On August 13, 2021, the U.S. Occupational Safety and Health Administration (OSHA) published its updated COVID-19 guidance to account for the U.S. Centers for Disease Control and Prevention’s (CDC) July 27, 2021, guideline change. The CDC change
recommends that fully-vaccinated people mask in all “public indoor settings” in areas of high and substantial COVID-19 transmission. But that change left employers to wonder what “public indoor settings” means and which of their workplaces qualify. When the CDC issued its new recommendation, we recommended that, until OSHA weighed in on the issue, employers consider carefully how, if at all, they should modify their workplace masking policies.

Now OSHA has spoken. But what it is “recommending” employers do (guidance by OSHA cannot mandate anything; it is not the law) when it comes to the masking of fully-vaccinated workers is not clear. In fact, the guidance is not clear even as to which workplaces the masking recommendation applies.

Two provisions of the guidance, one in the executive summary and one in the appendix, partially flesh out OSHA’s position on the masking of fully-vaccinated employees. The executive summary says, very generally, “Fully vaccinated people in areas of substantial or high transmission should be required to wear face coverings inside.” That recommendation does not appear plainly, however, in the main body of the guidance that the executive summary supposedly summarizes. The body mentions the CDC’s recommendation in the context of OSHA’s suggestion that employers supply employees with face coverings, but OSHA does not say it is adopting the CDC’s recommendation or include a section in the body of the guidance that explicitly recommends that fully-vaccinated employees be required to mask under any circumstances.

By contrast, the appendix, which is titled, “Measures Appropriate for Higher-Risk Workplaces with Mixed-Vaccination Status Workers” (emphasis added), offers a narrower masking recommendation than that of the CDC guideline. It provides, “Employers should take additional steps to mitigate the spread of COVID-19 among unvaccinated or otherwise at-risk workers due to the following types of workplace environmental factors, especially in locations of substantial or high transmission [per the CDC’s guideline].” The appendix goes on to list those workplaces that pose a “heightened risk [of COVID-19 transmission] due to workplace environmental factors” as including “manufacturing; meat, seafood, and poultry processing; high-volume retail and grocery; and agricultural processing settings.”

Employers with such heightened-risk workplaces, the appendix says, should adopt best practices that go beyond the “general precautions” provided by the main body of the guidance. And one of those best practices is to “[r]equire ... fully vaccinated workers in areas of substantial or high community transmission, to wear masks whenever possible, [and] encourage and consider requiring customers and other visitors to do the same.”

That position is different from the CDC’s guideline and much narrower than the broad statement in the executive summary. The appendix singles out indoor “workplaces with heightened risk,” that is, those in manufacturing; meat, seafood, and poultry processing; high-volume retail and grocery; and agricultural processing settings. And it provides that, in the event any such workplace includes unvaccinated or “otherwise-at-risk” employees and is located in an area of substantial or high community transmission, the employer should require that fully-vaccinated employees in that workplace mask.
Where an employer’s workplace a) is not in one of those listed “heightened risk” industries or b) is outdoors or c) includes only vaccinated, not-at-risk employees or d) is not located in an area of substantial or high community transmission, OSHA’s position seems to be that the employer need not require that fully-vaccinated employees in the workplace mask.

So now we know where OSHA stands in the wake of the CDC’s revised masking guideline. Or do we? OSHA has not adopted that guideline. It does not define “public indoor setting.” It uses the term, moreover, only when speaking of “public-facing workplaces such as retail establishments.” OSHA also does not include in that section of the guidance any mention of employee masking at all; only masking by customers, visitors or guests. When it comes to fully-vaccinated employee masking, OSHA focuses in the guidance on what is a heightened-risk workplace, not, like the CDC, on what is a public indoor setting.

Even if OSHA intends to recommend that employers with heightened-risk workplaces in high and substantial transmission areas require their vaccinated employees to mask if there also are unvaccinated or otherwise at-risk employees present, does OSHA really mean that it is going to cite employers in such workplaces if fully-vaccinated employees do not wear masks in their private offices? How about in their offices where the walls do not run to the ceiling or have no door, just a doorway? How about in cubicles? How about in one-person restroom stalls? How about in open work areas where a single employee is working alone? Or does the masking recommendation apply only to the non-administrative/office areas of heightened-risk workplaces and/or to other areas where employees work in close proximity? What if the private office is in the middle of the production floor? The guidance answers none of those questions.

Here is another question of serious legal and practical concern to employers unanswered by the guidance: What if an employer knows that the employees at its heightened-risk workplace are fully vaccinated, but does not know if any of them are at-risk? May an employer ask, in light of the pandemic, without running afoul of the Americans with Disabilities Act or similar state laws? Likely not. May or must every employer in such a case then presume one or more of its employees are at risk? That would render the otherwise-at-risk criterion “surplusage,” as the courts say: It would be a throw-away. All heightened-risk workplaces would have to be presumed to include at-risk workers. And all employees working there consequently would have to be required to wear masks, even though they all are fully vaccinated.

Employers with heightened-risk workplaces struggling with whether to require—or return to requiring—vaccinated employees to mask in light of OSHA’s revised guidance should keep in mind, as well, that, if OSHA is going to “enforce” its guidance (not to be mistaken for its Emergency Temporary Standard for healthcare), it will have to do so under the Occupational Safety and Health Act’s General Duty Clause. And in order to prove a General Duty Clause citation, the agency must show that an actual hazard existed in the inspected workplace and that mitigation steps other than those the employer took could have been and needed to have been taken. The chances that OSHA could show that, on any particular worksite on any particular day where fully-vaccinated employees were not required to mask, one of those fully-vaccinated employees had transmissible COVID-19 that posed a risk to others in the
workplace are going to be pretty slim. And, if the employer had taken all or even many of the other steps OSHA recommends to mitigate the risk to its employees of COVID-19 exposure, OSHA would have a difficult time showing that the employer’s failure to require its fully-vaccinated employees to mask rose to the level of a violation.

Most employers with workplaces meeting the updated OSHA guidance’s criteria for vaccinated employee masking, however, will not want to risk being the test case. Any such employer should consider requiring its fully-vaccinated employees to wear masks if the workplace is in a heightened-risk category, is in an area of high or substantial transmission and includes unvaccinated or otherwise-at-risk employees. Of course, the employer also will want to take into account the risk of the “collateral damage” that imposing or re-imposing such a requirement might do—to hiring, to retention, or to employee morale, to employee-management relations, or even, in some settings, to the avoidance of union organizing.

Should an employer that chooses to impose such a masking requirement consider allowing fully-vaccinated employees who work in private areas of the workplace or otherwise not around other workers to go without masks? It might want to choose to distinguish those circumstances from circumstances in which employees are working together, especially given the guidance’s acknowledgment that “a key way to protect such workers [i.e., those unvaccinated and otherwise at-risk] is to physically distance them from other such people (workers or customers) – generally at least 6 feet of distance is recommended, although this is not a guarantee of safety, especially in enclosed or poorly ventilated spaces.” OSHA may argue that even employees working a distance from one another should mask because the Delta variant does not seem to be the same respecter of distance that the original strain of the virus is. But it is interesting the agency does not make mention of the Delta virus’s reportedly greater contagiousness in the guidance’s section on physical distancing (though it does make mention of the Delta variant in the context of describing the CDC’s revised masking guideline).


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