

UPDATED: I Don't Want to Wear a Mask...Part 4: OSHA Weighs In!

Labor & Employment Law Update

on May 17, 2021



***On May 17, 2021, OSHA updated its web page regarding "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace" to state the following:

"The Centers for Disease Control and Prevention (CDC) has issued new guidance

relating to recommended precautions for people who are fully vaccinated, which is applicable to activities outside of health care and a few other environments. OSHA is reviewing the recent CDC guidance and will update our 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."

The CDC's May 13, 2021 guidance "Interim Public Health Recommendations for Fully Vaccinated People" states that fully vaccinated people can "Resume activities without wearing masks or physically distancing, **EXCEPT where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance.** Fully vaccinated people should also continue to wear a well-fitted mask in correctional facilities and homeless shelters. Prevention measures are still recommended for unvaccinated people."

However, the CDC has not made any changes to its workplace guidance regarding the use of masks. In particular, the CDC still advises employers to "encourage employees to wear face coverings in the workplace, if appropriate", and does not differentiate between those who have been vaccinated and those who have not.

Finally, even though the CDC and OSHA have issued this guidance, a patchwork of state and local policies or rules are popping up making it clear that an “across the board” mask-free workplace is not without legal risk for employers.

What does this mean for the workplace?

OSHA's updated reference to the CDC's guidance has essentially made this issue a little more clear. In doing so though, OSHA and the CDC has opened the door to employers and businesses allowing employees to be in the workplace without a mask, if they are fully vaccinated, but has not provided any guidance or direction on how to do so. The risk of OSHA issuing a fine or penalty on this issue has been reduced as long as the company is taking common sense steps to protect its employees, which could include (i) requiring verification or confirmation by employees that they have been fully vaccinated before allowing them to be mask free in the workplace; and (ii) modifying guidance to allow employees who have been vaccinated to not wear a mask in the workplace, unless interacting with or in a part of the business where there are customers, clients or the public.

In considering revised policies, employers should remember that there is still risk from workers' compensation claims. While being vaccinated reduces the possibility of getting COVID-19, if an employee is not wearing a mask in the workplace and gets COVID-19, the employer could still face a workers' compensation claim that the employee got COVID-19 at work.

With respect to customers or clients coming into the business, the issue is even muddier, as the CDC and OSHA guidelines are unclear on what is expected of businesses and employers at this point. For example, if a business allows customers or clients into the business without a mask, do they have to verify that they have been vaccinated? Moreover, there is no guidance on what questions a business could ask a customer or client to confirm if he or she has been vaccinated.

As such, this still 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.

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 may not have changed.

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.

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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.

For further information on this matter, keep an eye out for our timely webcast, “Mask Mandate Mayhem! A Briefing for Confused Employers” on Monday, May 24th at Noon CT.

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