

### **MIOSHA Endorses New MDHHS Order - Should Employers Still Require Masks For All Employees?**

By: Rebecca Seguin-Skrabucha, Senior Associate, Workplace Law Group

As we reported earlier this week, the Michigan Department of Health and Human Services (“MDHHS”) and the Occupational Safety and Health Administration (“OSHA”) explicitly adopted the following guidance from the Centers for Disease Control and Prevention (“CDC”): “[F]ully vaccinated people can resume activities [in indoor and outdoor settings] without wearing a mask or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.”

MDHHS consequently communicated its relaxing of the mask mandate in an Epidemic Order, effective May 15, 2021, which provides:

- “[F]ully vaccinated persons” are typically not required to wear masks at indoor or outdoor gatherings; and
- “A person responsible for an establishment . . . must prohibit gatherings of any kind at their establishment unless the person makes a good faith effort to ensure that all persons at their establishment (including employees) [wear masks indoors if they are not fully vaccinated] . . . [A] ‘good faith effort’ may include any of the following: posting a sign notifying people that wearing a mask is required unless a person falls into a specified exception; asking patrons not wearing masks whether they fall into a specified exception; requiring face masks of all patrons and employees; or any other policy designed to ensure compliance . . . .”

The Michigan Occupational Safety and Health Administration (“MIOSHA”), which has enforced its masking rules since October 2020, indicated that it will be deferring to the CDC guidance: “MIOSHA will soon post updated workplace rules reflecting the CDC’s recent guidance on face masks for fully vaccinated people. Until then, MIOSHA will consider compliance with the MDHHS order as good faith to comply when responding to employee complaints or conducting investigations related to COVID-19.” The extent of MIOSHA’s deference remains uncertain.

What does this mean for Michigan employers? While the answer will not be definitive until MIOSHA officially releases its amended Emergency Rules, employers currently have three options:

1. Continue to require masks for all employees when they cannot consistently maintain six feet of separation and when in shared spaces, and continue to require masks for all customers;
2. Continue to require masks for all employees when they cannot consistently maintain six feet of separation and when in shared spaces, and make a “good faith effort” (as defined above) to ensure that all customers who are not fully vaccinated wear masks; and

3. Require masks for employees who are not fully vaccinated when they cannot consistently maintain six feet of separation and when in shared spaces, and make a “good faith effort” (as defined above) to ensure that all customers who are not fully vaccinated wear masks.

Option 1 is the conservative approach. Employers abide by the current Emergency Rules and mitigate the likelihood of MIOSHA complaints, which may result in citations and fines, and employee claims for workers’ compensation benefits should they contract COVID-19 in the course of their employment.

Option 2 applies the MIOSHA Emergency Rules to employees and the MDHHS order to customers. This is consistent with the purpose of each administrative agency’s authority.

Option 3 presumes, without certainty, that MIOSHA and OSHA will adopt the CDC guidance in its entirety. To implement Option 3, employers must distinguish between vaccinated and non-vaccinated employees, which OSHA advised against in its January 2021 guidance. If MIOSHA or OSHA edit the CDC guidance for their purposes, employers risk MIOSHA or OSHA complaints and/or citations.

Employers who choose Options 2 or 3 must also be prepared to effectuate a “good faith effort” to ensure that individuals who are not fully vaccinated wear their masks while indoors. With customers, this can be accomplished with signage and screenings. With employees, this can be accomplished by tracking employees’ vaccination statuses.

If an employer seeks information about its workforce’s vaccination rate, it must do so in accordance with guidance released by the Equal Employment Opportunity Commission, which confirmed that the simple question of whether or not an employee is vaccinated is permissible, but that follow-up conversation (e.g., why are you not vaccinated) may constitute disability-related inquiries, which should only be posed in compliance with the Americans with Disabilities Act.

Any modifications to current workplace safeguards should be made cautiously while we await updated Emergency Rules from MIOSHA.

Employers should contact any member of **Bodman’s Workplace Law Group** to discuss the effectiveness and compliance of their COVID-19 policies and procedures. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

<b>WORKPLACE LAW PRACTICE GROUP</b>	<b>AARON D. GRAVES</b>   <i>Chair</i> 313.392.1075 <a href="mailto:agraves@bodmanlaw.com">agraves@bodmanlaw.com</a>	<b>JOHN T. BELOW</b> 248-743-6035 <a href="mailto:jbelow@bodmanlaw.com">jbelow@bodmanlaw.com</a>	<b>JOHN C. CASHEN</b> 248.743.6077 <a href="mailto:jcashen@bodmanlaw.com">jcashen@bodmanlaw.com</a>
	<b>GARY S. FEALK</b> 248-743-6060 <a href="mailto:gfealk@bodmanlaw.com">gfealk@bodmanlaw.com</a>	<b>JOHN DAVID GARDINER</b> 616.205.3123 <a href="mailto:jgardiner@bodmanlaw.com">jgardiner@bodmanlaw.com</a>	<b>MELISSA M. TETREAU</b> 248.743.6078 <a href="mailto:mtetreau@bodmanlaw.com">mtetreau@bodmanlaw.com</a>
	<b>REBECCA C. SEGUIN-SKRABUCHA</b> 313.393.7594 <a href="mailto:rseguin-skrabucha@bodmanlaw.com">rseguin-skrabucha@bodmanlaw.com</a>	<b>MICHELLE L. KOLKMEYER</b> 248.743.6031 <a href="mailto:mkolkmeier@bodmanlaw.com">mkolkmeier@bodmanlaw.com</a>	<b>ALEXANDER J. BURRIDGE</b> 313.393.7560 <a href="mailto:aburridge@bodmanlaw.com">aburridge@bodmanlaw.com</a>
	<b>DAVID B. WALTERS</b> 248.743.6052 <a href="mailto:dwalters@bodmanlaw.com">dwalters@bodmanlaw.com</a>	<b>KAREN L. PIPER</b>   <i>Of Counsel</i> 248.743.6025 <a href="mailto:kpiper@bodmanlaw.com">kpiper@bodmanlaw.com</a>	