

LEGAL UPDATES

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Mask Recommendations for the Fully Vaccinated and Incentives for Vaccinations

On July 27, 2021, the Centers for Disease Control and Prevention (CDC) released new recommendations applicable to non-healthcare settings for fully vaccinated individuals as well as a report regarding masks and other COVID-19 prevention strategies based on community transmission levels and vaccination coverage. These newly released CDC statements affirm the effectiveness of the vaccines in preventing serious illness and death in vaccinated individuals who are infected with COVID-19, including the Delta variant. It also acknowledges that COVID-19 cases have increased during the period of June 19 through July 23, 2021 by approximately 300% nationally, due to the transmissibility of the Delta variant. New preliminary evidence confirms that “a small proportion” of fully vaccinated individuals can become infected with the Delta variant and transmit the virus to others. As a result, the CDC issued new recommendations that fully vaccinated individuals wear a mask in public indoor settings in areas of substantial or high transmission and that all unvaccinated individuals wear a mask in public indoor settings regardless of community transmission rates.

Summary of new CDC recommendations and prevention strategies

The CDC’s recommendations for fully vaccinated individuals reinstates the masking requirement for public indoor settings in vulnerable geographic areas. “Fully vaccinated” is defined as individuals who have received the second dose in a 2-dose series of either the Moderna or Pfizer-BioNTech vaccine or received a single dose of the Johnson & Johnson/Janssen vaccine and two weeks have elapsed since the receipt of either the final dose in the two dose-series or the single-dose of the Johnson & Johnson/Janssen vaccine. For fully vaccinated individuals, the CDC’s recommendations are as follows:

Mask use by fully vaccinated individuals. Wear a mask in public indoor settings in areas of substantial or high transmission;

Mask use to protect high-risk individuals. Consider wearing a mask regardless of the level of transmission, particularly if the individual or someone in their household is immunocompromised or at an increased risk for severe disease, or is unvaccinated;

Testing of fully vaccinated individuals. Get tested 1) if experiencing COVID symptoms; and 2) 3-5 days following a known exposure to an individual with suspected or confirmed COVID-19 and wear a mask in public indoor settings for 14 days after exposure or until receipt of a negative test result;

Quarantine of fully vaccinated individuals. Isolate upon receipt of a test result that is positive for COVID-19 in the prior ten days or are experiencing COVID-19 symptoms; and

Other applicable laws. Follow applicable federal, state, tribal, or territorial laws, rules and regulations.

The report advises that until vaccination coverage is high and community transmission low, public health practitioners, schools, businesses, and organizations “need to regularly assess the need for prevention strategies to avoid stressing health care capacity and imperiling adequate care for both COVID-19 and other non-COVID-19 conditions.” The CDC identified the five factors that should be used to inform decisions regarding the implementation of prevention strategies as:

The level of SARS-CoV-2 (the virus that causes COVID-19) community transmission;

Health system capacity;

COVID-19 vaccination coverage;

Capacity for early detection of increases in COVID-19 cases; and

Populations at increased risk for severe outcomes from COVID-19.

As an additional prevention strategy, the report also recommends that all unvaccinated persons wear masks in public indoor settings.

To assist in the determination of whether the geographic area is one of substantial or high transmission, the CDC developed a COVID-Data Tracker that is updated daily to provide data by

county about the level of community transmission, and vaccination rates, reported cases, deaths, hospitalizations, and nucleic acid amplification test positivity percentages.

Biden Administration incentivizes vaccination efforts

In an opinion issued on July 6 by the Deputy Counsel to the President and released online, the U.S. Department of Justice concluded that the condition under Section 564 of the Food, Drug And Cosmetic Act that provides individuals with the option to accept or refuse a vaccine distributed under the FDA's Emergency Use Authorization does not prohibit vaccine mandates and requires only that certain information be provided to vaccine recipients. Thereafter, in remarks on July 29, President Biden encouraged businesses to require their employees to be vaccinated against COVID-19. As added incentive, the Biden administration also announced the following developments to support increased vaccination rates:

Requiring federal employees and onsite contractors to attest to their vaccination status, or, if unwilling to attest to being fully vaccinated, mandating that masks be worn on the job site, physical distancing, and compliance with a minimum of weekly COVID-19 testing, and being subject to restrictions on official travel;

Directing the Department of Defense to add COVID -19 vaccinations to the required list of vaccines for military personnel;

Requiring the Department of Veteran Affairs personnel and healthcare workers who provide care for veterans to be fully vaccinated;

Providing reimbursement to small and medium-sized businesses that offer employees paid leave to obtain vaccinations for themselves *and* family members;

Requesting state and local governments to offer financial incentives to motivate individuals to obtain vaccinations against COVID-19; and

Encouraging school districts and colleges to collaborate with pharmacies to host vaccination clinics.

What this means to you

As COVID-19 cases surge among the unvaccinated due to the Delta variant, the latest CDC guidance and the Biden administration's new vaccine incentives are consistent with the administration's continuing efforts to boost vaccine rates to stem the surge and end the pandemic. As we discussed in our recent commentary, OSHA instructed non-healthcare employers earlier this summer to follow CDC guidance which advocated dispensing with prevention and control measures, including mask

mandates for fully vaccinated workforces. It is likely that OSHA's recommendations for non-healthcare employers with a fully vaccinated workforce will be changed to reflect the latest CDC recommendations.

Employers should take the following steps to ensure compliance with the most recent CDC recommendations:

Review policies regarding masks, COVID-19 testing and quarantine due to COVID symptoms and positive test results.

Review vaccination policies.

Address changes necessary to comply with the latest CDC recommendations regarding fully vaccinated individuals or workforce.

Ensure that all policies and practices comply with federal, local and state laws.

Rely on the CDC's COVID Data Tracker to assess and inform decisions to re-implement prevention and control strategies.

Document the data relied upon when making a change in prevention and control strategies.

Moreover, the Biden administration continues to lay the groundwork to enable employers to either offer incentives for vaccinations or to mandate vaccinations. When considering vaccine mandates, employers should be aware of state laws that limit employers' ability to impose vaccine mandates.

Contact us

If you have specific questions about the latest CDC recommendations, other developments regarding prevention and control measures applicable to your workforce or vaccine mandates, contact Barb Grandjean, Julianne Story, Michaeli Hennessey, Courtney Steelman or your Husch Blackwell attorney.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.