

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

MAY 20, 2021

Recent Changes to Public Health Guidance on Masking

On May 16, 2021, the Centers for Disease Control and Prevention (CDC) issued revised guidance on mask wearing. This guidance states that fully vaccinated individuals no longer need to wear a mask except while using public transportation, as provided by workplace, business, or other organizations' guidance, or as provided by federal, state, or local law. The CDC also recommends that individuals continue to wear masks in health care settings, correctional facilities, and homeless shelters. The CDC defines "fully vaccinated" as:

- 2 weeks after an individual's second dose in a 2-dose series, such as the Pfizer or Moderna vaccines, or
- 2 weeks after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine

Beginning June 2, 2021, Public Health Madison & Dane County (PHMDC) will lift its mandatory public health order related to COVID-19, including mask mandates and gathering/capacity limits. Until then, PHMDC's current order remains in full effect. After June 2, PHMDC, consistent with the recent CDC guidance, will recommend that unvaccinated individuals continue to wear masks in public spaces and that individuals in schools and youth settings continue to wear masks in indoor settings as outlined in CDC guidance.

Organizations that operate outside of Dane County should check the status of any applicable local public health order or guidance. If an organization's local public health department adopts the recent CDC guidance, then organizations can begin re-evaluating their mask policies immediately.

OSHA Guidance

The CDC's updated guidance does not grant every employer the authority to ban or not require mask wearing on their premises. Some federal regulations, such as those OSHA promulgates, will still require mask wearing and other mitigation efforts. It is imperative that employers who are covered by OSHA continue to follow current OSHA guidance on capacity, masking, and other COVID-19 mitigation efforts. OSHA has stated that it is reviewing CDC guidance and will issue its own updated guidance. OSHA also recommends that employers refer to the CDC guidance for vaccinated individuals.

Updating Employer Policies

The updated guidance from the CDC and PHMDC signals a significant shift in public health recommendations. However, employers remain able to continue enforcing their own mask requirements.

If an employer does choose to extend its own mask policy, it should be prepared to address concerns from employees and patrons who may prefer abandoning their masks in light of updated health guidance and their full vaccination status. On the other hand, some employees and patrons who are fully vaccinated might prefer to continue wearing masks.

An employer can likely lawfully adopt a “facially neutral” policy that allows fully vaccinated employees to not wear a mask while requiring unvaccinated individuals to continue wearing them. Such an approach, however, raises potential legal and practical issues that employers should be prepared to carefully address. Employees who are not vaccinated due to religious beliefs or disability might claim that a mask rule that differentiates between vaccinated and unvaccinated employees is discriminatory against those employees based on their protected class. However, not all individuals who have chosen not to be vaccinated fall into a protected class. Therefore, the policy applies to more than just those in a protected class. If this situation arises, the employer will need to confirm that its mask policy is being implemented on a facially neutral basis and that its messaging around the mask issue is accurate and lawful. Additionally, employers may be able to address unvaccinated employees’ concerns on a case-by-case basis.

Employers adopting an exception to a masking policy for vaccinated status should carefully signal to all employees that the decision whether or not to be vaccinated is a personal choice and that vaccinated employees are welcome to continue wearing a mask. Employees should not make assumptions, make inappropriate inquiries, or treat people differently because of their choice to continue wearing a mask in the workplace. Additionally, employers should remind employees of their workplace harassment policies so that if an employee feels that they are being harassed at work based on their protected class as a result of the mask policy, the employee knows they can report such conduct to the employer for case-by-case analysis. Because mask wearing has become a polarizing issue for some individuals, employers should continually monitor their work environment to ensure that employees treat each other with respect and courtesy regardless of a choice or requirement to wear a mask.

If an employer chooses to adopt an exception to its mask policy for vaccinated individuals, one approach would be for the employer to continue enforcing a generally applicable policy that all employees must continue wearing masks. Such a policy could then include exceptions such as, being in a closed off space or private office, while eating or drinking, and a “new” exception for employees who are fully vaccinated and who voluntarily choose to disclose their vaccination status by not wearing a face covering. An employer can require an employee to present proof of vaccination to human resources (or other designated individual) prior to invoking this exception. Some employers are going one step further and having employees wear “I have been vaccinated” stickers, buttons, or wrist bands to reassure coworkers and customers that this is a vaccinated individual and not just someone failing to follow public health guidance. By designing the policy in this way, the choice not to wear a mask and disclose vaccination status by not wearing a mask is a voluntary choice by the employee. If an employee doesn’t want to disclose their fully vaccinated status publicly (regardless of the reason), that employee would simply have to continue wearing a mask.

This approach may invite legal risk as individual employees might still perceive (rightly or wrongly) that this policy is targeting them based on their protected class status. However, employers will have to balance that risk with their duty to provide a safe work environment.

Conclusion

Masks remain powerful tools in the public health mitigation effort. Employers should review their policies and obligations to ensure they are providing a safe environment to employees and patrons. If you have questions, please contact a member of the Boardman Clark Labor and Employment Team.

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