

Despite CDC Announcement, Employers Should Not Eliminate Masking and Social Distancing Requirements Immediately

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As has been widely reported, the U.S. Centers for Disease Control and Prevention (CDC) recently announced that fully vaccinated individuals may resume "activities without wearing masks or physically distancing . . ." The guidance also eliminates certain testing requirements or self-isolation requirements, as well as travel restrictions, for asymptomatic, fully vaccinated individuals. The CDC's guidance should be viewed as a strong encouragement for individuals to get vaccinated, based on the promise of fewer restrictions post-vaccination.

However, employers should remain cautious about the CDC's guidance, and, indeed, many employers (especially retail, hospitality, and other public-facing businesses) may be placed in difficult situations based on public expectations. The CDC still requires wearing masks when required by "federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance" though. Because the CDC defers to state and local requirements, the CDC's guidance may not be as far-reaching as it appears. The City of Chicago and State of Illinois have adopted the CDC guidance and updated their respective masks policies accordingly. Employers should not try to get ahead of possible changes in local requirements.

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Employers should be particularly careful about workplace rules that relax requirements only for employees who have been vaccinated. Employees who have not been vaccinated remain at a greater risk. In addition, although updated guidelines from the U.S. Occupational Safety and Health Administration (OSHA) have been promised as recently as May 21, 2021, the January 29, 2021 guidance from OSHA calls for social distancing and masks, and, more important, also prohibits employers from having requirements that distinguish between vaccinated and unvaccinated workers. In short, while we expect that OSHA will follow CDC recommendations to the extent feasible, OSHA notes that employers may follow CDC guidance for **fully vaccinated workers**, which could put unvaccinated workers at a disadvantageous position in the workplace and lead to claims of discriminatory treatment if different rules impact a person's terms and conditions of employment.

Employers should also be mindful of other possible issues that may come up in connection with loosening rules on masks and social distancing. From a morale perspective, while some employees may welcome "getting back to normal," other pockets of employees may prefer the relative safety of limited "in office" requirements, masks and keeping six feet apart. Employers who have collective bargaining agreements in place should consider whether changing requirements would require involvement of (negotiations with) employee representatives.

Also, if there are vaccinated and unvaccinated employees in the workplace, employers may have a difficult time effectively enforcing rules applicable only to unvaccinated employees without disclosing confidential medical information about the unvaccinated employee (including, for example, the employee's unvaccinated status). While employers are permitted to ask employees whether they have been vaccinated, employers cannot disclose an employee's vaccination status to the employee's co-workers.

For these reasons, employers should carefully assess how best to address the CDC's guidance and likely further relaxation of mask and social distancing requirements in coming weeks. Among other things, employers should bear in mind that state and local authorities and other different entities have published rules and guidance providing COVID-19 restrictions that should be considered.