections for Workers Getting Vaccinated

The [Safe Workers Proclamation](#) prohibits employers from taking adverse employment action (defined broadly) against a Washington worker (including independent contractors) for:

1. Receiving a COVID-19 vaccination;
2. Taking “reasonable” time off to receive a vaccination or recover from its side effects;
3. Taking time off when the worker is subject to a COVID-19 quarantine or isolation order;
4. Taking time off when the worker is advised by a healthcare official or provider to self-quarantine or self-isolate due to a positive COVID-19 diagnosis; or
5. Taking time off when the worker is experiencing COVID-19 symptoms and seeking a medical diagnosis or treatment.

Accordingly, while this Proclamation remains in effect, employers may not discipline employees for engaging in any of these activities during work hours, even if the employee lacks sufficient paid sick leave.

Other Updated L&I Rules

L&I has again extended temporary [WAC 296-800-14035](#) to remain in effect until at least September 21, 2021. This rule requires that, where a business activity is prohibited by an emergency proclamation, an employer may not allow employees to perform work. This rule also requires employers to comply with all conditions for operation under the governor’s proclamations.

Health Emergency Labor Standards Act

L&I has released a set of Questions and Answers for Protecting High-Risk Employees from Discrimination During Public Health Emergencies, which relates to the new law known as [HELSEA](#). HELSA adds numerous protections for specified workers during public health emergencies involving infectious or contagious diseases.

Jackson Lewis attorneys are closely monitoring updates and changes to legal requirements and guidance and are available to help employers weed through the complexities involved with state-specific or multistate-compliant plans.

If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you regularly work, or any member of our [COVID-19 team](#).

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