COVID-19: ARE MASKS BACK? CDC REVERSES, IN PART, GUIDANCE FOR VACCINATED INDIVIDUALS

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

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On 27 July 2021, the Centers for Disease Control and Prevention (CDC) issued updated guidance for When You've Been Fully Vaccinated,[1] given new evidence that the dominant strain of COVID 19 circulating in the United States, the B.1.617.2 (Delta) variant, is more contagious than prior variants and that vaccinated persons may transmit the virus to others.

The updated guidance states that individuals who are fully vaccinated against COVID-19 should wear a mask indoors in public if they are in an area of substantial or high transmission. Importantly, the change reflects a reversal in the CDC's previous guidance stating that most individuals who are fully vaccinated could go without masks when indoors. The CDC guidance provides a link to a map of the United States that provides an integrated, county view of COVID-19 positivity rates in each county and identifies (by color code) whether the level of community transmission is high, substantial, moderate or low in each county. Currently, over 60% of counties in the United States are ranked as having a high or substantial level of transmission.

Expanding the guidance beyond counties with high and substantial levels of transmission, the updated guidance also recommends that fully vaccinated people may choose to wear a mask regardless of the level of transmission in their area, particularly if they are immunocompromised or at increased risk for severe disease from COVID-19, or if they have someone in their household who is immunocompromised, at increased risk of severe disease or not vaccinated (fully or partially).

Additionally, given the risk of breakthrough cases, the CDC now provides that people who have a known exposure to someone with suspected or confirmed COVID-19 should be tested 3-5 days after exposure and should wear a mask in public indoor settings for 14 days or until they receive a negative test result. Lastly, the CDC now recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status.

Although the updated CDC guidance is not mandatory, employers, especially those operating in counties or other areas of substantial or high transmission, should evaluate their current return to work procedures for compliance with the new CDC guidelines. For those employers who have relaxed certain workplace safety policies, including social distancing and mask requirements, this new guidance may necessitate modifications to workplace rules to satisfy obligations to provide a safe workplace for both vaccinated and unvaccinated workers under federal and state regulations. Further, compliance with these new guidelines may minimize the risk of liability in the event of a COVID-19 outbreak in the workplace, including in states where legislation exists to protect businesses from liability for COVID-19 transmissions if best practices are followed, including those set forth by the CDC. Moreover, other federal and state agencies may publish updated guidance that is reflective of the CDC's revised course on the use of masks by the fully vaccinated. As has been consistent throughout the pandemic, applicable health and

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safety guidelines are constantly evolving, and employers must continue to adapt their workplace policies to remain compliant.

KEY TAKEAWAYS[2]

The CDC's guidance indicates that employers must be flexible as they continue to navigate the return to work landscape. Below are some considerations for employers in light of the new guidelines:

- Employers should consider designating an appropriate designee to monitor the level of transmission in the counties of their respective workforces, as this data is regularly updated by the CDC.
- Multi-state employers should consider how their current face covering/mask policy in the workplace may need to be revised consistent with fluctuating transmission levels across counties in the United States.
- Employers who may have relaxed COVID-19 health and safety screening measures due to employee vaccination requirements may consider re-implementing COVID-19 screening protocols throughout their workforce. Further, employers should incorporate a mask requirement into return to work guidelines for fully vaccinated employees who are exposed to COVID-19.
- 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 implementing any policy changes.
- Employers should consider the implications of the CDC's updated guidance with respect to conflicting state and local orders and be prepared to address conflicts that may arise.
- Employers in the education sector should work with counsel to ensure they can address any state and local considerations that may conflict with the CDC's updated guidance.
- Employers in low to moderate transmission areas 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 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.
- As addressed by the Equal Employment Opportunity Commission's most recent vaccine guidance, employers should address accommodation requests from fully vaccinated employees in the same manner as unvaccinated ones. Employers should be prepared for an increase in these types of requests, especially in high transmission areas.

FOOTNOTES

[1] Meanwhile, the CDC's guidance for unvaccinated individuals remains the same: continue masking until you are

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vaccinated.

[2] Employers should review K&L Gates' client alert on important considerations before returning to a mask-free workforce.

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