

COVID-19 Update—A Return to Masking, and New Guidance on COVID and the Americans With Disabilities Act

CDC updates masking guidance for fully vaccinated individuals in response to the Delta surge, and the Department of Health and Human Services Issues New ADA Guidance for COVID-19 “Long-Haulers”

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On July 27, 2021, the CDC issued updated guidance for fully vaccinated people in response to the “Delta” variant of the COVID-19 virus that is currently circulating throughout the U.S. In a reversal of course from just a few months ago, the CDC is now recommending that fully vaccinated individuals wear masks indoors in areas of “substantial or high transmission” of the virus. These new guidelines come on the heels of “a reversal in the downward trajectory” of COVID-19 cases and in the context of a “rapid and alarming rise in the COVID cases and hospitalization rates around the country.” Data collected by the CDC has indicated that the Delta variant is more infectious and more easily transmissible than prior strains (research indicates it is more than twice as contagious as previous variants) and may also cause “more severe illness” than prior strains.

The good news is that it appears that vaccination still provides ample protection from the Delta variant. The bad news is that, according to the CDC, fully vaccinated people can transmit the Delta variant to others. Accordingly, given the rapid spread of the Delta variant, the CDC is now recommending that fully vaccinated people return to wearing masks indoors—if they are in an area with “substantial or high transmission” of the virus. For purposes of these guidelines, an area with “substantial or high transmission” means an area that is experiencing fifty (50) or more new cases per 100,000 people, or an 8% or higher positivity rate. According to current CDC tracking methodologies, every county in Pennsylvania—with the exception of Forest County and Sullivan County—are experiencing “substantial or high transmission” of the virus.

The new guidelines also recommend that vaccinated people who have a close contact with someone who has COVID-19 to get tested 3-5 days after their exposure (even if they do not have symptoms) and to isolate for ten (10) days if their result comes back positive. The guidelines also recommend universal indoor masking for schoolteachers, regardless of their vaccination status. Moreover, masking remains required, regardless of vaccination status, while traveling on planes, buses, trains, and other forms of public transportation.

The universal face mask order was lifted in Pennsylvania on June 28, 2021, but the most current guidance from the Pennsylvania Department of Health recommends continuing to follow the CDC guidelines concerning masking. Employers should continually monitor for updates from the CDC and be aware of the transmission rates in their area and consider changing/updating their policies accordingly.

New guidance has also come from the Department of Health and Human Services, which released a joint memo with the Department of Justice concerning “Long COVID” as a disability

under the ADA. The guidance, which was published on July 26, specifically addresses individuals who continue to experience symptoms of COVID-19 for “months after first being infected,” and who may even have “new or recurring symptoms at a later time.” Symptoms can include “tiredness or fatigue,” “difficulty thinking or concentrating,” “heart palpitations” “joint or muscle pain” and even “depression or anxiety.” Colloquially referred to as “long-haulers,” individuals who suffer from this condition may be protected under the ADA if their “long COVID” substantially limits one or more major life activities.

Under the ADA, a “major life activity” can entail any number of activities, including physical activities such as “walking, standing, sitting, reaching, lifting bending, etc.,” as well as more general functions such as “caring for oneself,” “interacting with others,” “learning,” “reading,” or “communicating.” The term can also include “the operation of a major bodily function,” such as the functioning of the cardiovascular system, the neurological system, or “the operation of an organ.” The new guidance provides the following examples of individuals with “long COVID” who may be found to be “substantially limited in a major life activity.”

- “A person with long COVID who has lung damage that causes shortness of breath...is substantially limited in respiratory function...”
- A person with long COVID who has symptoms of intestinal pain, vomiting and nausea...is substantially limited in gastrointestinal function...
- “A person with long COVID who experiences memory lapses and ‘brain fog’ is substantially limited in brain function, concentrating, and/or thinking.”

Nonetheless, the guidance makes clear that “long COVID” is not always a disability, and that an “individualized assessment” remains necessary to determine whether a person’s “long COVID” substantially limits a major life activity. But if this is the case, employers need to be prepared to engage in the “interactive process” under the ADA to determine any reasonable accommodations that may be necessary. While an employer need never sacrifice or compromise essential job functions in implementing such accommodations, employers are required to offer such accommodations to the extent they are reasonable, do not pose an undue hardship on the employer, and enable the employee to perform the essential functions of the job.

Employers should review their disability accommodation policies to ensure compliance with this new guidance, and if they have any employees suffering from long-lasting COVID symptoms, should engage these employees in the interactive process to determine to what extent their COVID symptoms affect any major life activities and/or their ability to perform the essential functions of their positions. It may be necessary to make adjustments to the work environment to allow employees suffering from “long COVID” to perform essential job functions. The attorneys at Campbell Durrant, P.C. stand ready to assist employers as they confront personnel issues involving the interaction of COVID-19 and the ADA.