COVID-19: RETURNING TO A MASK-FREE WORKFORCE? NOT QUITE YET

Date: 18 May 2021

U.S. Labor, Employment, and Workplace Safety Alert

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On 13 May 2021, the Centers for Disease Control and Prevention (CDC) issued new guidance, stating that individuals who are fully vaccinated against COVID-19 "can resume activities without wearing a mask or staying 6 feet apart, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance." This forced employers across industries to evaluate their existing face covering/mask policies absent additional guidance from the Department of Labor (DOL) or Equal Employment Opportunity Commission (EEOC). On 17 May 2021, the Occupational Safety and Health Administration (OSHA) announced its endorsement of the CDC's new guidelines, but did not provide any additional guidance for employers. Specifically, OSHA stated that it "is reviewing the recent CDC guidance and will update our health materials on this website accordingly. Until those updates are complete, *please refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers.*" Given that OSHA has not formally revised its existing guidelines and recommendations related to face covering requirements in the workplace as a means of mitigating the spread of COVID-19 and the EEOC has not updated its COVID-19 guidance since December 2020, employers should tread carefully and closely consider the risks involved before relaxing any face covering workplace restrictions.

OSHA IS RESPONSIBLE FOR WORKERS; CDC PROVIDES GUIDANCE FOR THE PUBLIC

The CDC's mission is to protect the American public from "health, safety, and security threats,"[1] while OSHA's mission is to "ensure safe and healthful working conditions for workers."[2] The Occupational Safety and Health Act (OSH Act) contains a general duty clause, which requires employers to provide workers with a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm. Throughout the pandemic, OSHA has interpreted this clause to mandate the use of masks in the workplace to limit the spread of COVID-19.

Although the CDC's guidance throughout the pandemic has helped inform many employer decisions, it is important to keep the CDC's guidance in context. First, the CDC's guidance is just that—*guidance*. OSHA, on the other hand, is responsible for enforcing the requirements of OSH Act, promulgates rules and standards, and assesses penalties to ensure compliance with the OSH Act. Second, as noted above, the CDC's recommendations are aimed at protecting the American public, while OSHA's rules and standards are designed to ensure employers provide a safe working environment to their employees. While OSHA has apparently endorsed the new CDC guidance, OSHA may publish more detailed guidance concerning the relaxed use of masks for

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vaccinated individuals in the workplace. Until then, OSHA has not formally removed its most recent COVID-19 guidance for employers published on 29 January 2021, which includes mandating the use of masks by both employees and third parties in the workplace.

STATE AND LOCAL LAW

Many state and local laws, executive orders, and other guidance continue to require masks in the workplace (and inside public places). Indeed, the CDC does not have authority over state or local governments that may impose stricter requirements, and its recent guidance explicitly defers to state and local laws. Importantly, although some State Executive Orders across the country have been changed since the most recent CDC guidance went into effect, some other State Executive Orders remain in effect and some require mask wearing and social distancing. Therefore, employers should consult state and local restrictions before lifting any mask wearing policies.

Further, some jurisdictions also have employer liability statutes and specific workers' compensation standards that mandate employer compliance with certain health and safety guidelines, which may include state and local regulations. These statutes often provide that when employers adhere to safety standards designed to prevent the spread of COVID-19, the employer is able to limit exposure or reduce liability when and if an employee contracts COVID-19 in the workplace.

INDUSTRY GUIDANCE

Employers must also consider whether the CDC's new guidance actually changes anything for them, as the guidance does not apply to all industries or to all settings. For example, vaccinated individuals are still required to wear a face covering on airplanes and in healthcare facilities. Employers who work in or regularly interact with these industries should be mindful that requirements may differ. Any changes to a mandatory face covering policy should be made with those considerations in mind.

CONTRACTUAL OBLIGATIONS

In addition to government regulations, some employers may be contractually obligated under a lease or other agreement to maintain a mask mandate, regardless of the new CDC guidance. Therefore, prior to implementing any relaxed mask-related policies, employers should evaluate whether contractual or landlord restrictions may apply. Employers also should consider consulting any applicable insurance policies before modifying mask mandates.

EQUAL EMPLOYMENT OPPORTUNITY CONSIDERATIONS

Finally, the EEOC has not updated its “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (WYSK) to account for the widespread availability of vaccines or the impact of vaccinations on mask wearing in the workplace. However, the current WYSK guidance provides some helpful information for employers considering lifting mask mandates in the workplace. For example, as discussed in our December 2020 alert on workplace vaccination considerations, asking for an employee's vaccination status is not a prohibited medical inquiry under the Americans with Disabilities Act. Thus, if an employer elects to lift mask restrictions in the workplace, it should consider whether it will require employees to show proof of vaccination

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before allowing the employee to be present in the workplace without a mask, balancing risk avoidance with considerations of workplace culture and morale. If an employer chooses to require proof of vaccination, such proof should be limited to (i) an employee's CDC vaccination card *and* a (ii) corresponding identification card, such as a driver's license. Further, employers should ensure that employees *do not* bring an entire medical file or unrelated medical documents as proof of vaccination. Limiting who has access to information regarding employee's vaccination status is advisable and employers that choose to inquire about vaccination status should develop a written protocol for collecting such information and keeping it confidential. Such employers requiring proof of vaccination should maintain information related to an employee's vaccination status separate from the employee's general personnel file. Employers also may consider designating a human resources contact to administer the policy and maintain the list of vaccinated employees.

Keeping anti-discrimination laws in mind, employers should carefully consider how they will enforce a revised face covering policy in a non-discriminatory manner and while awaiting further guidance from the EEOC. Whether or not an employee is wearing a mask may inadvertently reveal the employee's vaccination status. Thus, the risk for employers will be in how employees are treated in response to unavoidable disclosure. Managers and supervisors should be reminded of company equal employment opportunity policies and should be trained to not exclude masked individuals (or vice-versa) from employment opportunities. While distinguishing between unvaccinated and vaccinated employees may seem non-discriminatory, employers must remember that many individuals will remain unvaccinated because of a medical disability or a sincerely held religious belief and others may simply be more comfortable continuing to wear a mask in the workplace.

KEY TAKEAWAYS

- Employers should consider a number of factors before implementing a revised face covering/mask policy in the workplace.
- Employers should work with their counsel to ensure their workplace policies are compliant with the OSH Act and all applicable state and local laws, including anti-discrimination laws.
- Employers should expect an increase in employee concerns related to wearing a mask in the workplace and should prepare responses to anticipated questions and develop a plan for messaging the changes to their workforce before making any policy changes.
- Employers should consider requiring proof of vaccination before allowing an employee to go without a mask in the workplace. If an employer chooses to do so, proof of vaccination should be in the form of the CDC vaccine card and government issued identification.
- Employers who are lifting mask restrictions for vaccinated employees should have a clear reporting procedure for employee concerns. Such a reporting procedure should not involve employee-to-employee communications.
- Employers who are lifting mask restrictions for vaccinated employees should consider identifying for employees' scenarios where mask wearing still may be expected such as visiting customer locations that mandate mask wearing, visiting industries excluded from the CDC's relaxed mask guidance, traveling

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and/or meeting with third parties, or attending events (where vaccine status of visitors cannot be ascertained).

- Employers should consider how a revised face covering policy may affect return-to-work plans. Employees, especially those who are immunocompromised or those who have children or individuals who are at high-risk of COVID-19 in their residences, may be more reluctant to return to a physical location with relaxed mask wearing policies.

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FOOTNOTES

[1] https://www.cdc.gov/about/organization/mission.htm

[2] https://www.osha.gov/aboutosha#:~:text=OSHA's%20Mission,%2C%20outreach%2C%20education%20and%20assistance.

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