To Mask or Not to Mask, That is the Question.

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Over the last several months, vaccination rates in the United States increased, COVID-19 cases decreased, and guidance from the Centers from Disease Control and Prevention (the “CDC”) regarding fully vaccinated individuals left employers wondering whether loosened COVID-19 face mask requirements were appropriate. While some state and local leaders took the leap and loosened face mask requirements, the CDC’s guidance still advised that fully vaccinated employees should be required to wear a mask, socially distance, and adhere to other mitigation strategies in the workplace even if they were around other fully vaccinated employees.

Yesterday, May 13, 2021, much of the nation celebrated news that the CDC had “changed its tune” and face masks were simply no longer required if an individual is fully vaccinated. But is that what the CDC really said?
The Guidance

While the news headlines, social media posts, and radio snippets will simply communicate that “fully vaccinated people no longer need to wear a mask or physically distance in any setting” the latest guidance for fully vaccinated individuals actually provides:

- Fully vaccinated people can resume activities without wearing a mask or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.

This distinction is important because EVEN if the CDC says it is okay not to wear a mask, employers CAN still require it. But should they?

State/Local Laws

While some states and municipalities have already loosened COVID-19 face mask requirements, others remain in place (though changes are likely to come in the next few days). If an employer opts to loosen their COVID-19 face mask requirement, they should ensure that the state/municipality where their workplace is located has no COVID-19 face mask requirements in place that would prohibit their less restrictive policies.

What about OSHA?

The Occupational Safety and Health Agency ("OSHA") Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace still provides that employers should not distinguish between workers who are vaccinated and those who are not vaccinated when implementing and enforcing COVID-19 safety policies. While OSHA’s guidance may change in the near future, employers should be aware that OSHA’s position remains that employees “who are vaccinated must continue to follow protective measures, such as wearing a face covering and remaining physically distant.” Importantly, following an Executive Order signed by President Joe Biden on January 21 directing OSHA to consider an Emergency Temporary Standard ("ETS") related to COVID-19, OSHA submitted a draft of an ETS related to COVID-19 to the White House Office of Information and Regulatory Affairs. The ETS will likely be issued soon and may very well implicate the use of face masks in the workplace.

Enforcement

If an employer is going to loosen COVID-19 safety policies based on the vaccination status of its employees, it becomes absolutely essential to know whether an employee is actually fully vaccinated. While the Equal Employment Opportunity Commission ("EEOC") has determined that inquiring as to whether or not an employee is vaccinated and/or asking for proof of vaccination is not a disability-related inquiry, follow-up questions or voluntary explanations from an employee may trigger an employer’s liability under the Americans with Disabilities Act ("ADA") or Title VII. Thus, employers considering whether to loosen their face mask
requirements should work with legal counsel to determine the best way to verify whether or not an employee is fully vaccinated. Moreover, employers should be cognizant of applicable state laws that may impact their ability to reveal employee vaccination status.

**Returning to the Workplace**

Finally, an employer’s decision regarding COVID-19 face mask policies can have a significant impact on their ability to return employees to the workplace. Many businesses are just beginning to return to the workplace. While some employees may welcome the news that the CDC no longer requires fully vaccinated individuals to wear masks, others may be leery of eased restrictions after working remotely for over a year, even if fully vaccinated. Employers should carefully consider their workforce to determine whether it is practical to adopt policies allowing fully vaccinated individuals not to wear a mask while at work.

Polsinelli attorneys will continue to monitor and report on any updated guidance from the CDC, EEOC, and other government agencies, and are available to answer your questions about vaccine-related policies.

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