

Virginia's Mass Mask Confusion

By Jessica Summers

Recent developments regarding when vaccinated individuals can be permitted to go without masks has left many Virginia employers in a state of confusion. So let's unpack what has occurred and what we know to date.

In mid-May, the Centers for Disease Control and Prevention (CDC) announced that, subject to certain exceptions, "fully vaccinated people can resume activities without wearing a mask or physically distancing." In response, Virginia Governor Ralph Northam lifted the Commonwealth's universal mask mandate and ordered that Virginia will follow the CDC recommendations on when masks will or will not be required indoors (though businesses remain free to impose their own requirements). The problem was that the Governor's directives failed to acknowledge that Virginia's Final Permanent Standard on COVID-19 workplace safety contains what appeared to be conflicting provisions on masks.

As most Virginia employers are aware, the Final Permanent Standard requires employers in the Commonwealth to take a wide range of actions depending on the nature of their workforces to prevent the spread of COVID 19 in the workplace. These requirements include imposing mask and other PPE requirements. The Final Permanent Standard remains in full force and effect. Thus, the Governor's actions left Virginia employers in a bit of a pickle – with the Governor saying that folks can follow the CDC guidelines but the Final Permanent Standard still requiring employers to enforce mask requirements.

Enter into the mix the Virginia Department of Labor and Industry (DOLI). The DOLI is the primary agency responsible for promulgating and enforcing the Final Permanent Standard. The DOLI maintains and regularly updates a web-based page of FAQs about the Final Permanent Standard. Following the Governor's announcements, the DOLI updated its FAQs (to add #54) to state that employers operating non-healthcare workplaces may allow fully vaccinated employees to stop wearing face coverings notwithstanding the general masks provisions in the Final Permanent Standard. Of note, this change does not apply to certain specific types of workplaces which are subject to their own special rules under the Final Permanent Standard – this includes health care providers, correctional facilities, homeless shelters, public transportation, K-12 education and certain other industries with high risks of COVID exposure.

From a strictly legal perspective the DOLI's FAQs do not provide a perfect solution. They do not officially modify the Final Permanent Standard which was enacted through the formal rule making process (which the FAQs were not). Thus, strictly speaking, if the FAQs and the Final Permanent Standard were placed head to head the Final Permanent Standard would prevail unchanged. That said, from a practical perspective, given that the DOLI is the enforcing agency, short of modifying the Final Permanent Standard itself, the FAQs provide Virginia employers with as much cover and assurance as they are going to get on this front.

The bottom line is that – employers in Virginia should still be mindful of the requirements that apply to them under Final Permanent Standard (especially if they are in a specifically covered industry) but most non-healthcare employers have the option to allow fully vaccinated employees to forego masks without concern that they will be cited for a violation of the Standard.