

Mask Up, Mask Down: In Reversal, Health Officials Recommend Masks for Fully-Vaccinated Individuals. What is the Potential Impact on Employer Immunity?

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On July 27, 2021, the U.S. Centers for Disease Control and Prevention (CDC) updated its guidance on masking and other health measures in light of the rise in coronavirus cases fueled by the delta variant of SARS-CoV-2, or COVID-19. On that same day, the S.C. Department of Health and Environmental Control (SCDHEC) issued a press release formally adopting the CDC's latest guidance. The CDC and SCDHEC now recommend that fully vaccinated individuals wear masks both indoors and in public settings in areas with high or substantial rates of COVID-19 transmission.

New CDC and State Guidance

The CDC (and SCDHEC by reference) defines substantial and high rate of transmission as 50 or more total cases per 100,000 persons in the previous seven days. Community rates may be found through a tracker on the CDC website, which has transmission information down to the county level for every state. This resource allows anyone to determine whether the transmission in their county falls within the substantial or high range. As of this writing, every county in South Carolina is listed as having substantial or high transmission levels of COVID-19.

The CDC's July 27 guidance reversed its own previous recommendations issued May 13, 2021, that stated fully vaccinated individuals no longer needed to wear a mask at any time, regardless of community spread. The explanation provided by the CDC for the change is the rapid increase in COVID-19 cases among unvaccinated people as a result of the delta variant. Note, however, that the CDC guidance remains unaltered for unvaccinated individuals: they should wear masks indoors and in public settings, regardless of current community transmission rates (even if the rate is low in their community).

South Carolina's COVID-19 Liability Immunity Act, which was signed into law in late April 2021, provides employers with a potential defense in the form of immunity from liability if an employee claims he or she contracted COVID-19 at work. To get the protection of immunity, however, the business needs to show "reasonable adherence" to applicable "public health guidance," which refers specifically to directives provided by South Carolina state agencies, including SCDHEC, and federal guidance to the extent referenced by state agencies. South Carolina employers should consider the new state guidance and strive to reasonably adhere to it to gain the protection of the Immunity Act.

Following the CDC and SCDHEC's action, on July 30, 2021, the North Carolina Department of Health and Human Services (NCDHHS) issued new interim guidance in connection with COVID-19 for businesses and organizations, as well as for public facing businesses. The interim guidance "strongly recommends" that employers require employees to report their vaccination status and require unvaccinated employees (or those who do not disclose their status) to participate in regular COVID-19 screening and testing programs. NCDHHS also strongly recommends that employers require "all employees and guests who are not fully vaccinated wear a face covering when they are indoors" (regardless of county transmission rate), and further recommends that businesses encourage all vaccinated employees and guests to wear masks when indoors as well if they are in a county with high or substantial levels of transmission.

The North Carolina guidance also covers issues of social distancing, cleaning and hygiene, monitoring for symptoms, combatting misinformation, and ventilation systems. Employers in North Carolina should carefully review the new recommendations and vet the requirements of North Carolina's immunity law to determine whether their actions are in line with what must be done to get the protection of immunity from liability.

Primary Takeaways

With the new guidance, employers should be aware of how their actions now may impact their ability to claim immunity in the future. In light of SCDHEC's adoption of the CDC's latest recommendations on masking and NCDHHS's new interim guidance, employers in South and North Carolina would be wise to consider making adjustments to their mask requirements for all employees.

We recognize that the evolving guidance from federal and state agencies on COVID-19 can be confusing to employers. It is important for employers to stay updated on the latest recommendations and to document the actions taken to prevent the spread of COVID-19 infections. Doing so will put employers in the best position to defend against any future claims related to COVID-19, and to potentially take advantage of the immunity shield.

The Nexsen Pruet Employment and Labor Law Team is available to assist with any questions that may arise as employers navigate these issues.