



Does *no mask* still mean *no service*? What's in store for pandemic restrictions for retailers

By Staci Jennifer Riordan, Sarah Swank, and David Kaufman

At the beginning of the pandemic in spring 2020, American retailers began adopting COVID-19 preventative measures, including capacity limits, social distancing, temperature checks, and mask requirements. Some of these restrictions were based on local and state mandated protocols, while others were corporate policies. Nevertheless, many retailers experienced customer friction and even violence in some instances in enforcing these rules. This was shown on May 1, 2020, when a security guard at Family Dollar Store in Flint, MI, was fatally shot over a dispute involving mask-wearing by a customer.

Changing CDC guidance means changes for retailers

The enforcement effort by retailers was eased in some instances as the U.S. Centers for Disease Control (CDC) in July 2020 shifted their guidance to endorse general mask-wearing and more states and municipalities enacted their own restrictions. Now that a large percentage of U.S. adults are now vaccinated, the CDC changed their position, taking by surprise some states that were planning on lifting protocols regarding masks and social distancing over the summer. On May 13, 2021, the CDC announced that, "Based on what we know about COVID-19 vaccines, people who have been fully vaccinated can start to do some things that they had stopped doing because of the pandemic." Some of these things include not wearing masks in both indoor and outdoor settings, while remaining socially distant, which includes retail stores and restaurants. The CDC did elaborate that individuals should adhere to "local business and workplace guidance."

As a result of this change in CDC guidance, many national retailers announced that they were eliminating the mask requirements for vaccinated individuals in jurisdictions where there is no state or local mandate. For example, Starbucks announced its response to the CDC statements: "As such, facial coverings will be optional for vaccinated customers beginning Monday, May 17, unless local regulations require them by law."

Is everyone happy about the changes?

For many Americans, being freed of the responsibility of wearing masks may seem to be a welcome development. Not everyone is happy about the new policies. The 1.3 million members of the United Food and Commercial Workers (UFCW) union issued a statement following the change:

“While we all share the desire to return to a mask-free normal, today’s CDC guidance is confusing and fails to consider how it will impact essential workers who face frequent exposure to individuals who are not vaccinated and refuse to wear masks.” Indeed, while these guidelines impact **vaccinated** customers, there is currently no easy way for stores to determine which of their shoppers are **unvaccinated**—a point that the UFCW makes in its release: “essential workers are still forced to play mask police for shoppers who are unvaccinated and refuse to follow local COVID safety measures. Are they now supposed to become the vaccination police?”

What to do next?

In this changing environment, below are a few important action items retailers should keep in mind.

Consider adjusting mask and other COVID-19 restrictions

Retailers need to consider if they will be adjusting their mask policies and other COVID-19 restrictions in light of the new CDC guidance. The CDC guidance is just that—guidance, not a federal mandate or protection. Stores need to keep in mind that state and local rules mandating masks and other restrictions may remain in force for several weeks and possibly months. This could create significant variations in policies across locations. Other factors for retailers to contemplate are landlord/shopping center rules, consumer reaction to changes in policy, and employee relations issues. For example, airports and other transportation hubs will likely maintain masking rules for some time.

Think about how to enforce the policy

If everyone entering the store needs to be masked, it is pretty easy to see who is violating your policy. If a retailer’s policy forbids only unvaccinated customers from not wearing masks, retailers are left with the difficult challenge of determining vaccination status for customers. Does that mean you have to ask for their vaccine card? While some states, like New York, are experimenting with vaccine passports, other states, like Florida, have banned by executive order businesses from asking about vaccination status “to gain access to, entry upon, or services from” an establishment. That may or may not prohibit asking about status to enforce mask wearing. However, in most retail store environments, there would not be HIPAA medical privacy concerns regarding customers.

Prepare for increased friction with consumers over policies

No matter what happens with a retailer’s policy, stores and their employees should be prepared for increased friction with shoppers over them. There will likely be more instances of customers not wearing masks if mandated by store policy. And, on the flipside, we may see other shoppers complain about unmasked consumers no matter what the policy states. This friction will increase the risk for possible unpleasant and even violent encounters between employees/customers AND customers/other customers.

Recognize employee guidelines may differ from customer policies

Before you take down your plexiglass, check the employment law requirements in the state. While the CDC has changed its guidance, the U.S. Occupational Safety and Health Administration (OSHA) and state agencies will likely make its own independent changes to health regulations focused on employee safety. For example, New York passed its own HEROs Act, which mandates employers create infection control plans and provide employees the right to request employee-management committees to monitor safety.

Revisit store layout and other changes made during the pandemic

In addition to masks, stores instituted a wide range of changes to layout to assure social distancing and other policies, including returns/exchanges, curbside and in-store pickup, restroom use, food/drink, cleaning protocols, and taped directional arrows on the floor. As CDC, state, and local guidelines and recommendations shift, retailers need to study all of these pandemic-related changes and evaluate them based upon the current situation. Some changes, while they were made to achieve a specific health and safety goal, may have been embraced by customers and continue to make business sense.

Anticipate changes in guidance and protocols

The pandemic has kept businesses on their toes for over a year. We anticipate changes in the outbreak and government response to continue, including the possible need for booster vaccination shots in the fall or winter. Retailers need to be aware of the environment and be agile as they deal with shifts in guidance and mandates.

Keep informed

Nixon Peabody LLP has been advising retailers through every phase of this crisis and will continue to monitor the guidelines and other trends that impact retailers during this unsettled time. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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