

CDC Guidance for Fully Vaccinated Individuals Impacts Pennsylvania's Masking Order

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On May 13, 2021, the Centers for Disease Control and Prevention issued revised guidance for individuals who are fully vaccinated against COVID-19 that significantly changes the rules with respect to mask wearing and social distancing. The CDC guidance is immediately applicable to Pennsylvania employers due to a previous amendment to the Commonwealth's Mask Order allowing exceptions to that Order based upon CDC guidance.

So, what did the CDC say? Fully vaccinated people are not required to wear a mask or to socially distance in most situations. Fully vaccinated persons will not need to quarantine or get tested if they are exposed to a person who is COVID-positive, unless the fully vaccinated person resides in, or works in, a correctional facility or a homeless shelter, or if the person shows symptoms, in which cases the CDC recommends testing. Mask wearing is still required, however, on public transportation, for train or airplane travel, and recommended for persons who work or reside in correctional facilities or homeless shelters.

An important disclaimer in the CDC's May 13 guidance is that it does not preempt any other federal, state, or local rules regarding COVID mitigation, including rules that individual business owners may have adopted. However, by Order of March 16, 2021, Pennsylvania's Acting Secretary of Health amended the Commonwealth's November 17, 2020 Mask Order and created an additional exception to the mask requirement "in non-healthcare settings when CDC's Interim Public Health Recommendations for Fully Vaccinated People ... or its successor allow for no face coverings and if acting in accordance with the Public Health Recommendations." Because the Secretary of Health's March 16th Order applies only in "non-healthcare settings," the obligation to wear a mask still applies in healthcare settings to both fully vaccinated and non-fully vaccinated persons. Otherwise, the CDC's guidance applies with respect to mask wearing.

The CDC's May 13th guidance, coupled with the Secretary of Health's March 16th Order, now establishes a two-tiered system with respect to the obligation to wear a mask: those who are fully vaccinated, and those who are not. That is, at least until 70% of Pennsylvania's adult population is fully vaccinated, at which point Governor Wolf has stated he will repeal the mask order in its entirety.

The question that many Pennsylvania municipal employers may now be asking is: what do we do? Employers are still allowed under the CDC guidance to require mask wearing and are still required to require masks for those who are not vaccinated. Employers now have to decide if they want to implement the new CDC guidelines and, if so, need to take affirmative steps in monitoring the vaccination status of employees.

The U.S. Equal Employment Opportunity Commission issued guidance in December of 2020 clarifying that employers can ask employees whether they have been vaccinated: it is not an impermissible disability-related inquiry. So, you can ask your employees whether they have been vaccinated, and then permit the vaccinated employees not to wear masks.

Employers who desire to follow the updated CDC masking guidance must be prepared to survey the workforce regarding COVID-19 vaccination and once proof of vaccination is provided can exempt vaccinated employees from mask wearing requirements. Employers should update their COVID-19 workplace policies and clearly communicate the updated policy to all employees.

Some employees have refused to respond to vaccination inquiries by claiming such inquiries are HIPAA violations. A narrowly crafted inquiry that simply asks employees if they are vaccinated and if vaccinated to produce proof is not a HIPAA violation. Some unionized employees have also raised bargaining implications as to updated policies that modify existing employer mask policies. An updated policy mirroring the CDC fully vaccinated guidance that loosens and removes masking requirements based upon proof of vaccination would not appear to require bargaining. However, any changes to discipline for mask policy violations could implicate bargaining requirements. Any updated mask policy should be fully reviewed by labor counsel.

Hopefully, unvaccinated employees (when reviewing updated mask policies) will now decide to be vaccinated once they are informed that workplace mask wearing is not required for fully vaccinated employees.