



June 8, 2021

The Honorable Andrew Cuomo
Chairman
National Governors Association
444 N. Capitol Street, NW
Washington, DC 20001

The Honorable Asa Hutchinson
Vice Chairman
National Governors Association
444 N. Capitol Street, NW
Washington, DC 20001

Dear Governor Cuomo:

On behalf of the National Retail Federation (NRF), I write to solicit the assistance of the National Governors Association in ensuring that states implement uniform policies that will allow Americans to return to work safely.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and internet retailers from the United States and more than 45 countries. Retail is the nation's largest private-sector employer, supporting one in four U.S. jobs — 52 million working Americans. Contributing \$3.9 trillion to annual GDP, retail is a daily barometer for the nation's economy.

Retailers' biggest priority has been and will continue to be protecting the health and safety of their customers, associates and communities. Increased vaccinations and expanded immunity are creating more opportunities for retailers specifically and the U.S. economy generally to get back to full strength. However, in their attempt to innovate and spur economic growth, retailers have been hindered by state policies that are inconsistent, not grounded in sound science, and, in some circumstances, wholly unworkable.

On May 13, 2021, the Centers for Disease Control and Prevention (CDC) released new guidance clarifying that "fully vaccinated people no longer need to wear a mask or physically distance in any setting, except where required by federal, state, local, tribal or territorial laws, rules and regulations, including local business and workplace guidance." In so doing, CDC essentially commenced a transition from full pandemic protocols to pre-COVID normality.

Subsequently, on May 27, 2021, the Equal Employment Opportunity Commission (EEOC) issued guidance clarifying that employers may mandate that employees physically entering the workplace be vaccinated against COVID-19 and may offer their employees incentives to vaccinate against COVID-19.

Unfortunately, several states have implemented policies that are inconsistent with these guidance documents, leaving retailers in a precarious legal position. Some states have required businesses to ascertain every employee's vaccination status. Alternatively, some have outright prohibited businesses from even asking about an employee's vaccination status. Some have gone as far as to require employers to verify their *customers'* vaccination statuses. All these approaches are inconsistent with federal guidance. Businesses should be given the flexibility to determine the best course of action specific to their particular circumstances — pursuant to all federal health, safety and workforce guidelines — to protect the health of their own workforces.

Most states that implemented face-covering mandates in 2020 have lifted them over the past month, consistent with CDC guidance. However, some state standards continue to differ with the CDC's clear language. California, for one, just announced new revisions to that state's November 2020 emergency temporary standard. Under the new language, which is in effect indefinitely, vaccinated employees can only enter their workplace unmasked if everyone in the workplace is also vaccinated. Thus, California is effectively requiring every employer to know the vaccination status of every employee, apply different treatments to employees based on their vaccination status, and require their vaccinated employees to don masks in some circumstances. California's imposition of these mandates is inconsistent with CDC guidance, detrimental to public confidence in the vaccines, and ungrounded in any sound science whatsoever.

Regarding vaccination certification of employees, EEOC guidance is clear that employers may request certification documentation or simply accept their employees' attestation as to their vaccination status. EEOC's guidance gives employers this choice. Oregon's Occupational Safety and Health Administration, however, stated on May 19, 2021, that employers must verify that the employees have been fully vaccinated before employees can be at work without a mask. Oregon employers cannot utilize the honor system regarding their employees' vaccination status, even if the employer has no interest in obtaining vaccination certification documentation. Conversely, on May 7, 2021, Montana enacted Montana House Bill 702, recognizing an individual's vaccination status as a protected category. The legislation aims to prohibit employers from requiring employees to receive a vaccination and/or disclose their immunization status. In short, that which is mandated in Oregon is prohibited a few miles east in Montana.

With no legal or scientific rationale, Oregon further mandated that retailers wishing to discontinue mask requirements for customers must "require, request and review" proof of each customer's vaccination status prior to entry or admission. Should an individual decline to provide proof of vaccination status, Oregon requires retail employees to enforce masking and physical distancing requirements. Similarly, Hawaii announced on May 25, 2021, that it will continue to require retailers to "refuse admission or service to any individual who fails to wear a face covering" in most circumstances. Hawaiian retailers not enforcing this rule "may be subject to enforcement, including fines and mandatory closure."

Businesses and their employees should never be compelled by government order to verify the vaccination status of customers or the general public. Not only are Oregon and Hawaii's

policies inconsistent with CDC guidance and sound science, but they are also potentially dangerous for retail employees. Requiring employees to confront customers can lead — and has led — to violence. Customers may feel strongly about their decisions regarding whether to get vaccinated; these states are wrong to ask retail employees to question such beliefs. Placing the onus on retail employees to verify the vaccination status of customers will put them at greater risk than if these states simply allowed vaccinated customers to enter without masks.

As our nation returns to some semblance of a pre-pandemic normal, retailers are eager to hire workers, grow the economy and serve their communities. NRF encourages you to work with governors nationwide to implement uniform policies that will foment a strong economic recovery.

Sincerely,

A handwritten signature in black ink, appearing to read "David French".

David French
Senior Vice President
Government Relations

cc: Bill McBride, Executive Director
State Retail Association Executives