

## Management Bulletin – COVID-19 Mask Mandates

For the past year, the novel coronavirus has been on the minds of everyone. Most recently, as some states begin to slowly reopen, employers are left with questions about the intersection of state law and federal OSHA. For example, on March 2, 2021, Governor Greg Abbott of Texas issued an Executive Order relating to the opening of his state in response to the COVID-19 pandemic. Governor Abbott rescinded his previous orders in favor of removing operating limits on businesses and other establishments and lifting the mask requirement previously in place. Montana, Iowa, North Dakota and Mississippi have also announced plans to reopen and end their mask requirements.

In contrast to those states' reopening plans, OSHA issued guidance on January 29, 2021 aimed at helping employers and workers identify potential risks of exposure to COVID-19 at work as well as helping them determine which appropriate control measures to implement. In addition to continued guidance for best practices of mask wearing, good hygiene and physical distancing, OSHA goes to great lengths to encourage employers to implement what they call "COVID-19 Prevention Programs" in the workplace by engaging workers and their unions or other representatives in the program's development. The revised Guidance outlines sixteen (16) elements of an effective COVID-19 Prevention Program.

OSHA has received many employee complaints alleging that employers either do not have a COVID-19 plan in place or that they are not enforcing the plan they have. OSHA has been addressing these complaints under the General Duty Clause. The general duty clause remains in play with the requirement that employers furnish a place of employment free from "recognized" hazards that are causing or likely to cause death or serious physical harm.

Given the contrast in guidance, and questions about whether COVID-19 is in fact a "recognized hazard", employers are left wondering whether a state mandate, like the one mentioned above, impacts its obligations under federal OSHA and the general duty clause. Employers should consider the following situations:

- *Situation #1: Employer located in Federal OSHA state, state lifts mask mandate*
  - Employers located in a federal OSHA state should continue to adhere to OSHA guidance as it relates to mask wearing, good hygiene and physical distancing. Despite a state's executive orders, federal law remains controlling when it comes to OSHA enforcement.
- *Situation #2: Employer located in state OSHA plan state, state lifts mask mandate*
  - While employers who are located in state plan states are free to follow their own state's health and safety guidance, these employers should be vigilant when sending their employees to work in states that follow federal OSHA or states that continue to have mask wearing requirements.

- *Situation #3: Employer located in a federal OSHA state with mask mandate in effect, but sends employees to work in state plan state that has lifted mask mandate.*
  - Employers, again, should adhere to federal OSHA when in their home state. But when sending employees to another state with different rules, employers are advised to pay close attention to the language of the Executive Order of the state to which they are sending its employees. Oftentimes, including in the case of Texas, masks are still “strongly encouraged”, albeit not required. A best (safe practice for the health of employees as far as OSHA compliance) practice would be for the employer to adhere to the most stringent requirement. In this particular scenario, federal OSHA guidance regarding the continued use of mask wearing, good hygiene and physical distancing should prevail.
  - Alternatively, if a federal OSHA employer sends its employees to a state plan state with an Executive Order in place that is more stringent than federal OSHA (for example Virginia), that employer is advised to follow the Executive Order of the state in which they are working. Doing so will ensure they are in compliance with both the state and federal requirements.
- *Situation #4: Employer located in state plan state without a mask mandate, sends its employees to a federal OSHA state or a state plan state with a mask mandate.*
  - Employers sending their employees into states with either federal OSHA obligations or an Executive Order in place requiring masks should ensure those employees adhere to the most stringent requirements and ensure their employees fall in line with OSHA guidance or the language of the specific Executive Order.

As always, our primary goal is to protect employees. To that end and in general, employers should adhere to the most stringent guidance. Employers should also ensure they are well informed about the requirements of the states to which they send their employees. Employees will always have an option to wear a mask, and until the mask mandates have been lifted across the country or until OSHA revises its current guidance, employers are advised to continue to require mask wearing, good hygiene and physical distancing along with the other components of their COVID-19 protection plans.

Gary Auman will cover this issue in greater detail in the Safety Directors Meeting scheduled for April 13<sup>th</sup> from 2:00 – 3:00 pm EDT. Keep your eyes open for registration information.

**Association Members, please remember that your Membership includes your Legal Services Plan. This plan allows you one free consultation up to 30 minutes per month via phone, email, or office conference with Legal Counsel. To take advantage of this, please contact Auman Mahan & Furry’s Gary Auman at 937-223-6003 ext. 3111. This program is exclusive to current Members.**