CLIENT ALERTS & INSIGHTS

New CDC Mask Guidance - What Does it Mean for Employers?

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On July 27, 2021, the CDC revised its advisory guidance — providing that even the fully vaccinated should wear a mask indoors in public if in an area of "substantial or high transmission." The CDC has provided a map indicating which counties have "substantial" (orange) or "high" (red) transmission. The CDC updates this data week to week.

The CDC guidance remains advisory, and not mandatory, for most employers. As such, the good news is that most employers do not have to do anything differently as a result of the CDC's revised guidance - and that is the decision that has been made by many. (As always, employers should consider local rules which may be compulsory, as some localities have re-implemented mask mandates, e.g., Los Angeles County.) However, those employers that have committed to adhering to the CDC guidance are undoubtedly considering if, and how, they revise their policies in light of the CDC's revised perspective. Feasible options vary. You can continue to require/encourage masks for the non-vaccinated among your workforce, depending on applicable state orders. If you want to do more, most conservatively, you could go back to requiring that everyone wear masks. Practically, this is not likely to be well-received by your employees. Plus, there could be some state issues - more on that below. Or, as a middle-ground alternative between the conservative approach versus taking no action, you could look at the CDC's map week to week and make a determination based on it, and consistent with the new guidance. This too likely is not going to be well-received by your employees, and you get the added bonus of more administrative burden related to COVID-19 as you constantly adapt to the revised classification of the county(ies) where your employees work. A final option would be just to let your employees know about the new guidance, and that you encourage even the fully vaccinated to wear masks indoors.

Perhaps in response to this, we are seeing a few large employers begin to require vaccines for employees returning to the office (e.g., Google, Facebook, Disney, and Walmart). But employers should be aware that certain states have taken action to restrict vaccine mandates with respect to customers/patrons/consumers. Even if those orders on their terms do not apply to employees, they may make enforcing a mandate in the workplace practically challenging. For example, in Arizona and Texas, public entities and those private entities that are or will receive public funds cannot condition entry by a consumer or receiving any service based on vaccination status. (Read the Arizona order here and the Texas order here.) In Florida, all businesses (regardless of public funding) cannot require patrons or customers to certify vaccine status in order to enter or receive services. (See Florida legislation here). And in Ohio, there is a law (effective in October 2021) - applicable to public schools - prohibiting "discrimination" against a non-vaccinated individual, including by requiring different precautions for him/her (which would appear to apply to masks). Employers should be

mindful of new and additional laws on this topic, especially as the country remains divided as to the vaccine and masks.

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