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CDC Relaxes Face Covering and Distancing Guidelines

By Conn Maciel Carey LLP's COVID-19 Task Force

As governors and big city mayors across the country have been allowing indoor masking mandates to expire over the last few weeks, last Friday, February 25th, the CDC unveiled a brand new approach to assessing COVID-19 risks and setting mask and distancing recommendations. The CDC's old tool, which measured the number of COVID-19 cases to determine the relevant level of virus transmission in each community had lost its usefulness as it rendered nearly the entire country as high-risk (95% of all counties), even as the number of people getting seriously ill had dropped precipitously this year.

CDC's new guidelines measure the impact the pandemic by looking at three factors week over week:

1. New cases per capita (as with the prior guidelines); but also
2. New COVID-19 related *hospital admissions*; and
3. The percentage of area hospital beds occupied by COVID-19 patients.

Each county will have a weekly "COVID Community Level Rating" that is either Low (green), Medium (yellow) or High (orange). Each level/color has recommended mitigation strategies, set in the table below:

What Prevention Steps Should You Take Based on Your COVID-19 Community Level?

Low	Medium	High
• Stay up to date with COVID-19 vaccines • Get tested if you have symptoms	• If you are at high risk for severe illness, talk to your healthcare provider about whether you need to wear a mask and take other precautions • Stay up to date with COVID-19 vaccines • Get tested if you have symptoms	• Wear a mask indoors in public • Stay up to date with COVID-19 vaccines • Get tested if you have symptoms • Additional precautions may be needed for people at high risk for severe illness

Here is a link to CDC's tool to identify the level of COVID-19 transmission in your county.

The big news is that CDC recommends that everyone continue to mask indoors *only* in those counties that are currently rated "high," and the CDC's new threshold for new cases to constitute High community spread quadrupled from 50 new cases per 100,000 people to 200 cases per 100,000 in the new guidelines. The rationale for the much higher trigger approach is that the as the total number of Americans have immune protection either from vaccination or infection, hospitalization rates and deaths will continue to decline, even if case counts are higher. As a result of the CDC's new tool to measure community spread, today less than a third of the country is experiencing High community spread, a dramatic shift from a few days ago, when most of the country was still in the High category.

Shifting to evaluate these issues on a more local level, rather than at the state-wide level as it has been, makes a lot of sense, but on the other hand, these new guidelines represent a shift from relying on leading indicators (just case counts) to a metric that is 2/3^{rds} based on lagging indicators (hospitalizations and hospital capacity). If we encounter a future variant that is more virulent or more easily evades immune protections from vaccination or prior infection, the new CDC system could result in too slow of a trigger to reinstitute COVID-19 protocols.

So where does this leave employers? If there are no state or local masking requirements, and there are very few of those left now, and the CDC has designated the county where your workplace is located to be in the low or medium category, you have no obligation to require your employees to be masked in the workplace. Of course, you may continue do so, but you would not have to adhere to CDC's guidelines. And now that federal OSHA is without a COVID-19 regulation, as Secretary of Labor Walsh indicated, OSHA's only option for enforcement of COVID-19 related issues is the General Duty Clause and some existing standards (e.g., PPE and respiratory protection). Throughout the pandemic, whenever OSHA has issued a General Duty Clause citation, it has referenced general compliance with CDC recommendations as the feasible means of abatement the employer could and should have undertaken to address workplace spread of the virus. Accordingly, the big shift in CDC guidance about masks and other COVID-19 protocols should result in the same shift in expectations from OSHA.

The big takeaway is, absent any state or local masking requirements (see, e.g., the status of Virginia OSHA's COVID-19 rule discussed below), we recommend that you evaluate each of your workplace locations on a weekly basis and remain agile to return to mask requirements if and when the COVID Community Level is or reaches the new High Level designation.

What about Physical Distancing?

Although the CDC's updated guidance does not specifically address distancing, there are a couple of reasons to think there is low risk of OSHA regulatory liability for not implementing physical distancing in areas designated as Low COVID-19 community level; i.e., for treating masking and distancing as a pair. We think this is justified at least in part because OSHA's COVID-19 Vaccination, Testing, and Face Covering regulation, although withdrawn as an ETS, still exists as a proposed permanent rule, and there is pretty well-established OSHRC jurisprudence that if an employer complies with a proposed rule, any violation of other existing regulatory requirements should be characterized as, at worst, a *de minimis violation* (i.e., not a citable violation at all). The Vaccination and Testing ETS did not impose any social distancing requirements. Thus, we think employers can reasonably defend a policy that does not include social distancing requirements, especially in areas with low community spread.

Note, however, that OSHA could counter that it did not include social distancing requirements in its Vaccination and Testing ETS because of the heightened COVID-19 safety measures afforded by vaccination and/or testing. That is, with a highly vaccinated workforce and/or a workforce that is subject to weekly testing, there should be less risk of transmission, and thus, no need for social distancing. Nonetheless, we believe the proposed rule provides a strong argument that employers do not need to implement physical distancing to meet their general obligations under the General Duty Clause.



Additionally, we think even stronger support for a policy that does not include social distancing requirements can be found in CDC's new masking guidelines. In looking more closely at CDC's new masking guidelines, we think it is actually a misnomer to call them "masking" guidelines – that is, they speak more generally about COVID-19 safety measures as a whole. Indeed, the title of the chart that depicts the new low, medium, and high COVID-19

community levels is "What ***Prevention Steps*** Should You Take Based on Your COVID-19 Community Level?" And, within the chart itself, although language about masking is included, language about other COVID-19 safety measures, such as vaccination, testing, and additional precautions for people at high risk for severe illness, is included as well.

The new guidance seems to implicitly recommend implementation of social distancing *only* in areas of high COVID-19 community levels (for all people) and medium COVID-19 community levels (for people at high risk for severe illness). Under this interpretation of the new guidance, the full suite of COVID-19 safety protocols (masking, social distancing, health screenings, physical barriers, etc.) would be required for all people in areas of high COVID-19 community transmission, and for all people at high risk for severe illness in areas with medium COVID-19 community level, but would not be required for anyone in areas of low COVID-19 community level.

The only measure for people in areas of low COVID-19 community level would be isolation. Even though this guidance has not been developed specifically for workplaces, we believe it would be a reasonable decision for an employer to adopt such a scheme in its workplace COVID-19 policy. Thus, we believe that there would be little enforcement risk to implement a policy that applies the same analysis regarding masking (i.e., requiring masks for all people in areas of high COVID-19 community level, and for people at high risk for severe illness in areas of medium COVID-19 community level) to other COVID-19 safety protocols, such as social distancing, health screenings, physical barriers, etc., again, with the exception of isolation which of course should be a mainstay of any COVID-10 policy.

What about Federal Contractors?

For federal workers and contractors, the Safer Federal Workforce Task Force guidelines designated two categories of COVID-19 risk – federal employees and contractors in areas of high or substantial levels of community transmission are required to wear masks in federal workplaces; and in areas of low or moderate levels of community transmission, only the unvaccinated federal contractor employees are required to wear masks. Though there is a national federal court injunction currently barring federal agency enforcement of the vaccination mandate aspect of the Executive Order 14042, but not other COVID-19 safety requirements under the EO, a notice on the Safer Federal Workforce Task Force Guidelines webpage indicates that all of the requirements under the EO are only currently being enforced on federal property; i.e., proof of vaccination or recent negative test, masking, social distancing, etc. The Task Force website has not been updated yet to conform to CDC's most recent guidance, but we expect that to happen very soon.

Let us know if you have any questions or if we can do anything to help as you adjust your COVID-19 protocols over the next few weeks.