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More Masking: What Updated CDC Guidance Could Mean for Employers

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The CDC released [new guidance](#) last week in an effort to curb the spread of the Delta variant of COVID-19. With cases on the rise, predominantly from the Delta variant, the CDC now recommends that both unvaccinated *and* vaccinated individuals wear a mask when indoors in public areas where there is “substantial or high transmission” in the community. A county has high transmission if it logs 100 or more weekly cases per 100,000 residents or a 10% or greater test positivity rate in the last seven days.

In response to CDC guidance, many states and counties are adding more restrictions after a general loosening of rules over the past couple months. In Chicago, Gov. J.B. Pritzker issued a mask mandate for schools and a vaccine requirement for some state workers. California recently issued guidance that vaccinated citizens are also encouraged to wear a mask while indoors, while unvaccinated citizens are required to do so. New York City has not mandated masks, but will be the first major U.S. city to require proof of COVID-19 vaccination at restaurants, gyms and other businesses. Additionally, President Biden announced that all federal workers will be required to attest to being vaccinated. Those who are not vaccinated will be required to submit to regular testing, along with masking and social distancing.

With a reversal of guidance regarding vaccinated individuals, there is widespread confusion. Adding to it, some states are resisting or even rejecting the CDC’s newest guidance. For example, last week, the governor of Florida issued Executive Order Number 21-175 “Ensuring Parents’ Freedom to Choose Masks in Schools,” which mandates that school districts in Florida cannot institute mask mandates in public schools. Addressing both masks and vaccines, the governor of Texas recently issued an executive order stating that “no governmental entity, including a county, city, school district and public health authority, and no governmental official, may require any person to wear a face covering or to mandate that another person wear a face covering,” except for hospitals and county and municipal jails. Additionally, while the order “strongly encourages” those eligible to receive the vaccine to do so, it also states that the “COVID-19 vaccine under an emergency use authorization is always voluntary in Texas and will never be mandated by the government.” The order also provides that any private entity that receives or will receive public funds may not require consumers to provide their vaccination status or deny them entry based on their status so long as the vaccine is under an emergency use authorization.

Implications for Employers

The shift in CDC guidance comes at a difficult moment for many employers eager to return to the workplace after nearly a year and a half of working remotely. Although the CDC’s guidelines are not law, the EEOC and OSHA have consistently deferred to and referenced them, giving employers good reason to follow CDC recommendations. In the face of an unprecedented pandemic, following CDC guidance is a best practice for employers looking to maintain a safe workplace while not running afoul of statutes such as the ADA and Title VII. Notably, the executive orders in Texas and Florida do not prevent private employers from encouraging or requiring their employees to be vaccinated.

Private employers who have lifted mask mandates for their workplaces should revisit COVID-19 safety guidelines in light of these new guidelines. Even absent state and local regulations on masking, mask mandates could become more widely adopted by businesses, solely based on their interest in decreasing liability for employee injury or death. While OSHA has not updated its "Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace" since the CDC changed its guidance last week, OSHA's General Duty Clause does require employers to provide workers with a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. As a result, it is not a stretch to think that a COVID-19 outbreak in the workplace that did not follow CDC protocol could give rise to a claim for an OSHA violation.

For more information about mask mandates or COVID-19 CDC guidance, contact a member of Gould & Ratner's [Human Resources and Employment Law Practice](#).