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EMPLOYMENT LAWSCENE ALERT: WHAT DOES THE CDC'S NEW MASK GUIDANCE MEAN FOR EMPLOYERS?

On May 13, 2021, the CDC announced that it had updated its guidance for individuals who have been fully vaccinated against the COVID-19 virus (i.e., individuals who received their final shot more than two weeks ago). The updated guidance states that individuals who have been fully vaccinated against COVID-19 are not required to wear masks or follow social distancing guidelines in most settings. Masks are still required for those who have not reached full vaccination. Masks are also still required for all individuals in certain places, including on public transportation, in transportation hubs, and at high-risk workplaces, such as healthcare, correctional facilities, and homeless shelters. Although this guidance was issued for individuals, the CDC has promised updated guidance for businesses and employers shortly, and some companies have already lifted their mask mandates for customers.

So, while this means that employers may soon be able to relax their mask rules for employees, there are a number of important considerations for employers.

Can an employer ask its employees if they have been vaccinated?

Yes. According to the EEOC, requesting proof of COVID-19 vaccination is not likely to elicit information about a disability, and therefore is not a disability-related inquiry under the ADA, which would otherwise need to be job-related and consistent with business necessity, and does not elicit genetic information protected by the Genetic Information Nondiscrimination Act. Additionally, HIPAA does not apply to employee health information collected or maintained by an employer in its role as an employee's employer. However, medical information regarding employees should be kept confidential and separate from an employee's general personnel file.

Does my company still have to comply with local mask ordinances?

Yes. The CDC guidance specifically says that individuals are still required to wear masks when required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance. Therefore, companies located in areas where there are currently mask ordinances in place must continue to follow such local or

state laws.

What about OSHA and other safety concerns?

On January 29, 2021, OSHA published guidance that required all individuals to wear masks when in public and around other people and provided that employers should not distinguish between workers who are vaccinated and those who are not. However, OSHA has now stated that it is reviewing the CDC guidance, will update its guidance in the near future, and to "refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers." Therefore, employers should be able to rely on the CDC guidance related to mask mandates and social distancing for fully vaccinated employees. However, employers must remember that, consistent with the obligations under the OSH Act's general duty clause, they will need to continue to provide a safe workplace. Therefore, an employer that abandons all COVID-related safety protocols or permits all employees, regardless of vaccination status, to stop wearing masks may still be at risk of an OSHA complaint.

In summary, employers must continue to comply with local mask ordinances and should monitor OSHA and other guidelines to make sure that they are ensuring the safety of their employees. If an employer decides to allow fully vaccinated individuals to stop wearing masks, it should clearly communicate its policy, including how it will verify vaccination status, to its employees. As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID-19 and related issues.