

# I Don't Want to Wear a Mask...Part 5: CDC Reversal...and School Supplies Include Masks?!?!

## Labor & Employment Law Update

on July 28, 2021



Just when we were starting to let loose and enjoy the summer without masks, as a result of rising number of COVID-19 cases and the Delta variant, the CDC revised their guidance for fully vaccinated individuals on July 27, 2021 with the following changes:

- Fully vaccinated individuals are recommended to wear masks when indoors in areas of substantial or high transmission.
- Fully vaccinated individuals who have a known exposure to someone with suspected or confirmed COVID-19 should be tested 3-5 days after exposure, and wear a mask in public indoor settings for 14 days or until they receive a negative test result.
- Universal indoor masking for all teachers, staff, students, and visitors to schools, regardless of vaccination status.

Since OSHA adopted the CDC's prior changes regarding fully vaccinated individuals not being required to wear masks, it is expected that OSHA will also adopt the CDC's new guidance.

**What are Areas of Substantial or High Transmission?** – It's not a reference to a certain type of workplace (e.g. hospital), but rather the geographic county that you are in. The CDC's COVID-19 Data Tracker shows the level of transmission and COVID-19 cases within counties and based on the CDC's evaluation of community characteristics will identify a risk level. The CDC's COVID-19 Data Tracker is updated on a daily basis at 8 p.m. EST with the map representing a 7 day period. Based on the current map over 63% of counties in the US are considered areas of substantial or high transmission.

**What does that mean for your business?** – While it is sometimes hard to turn back the clock, with the threat of OSHA violations and exposure to legal claims, employers should check whether their business falls within an area of substantial or high transmission. If the business does fall within an area of substantial or high transmission, then based on CDC guidance (and likely OSHA's adoption), businesses will have to re-evaluate their mask policies and consider going back to requiring all individuals coming into their business wear a mask, regardless of whether they have been fully vaccinated or not.

Additionally, pursuant to the CDC guidance regardless of whether or not a business is in an area of substantial or high transmission, fully vaccinated employees who have a known exposure to someone with suspected or confirmed COVID-19 should be tested 3-5 days after exposure and wear a mask in indoor settings for 14 days or until they receive a negative test.

**What risks do I face if my business ignores this guidance?** – If OSHA adopts the CDC's new guidance (which it is expected to do), and your business is located in an area of substantial or high transmission, you will be expected to require all employees and visitors, regardless of vaccination status, to wear a mask indoors. If you do not make changes and still allow employees, customers and visitors to go maskless indoors you will face potential fines from OSHA. Additionally, if there is an outbreak in your facility or one of your employees, customers or visitors claims that they contracted COVID-19 at your business, you could face civil claims (including workers' compensation claims) which would be more difficult to defend based upon you not complying with the CDC and/or OSHA's current standard.

**Impact on K-12 Schools** – School Administrators that have been working long hours to figure out whether or not students and staff have to be masked, just got the answer to that question for this fall. The CDC's guidance states children in K-12 should return to full-time in-person learning, but that all teachers, staff, students and visitors to K-12 schools, regardless of vaccination status, should wear masks indoors.

**State and Local** – The trickle down effect of the CDC's new guidance will not just impact OSHA's requirements, but those at the state and local levels. As such in the coming days businesses will need to keep up to date with local guidance. For the immediate future, businesses should anticipate being faced with state and local guidance that provide fully vaccinated individuals do not need to wear masks, while the CDC guidance states the opposite. In looking at those conflicts, businesses should recognize that the state and local guidance will likely be updated to comply with the CDC's guidelines, much like it has in the past.

**How to Address?** – Businesses are now faced with the impossible task of addressing guidelines that can potentially change on a weekly basis. There is no simple answer. For businesses that are in a county that is currently considered an area of substantial or high transmission, the best practice will be to err on the

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side of safety and require employees, customers and visitors to wear masks when indoors. This minimizes the potential risk and exposure to legal claims, while also protecting the business's workforce from the surge in COVID-19 cases and the Delta variant. In this day and age where maintaining a workforce and recruiting employees is already difficult, keeping one's workforce intact and working is of utmost importance.

Businesses will also be faced with potential issues in communicating and/or enforcing the new guidelines. When the CDC and OSHA issued the "mask free" announcement it was relatively easy for businesses to take down signs and allow customers, visitors and employees to not wear a mask if they were fully vaccinated. With the CDC backtracking, businesses will be faced with the same issues and problems from when mask mandates were instituted (e.g. viral video of customer and employee confrontations over not wearing masks). Even more problematic is how often will the business want to change its policy and procedures, with the understanding that whether or not the business is located in an area of substantial or high transmission could change on a daily or weekly basis.

Communicating your decision on how to address this issue and whether you will be updating your policy on a regular basis to stay in line with areas of substantial or high transmission, or are simply re-instituting your mask policy, will be key. Likewise training employees on addressing, managing and de-escalating conflicts with customers and other employees will play a major role in addressing these issues, while minimizing potential problems. With these changes, employers must also recognize their obligations to provide reasonable accommodations to employees based on a disability or religious belief. Needless to say, just when we felt we were getting out, we've been pulled back into the pandemic life.

As these issues continue to change and evolve it will be important for businesses to consult with legal counsel experienced and knowledgeable in labor and employment law to help you continue to evolve your business for success during these times.

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