

OSHA Backs New CDC Mask Recommendations ... For Now, and Implications for Employer Policies

Related Professionals

David E. Dubberly
803.253.8281
ddubberly@maynardnexsen.com

Practices

Employment & Labor Law

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The day after his inauguration, President Biden signed an executive order directing the Occupational Safety and Health Administration (OSHA) to “consider whether any emergency temporary standards on COVID-19, including with respect to masks in the workplace, are necessary, and if such standards are determined to be necessary, issue them by March 15, 2021.” Though March 15 has passed, OSHA has reportedly been finalizing an emergency temporary COVID-19 standard that would require blanket use of masks at work, at least indoors.

CDC and OSHA Developments

But on May 13, 2021, the Centers for Disease Control and Prevention (CDC) updated its COVID-19 recommendations to state that in non-healthcare settings people who are fully vaccinated against COVID-19 can resume activities indoors without wearing masks or physically distancing, except where masks are “required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.” (Per the CDC, a person is “fully vaccinated” if two weeks have passed since receiving the second dose of the Pfizer-BioNTech or Moderna vaccines or the single dose of the Johnson & Johnson/Janssen vaccine.)

And on May 17, 2021, OSHA advised that employers can follow the CDC’s new recommendations “on measures appropriate to protect fully vaccinated workers” for now. OSHA added that it is reviewing the CDC recommendations and will update its own guidance “accordingly.”

Even though the CDC’s new recommendations do not specifically address the workplace, throughout the current pandemic OSHA’s guidance on preventing the spread of COVID-19 at work has been

based on CDC recommendations. So with the CDC relaxing its mask recommendations, OSHA may not issue an emergency standard requiring that employers enforce mask-wearing by employees. However, it is also possible that the CDC could clarify its position and that OSHA could require masking in at least some workplaces.

Employer Responses

In response to the latest information from the CDC and OSHA, some employers in the Carolinas have made masks optional for fully vaccinated employees while still requiring them for unvaccinated workers. Other employers have not changed their policies and continue to require all employees to wear a mask. (Note that some state occupational safety and health agencies outside of North and South Carolina, and some state and/or local public health agencies, still require mask wearing at work or in public.)

Many employers who face a worker shortage continue to require employees to mask because they cannot afford lost work days due to illness, and masking is an easy way to control the spread of COVID-19. Also, employers in industries with specific health requirements, and many employers with employees who work in close proximity, continue to require masks.

Employers who are easing mask requirements face the dilemma of whether or not to require proof of vaccination; there is legal risk involved if the employer requires proof and if the employer does not require proof:

- If requiring proof, an employer should have a plan for collecting information on vaccination status and complying with the strict confidentiality requirements of the Americans with Disabilities Act, among other things.
- If not requiring proof, an employer should be prepared to explain how it is still meeting its duty to provide a safe workplace.

Employer approaches to masking may have to be readjusted if and when the CDC and/or OSHA issue new guidance.