

CDC REVERSES COURSE AND RECOMMENDS FULLY VACCINATED INDIVIDUALS IN “SUBSTANTIAL” AND “HIGH” TRANSMISSION AREAS CONTINUE TO WEAR MASKS

Insights
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The U.S. Centers for Disease Control and Prevention (CDC) announced yesterday that the agency now recommends that people in areas with “substantial” and “high” COVID-19 transmission should wear masks indoors, regardless of vaccination status. This announcement reverses the [CDC’s May 13 guidance](#) that vaccinated people do not have to wear masks in non-healthcare settings. The updated guidance comes on the heels of what some call the third (or fourth) surge of COVID-19 infections due to the highly transmissible Delta variant, which CDC Director Dr. Rochelle Walensky indicated behaves “uniquely differently” from prior virus strains. While Director Walensky stressed that the vast majority of severe illness and death is among unvaccinated people, she also indicated data shows breakthrough infections can happen in 1 out of 10 vaccinated individuals in a “substantial” or “high” transmission area. So what does this mean for employers and your masking policies?

What Has Changed and Why?

The announcement reverses the [CDC’s May 13 guidance](#) that vaccinated people do not have to wear masks in non-healthcare settings. Since then, new data shows the Delta variant is more transmissible than earlier strains of COVID-19, with those infected with the Delta variant [carrying the same viral load as unvaccinated individuals with COVID-19](#).

Indeed, the CDC indicates while most COVID-19 transmission occurs in unvaccinated people, the amount of

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the virus in breakthrough infections caused by the Delta variant (e.g., viral load) is comparable to unvaccinated infections. This led the CDC to conclude that – although rare – breakthrough infections of vaccinated individuals have the same potential level of transmissibility as unvaccinated persons. Accordingly, the agency urged communities with substantial and high transmission rates to enforce masking guidelines to prevent the spread of COVID-19.

What About OSHA's Emergency Temporary Standard?

Last month, OSHA issued its [Emergency Temporary Standard \(ETS\)](#), which gave wide latitude to most employers on their masking policies for vaccinated workers. As we [detailed previously](#), OSHA provided that, except for workplace settings covered by the agency's healthcare ETS and the remaining mask requirements for public transportation settings, most employers no longer need to take steps to protect their workers from COVID-19 exposure in any workplace, or well-defined portions of a workplace, where all employees are fully vaccinated.

Yesterday's CDC guidance could change that, particularly in areas with substantial and high transmission. That's because the OSHA ETS specifically cited to the CDC's May 13 guidance on masks as a factor to justify many of its recommendations.

According to the CDC, "high" transmission equals more than 100 cases per 100,000 people over a seven-day period, while "substantial" transmission equals 50-100 cases per 100,000 people over a seven-day period. The CDC recommended using its [COVID-19 data tracker](#), which is updated daily by state and county. Much of the nation is currently in a substantial or high transmission category.

Of course, employers should still take measures to protect unvaccinated or otherwise at-risk workers in their workplaces, or well-defined portions of workplaces, but many may need to implement masks for fully vaccinated workers in specific communities.

What Should Employers Do?

The CDC's new guidance provides important considerations for employers who may be thinking about implementing or rescinding masking policies. Even though CDC guidance is not directly binding on employers, it is critically important.



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This is because OSHA's guidance repeatedly refers to CDC guidance and clearly emphasizes the protection of people who are unvaccinated or otherwise at risk, which is the focal point of the CDC's updated guidance.

If you have locations in areas which do not meet the criteria for "high" or "substantial" transmission, no immediate action is necessary. But it may still be prudent to have a plan in place to address how your company will adjust its masking policies if necessary. You should also consider state and local laws before making any changes to masking policies, given that states, such as Arkansas, have passed [legislation](#) barring entities (local governments) from imposing mask mandates.

If you are encouraging or mandating vaccines, you should also be prepared to address employee concerns over vaccination policies. This is especially true given the CDC's position that infections are possible in vaccinated individuals and that those individuals may transmit the virus to others at a greater rate than previously understood.

What's Next?

To ensure you stay up to speed with the latest developments, make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information and check out our [FP Vaccine Resource Center For Employers](#). For further information, contact your Fisher Phillips attorney or any of the authors of this Insight.