

I Don't Want to Wear a Mask...Part 3: Land of the Mask Free and Home of the Brave

Labor & Employment Law Update

on May 14, 2021



On May 13, 2021, the CDC issued new guidance stating that those who are fully vaccinated can resume activities without wearing a mask or social distancing. Following the CDC's announcement, President Biden lifted the mask mandate that was required by staff and visitors of the White House.

While the CDC has issued this guidance, a patchwork of state and local policies or rules are popping up making clear that we are not going to be mask free quite yet. More importantly, the CDC's announcement contained a big "EXCEPTION" by stating "except where required by federal, state, local, tribal or territorial laws, rules and regulations, including local businesses and workplace guidance."

To be clear, the CDC has not made any changes to its workplace guidance regarding the use of masks. The CDC guidance still advises employers to "encourage employees to wear face coverings in the workplace, if appropriate." More importantly though for employers, OSHA still states that employers and businesses should require the use of face masks and emphasizes that "employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious harm. In fact, President Biden's "lifting of the mask mandate" for staff and visitors could potentially be considered a violation of CDC and OSHA guidance regarding workplaces.

Employer and business compliance with CDC and OSHA Guidelines is still very important, especially with the potential for fines. Recently, OSHA issued a \$136,532 penalty and citation to a Massachusetts company for prohibiting employees and customers from wearing face coverings in the workplace and

requiring employees to work within six feet of each other and customers for multiple hours while not wearing face coverings, finding that the company's actions put its employees safety at risk of recognized hazards that are causing or likely to cause death or serious physical harm.

The issue gets even more complicated at the state and local level. Some states, including New York, New Jersey, North Carolina, and Maine, have advised that they will not be modifying their mask mandates at this time. Many other states, including Illinois, Kentucky, Minnesota, Nevada, Oregon, Pennsylvania, Connecticut, and California have begun adjusting their mask mandates and guidance (including setting dates for them to tentatively end). While other states, including Alabama, Arkansas, Iowa, Mississippi, Montana, New Hampshire, and Texas, have already rescinded their statewide mask mandates. To make things even more confusing, even in the states that have rescinded the state wide mask mandates, some local governments have maintained mask mandates including those for employees and/or customers. Then to make it even more unclear, Indiana just passed a law stating that the decision regarding masks is now controlled by city councils and mayors/elected officials and not local health officers. At least one county in Indiana, Marion County, which covers Indianapolis and its surrounding suburbs, has already had its City Council vote to continue its mask mandate.

What does this mean for businesses?

This means that businesses must still require employees to wear masks in the workplace and must still require customers coming into the business to wear masks unless otherwise allowed by state or local guidelines, and even then you are still required to comply with OSHA requirements.

This also means that training, education and communicating with employees and customers will be vital within the next few weeks and months. Many employees and customers will hear about the federal "unmasking," but will not understand that it does not apply to employers or businesses based on state or local requirements or guidelines. Moreover, as OSHA has now made clear by fining businesses, there are repercussions for employers and businesses violating the face mask requirements and guidance.

Training for employees should include methods on addressing, managing and de-escalating conflicts with customers and between employees. In particular, re-emphasizing and educating employees on how to communicate the business' policies and more importantly the reason why the business' policies have not changed. This is vitally important to avoid "viral videos" of confrontations as businesses will no longer be able to point to a presidential mandate or executive order to validate mask policies. Rather, businesses will have to educate employees and customers on federal, state and local requirements and guidelines for businesses and make clear that the "mask free" announcement for

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those with vaccinations are limited to public and social activities and not so much the workplace, business interactions and shopping.

Finally, don't forget that employer and business obligations regarding reasonable accommodation of disabilities and religious beliefs under the ADA and Title VII are still in place.

Due to the complexity and interplay of federal, state, local, tribal or territorial laws, rules and regulations, including CDC, OSHA and state and local health departments and governments, it is important to use legal counsel experienced and knowledgeable in labor and employment law to help you navigate these waters.

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