SEPTEMBER 24, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

CDC Updates Mask Recommendations for Fully Vaccinated Individuals

By Conn Maciel Carey's COVID-19 Task Force

We have an unfortunate update to share out of the CDC yesterday, July 27, 2021. Short story, do not throw away your "Masks Required" signs.

What Did the CDC Change About Mask Recommendations?

In the afternoon of Tuesday, July 27th, the CDC updated its "Interim Public Health Recommendations for Fully Vaccinated People," in which the CDC recommends:


CDC Centers for Disease Control and Prevention

COVID-19

Interim Public Health Recommendations for Fully Vaccinated People

Summary of Recent Changes

Updates as of July 27, 2021

- Updated information for fully vaccinated people given new evidence on the B.1.617.2 (Delta) variant currently circulating in the United States.
- Added a recommendation for fully vaccinated people to wear a mask in public indoor settings in areas of substantial or high transmission.
- Added information that fully vaccinated people might choose to wear a mask regardless of the level of transmission, particularly if they are immunocompromised or at increased risk for severe disease from COVID-19, or if they have someone in their household who is immunocompromised, at increased risk of severe disease or not fully vaccinated.
- Added a recommendation for fully vaccinated people who have a known exposure to someone with suspected or confirmed COVID-19 to be tested 3-5 days after exposure, and to wear a mask in public indoor settings for 14 days or until they receive a negative test result.
- CDC recommends universal indoor masking for all teachers, staff, students, and visitors to schools, regardless of vaccination status

Key Points

The following recommendations apply to non-healthcare settings. For related information for healthcare settings, visit Updated Healthcare Infection Prevention and Control Recommendations in Response to COVID-19 Vaccination.

Fully vaccinated people can:

- Participate in many of the activities that they did before the pandemic: for some of these activities, they may choose to wear a mask.

- fully vaccinated people wear masks in public indoor settings in areas where there is substantial or high transmission;
- fully vaccinated people can choose to wear a mask regardless of the level of transmission, particularly if they are immunocompromised or at increased risk for severe disease from COVID-19, or if they have someone in their household who is immunocompromised, at increased risk of severe disease or not fully vaccinated; and
- fully vaccinated people who have a known exposure to a suspected or confirmed COVID-19 case be tested 3-5 days after exposure, and wear a mask in public indoor settings for 14 days or until they receive a negative test result.

Although the guidance speaks in absolutes, we think that the general limitations that have applied to all prior mask mandates throughout the pandemic continue to inform this updated guidance; i.e., "public indoor settings" is intended to cover locations where there is the potential for exposure to another individual, and not where an employee is "alone in a room" or "alone in a vehicle."

Is Your County Experiencing Substantial or High Levels of Transmission?

To determine whether your workplace is in a county experiencing substantial or high transmission of COVID-19, the CDC uses two different indicators, the higher of which prevails:

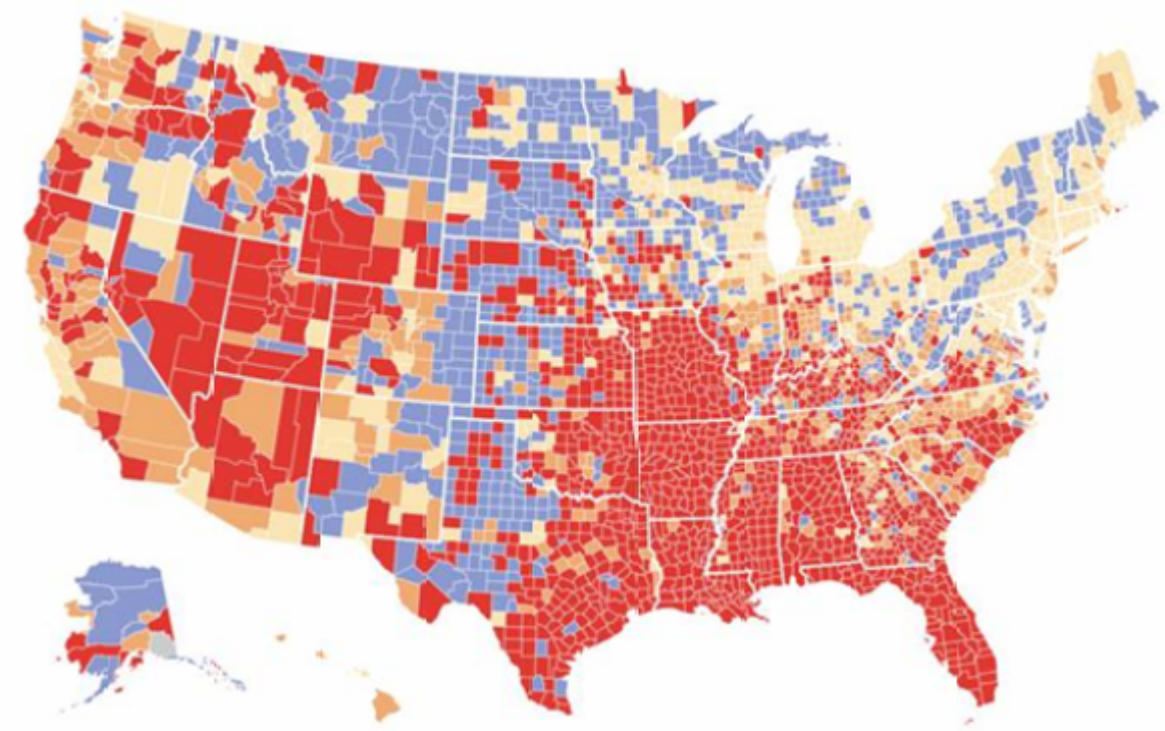
1. total new cases per 100,000 persons over the past seven days; and
2. positive test rate over the past seven days.

In terms of new cases, "High" community transmission occurs when there are 100+ new cases per 100,000 persons over the past week, and "substantial" transmission occurs when there are 50-99 total new cases per 100,000 persons.

For the positivity rate indicator, the CDC provides that "high" community transmission occurs when 10%+ of tests are positive over the past seven days, and "substantial" transmission occurs when 8-9.99% of tests are positive. Here is the CDC's indicator table:

Indicator *(If the indicators are at different transmission levels, the higher level prevails)*	**Low Transmission Blue**	**Moderate Transmission Yellow**	**Substantial Transmission Orange**	**High Transmission Red**
New Cases per 100,000 persons over 7 days	0-9.99	10-49.99	50-99.99	≥100
Test Positivity Rate over 7 days	0-4.99%	5-7.99%	8-9.99%	≥10.0%

Here is a map that shows in **red** and **orange** the counties that are currently experiencing Substantial and High Transmission. It is approx. 66% of the country today.



Why is the CDC Backtracking on Mask Recommendations?

While it is very disappointing to move backwards, CDC Director Walensky did not rule that out when the CDC last updated its mask guidance in mid-May, when we were told that fully vaccinated individuals could remove their masks indoors. At that time, Dr. Walensky warned that *"the past year has shown us that this virus can be unpredictable, so if things get worse, there is always a chance we may need to make a change to these recommendations."* And conditions have gotten worse.

In mid-May, when the mask requirement was relaxed, approx. 60% of US counties were experiencing "substantial" or "high" levels of transmission, and the percentage change over 7 days of communities experiencing "high" levels of transmission was –7.39%. Importantly, at that time, the highly transmissible Delta variant represented only 1% of reported infections in the US. Fast forward to today, approx. 66% of US counties have a "substantial" or "high" level of transmission, and the percentage change of communities in the "high" category is +17.11% over the last week. Today, the Delta variant represents a staggering 83% of total cases.

Dr. Walensky further explained:

"In recent days, [she has] seen new scientific data from recent outbreak investigations showing that that the Delta variant behaves differently from past strains of the COVID-19 virus. Information on the Delta variant from several states and other countries indicates that in rare occasions, some vaccinated people infected with the Delta variant after vaccinations may be contagious and spread the virus to others. This new science is worrisome and unfortunately warrants an update to our recommendations." **Dr. Walensky emphasized that**

vaccinated people represent *"a very small amount of transmission" and that "the highest spread of cases and severe outcomes is happening in places with low vaccination rates and among unvaccinated people."*

We suspect there was more to this change in guidance than just the "*rare occasions of vaccinated people … spreading the virus to others*." Businesses have faced enormous challenges enforcing the CDC's May mask guidance that set different mask requirements depending on vaccination status. Because we do not wear our vaccination status on our sleeves, and delving into that status is highly sensitive, an unintended consequence of the CDC's May guidance allowing *fully vaccinated* people to drop their masks, was that many *unvaccinated* people also took off their masks unbeknownst to host businesses and employers. Unless employers view vaccination cards, which may be counterfeit and many are loathe to share, or require self-attestations, which may be false, there is no easy way to know whether someone is in fact fully vaccinated. Accordingly, the CDC likely concluded the best way to ensure that unvaccinated people continue to wear masks, is to make everyone wear masks.

Does this Updated Guidance Apply to Workplaces?

While yesterday's update comes from the CDC, not OSHA, we do think the concept of "public indoor settings" is intended to apply to workplaces where more than individual will be present; i.e., "public" just means outside your own home. Like the May 13th guidance that relaxed mask requirements for fully vaccinated individuals, there are a few references to certain types of workplaces and workers, such that the CDC's intent that this would apply to workplaces seems clear enough. For example, the section of the guidance about isolation, quarantine, and testing for fully vaccinated individuals focuses substantially on workers:

Most fully vaccinated people with no COVID-like symptoms do not need to quarantine, be restricted from work, or be tested following an exposure to someone with suspected or confirmed COVID-19, as their risk of infection is low. However, they should still monitor for symptoms of COVID-19 for 14 days following an exposure. Exceptions where testing (but not quarantine) is still recommended following an exposure to someone with suspected or confirmed COVID-19 include: Fully vaccinated residents and employees of correctional and detention facilities and homeless shelters.

The idea that workers in certain types of workplaces — correctional facilities and homeless shelters — are exempt from the general recommendations in the July 27th guidance, indicates that workers in other types of work environments are intended to be covered by it.

Furthermore, this guidance is specifically identified by the CDC as an update to the May 13th guidance, which is well established now to be applicable to workers and workplaces. And like the May 13th guidance, yesterday's update talks about how the guidance does not supersede or limit conflicting "workplace guidance." The only logical reason CDC would clarify that federal, state, and local *workplace* rules, regulations and guidance also continue to apply, would be if this guidance was intended to cover workplaces, as well.

Finally, the explicit rationale for the change in guidance – that *"evidence suggests that fully vaccinated people*

who do become infected with the Delta variant can spread the virus to others" – applies the same in the workplace as it does in any other environment outside our homes; i.e., there is no logical way to distinguish workplaces from other places in terms of the risk that the guidance is attempting to address.

What will OSHA do next?

We likely will not have to speculate for long about the applicability of this updated CDC guidance to workplaces. Federal OSHA has been quick to align its workplace guidance with CDC's guidance throughout the pandemic. Look no further than OSHA's Updated COVID-19 Guidance from June 10th to see that it is filled with links to CDC recommendations guidelines. Indeed, as reflected in the opening paragraph of OSHA's June guidance, the entire basis for the sea shift in workplace guidance OSHA revealed there was the CDC's "Interim Public Health Recommendations for Fully Vaccinated People." That is the very same CDC guidance that was updated yesterday. We think it is only a matter of time until OSHA updates its guidance to realign with this move by the CDC.



Remember that, at least for now, outside of the healthcare space, OSHA's enforcement of COVID-19 protocols like masking is limited to the General Duty Clause. To date, President Biden's OSHA has already conducted approx. 600 COVID-19 inspections under its National Emphasis Program just launched two months ago, and it has issued 5x more General Duty Clause citations than in the entire year of the pandemic covered by President Trump's OSHA, including at least two willful GDC violations. General duty citations are essentially judgments of employers' actions relative to a "reasonable employer" standard, and the citations we have seen include references to CDC guidance. So even before OSHA changes its guidance, there is risk in not adjusting workplace policies to keep up with the CDC.

To the extent that OSHA decides to track CDC's guidance exactly (i.e., applying it only in counties experiencing "high" and "substantial" levels of transmission, rather than everywhere in the country), that will require employers to monitor COVID-19 data in their areas, similar to requirements under Cal/OSHA's Wildfire Smoke Rule, and OSHA's expectations for protecting against Heat Illness, where there is a threshold condition that must be present in your area to trigger certain requirements. For wildfire smoke, employers have to check the Air Quality Index ("AQI") every day to determine whether N95 and other requirements kick in. Similarly, for heat illness hazards, employers should be regularly checking meteorological data for their work areas to determine whether high heat conditions are present that require actions under heat illness prevention plans.

In the COVID-19 context, employers will likely have a couple of options. First, there is nothing to prevent employers from reverting back to a mask mandate for all workers indoors regardless of the conditions in their area. Alternatively, to the extent OSHA does not require masks regardless of location, employers could regularly check CDC's county map to determine whether their worksites, on any given day, are in a county experiencing a "high" or "substantial" level of transmission, and enforce the mask requirement accordingly.

Last, but certainly not least, the CDC's updated guidance has raised our already high level of concern that OSHA will revisit its decision to exclude non-healthcare workplaces from its COVID-19 emergency temporary standard. As we know, the final ETS revealed in June was limited to healthcare workplaces only, but the proposed ETS delivered to OMB in late April was a broad, onerous rule applicable to all industries. One of the major reasons that OSHA shifted direction and issued the narrow healthcare-focused rule was the CDC's updated guidance in May that emphasized how safe vaccinated individuals are and the lack of a need to implement COVID protocols for vaccinated workers. Yesterday's reversal of the CDC's May 13th mask guidance could inspire OSHA to reverse its decision too. That is especially worrisome when considering the confluence of several other factors:

- a general increase in recent COVID-19 cases and deaths;
- the increased prevalence of the highly contagious Delta variant;
- the impending confirmation of Doug Parker to head Fed OSHA, who led Cal/OSHA's efforts to issue its broad ETS; and
- the AFL-CIO lawsuit challenging OSHA's decision to issue a narrow ETS despite OSHA's explicit determination that COVID-19 presented a grave danger in every shared workplace in the country

We will track any clarifications from the CDC or OSHA about how this guidance impacts employers. Please contact any of the attorneys in Conn Maciel Carey's national OSHA Practice if you have questions.

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