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MEMORANDUM

TO: Tom Scott, M.A.S.S.
FROM: Mike Long and Leslie Carey, Long & DiPietro, LLP
RE: Legal Update: Evolving Mask Guidance and Related Vaccination Issues
DATE: August 6, 2021

I. INTRODUCTION / SUMMARY

This legal update discusses two primary issues: masking in K-12 schools and adoption of vaccination policies. It is in follow up to the two previous mask updates included in the 2021 Summer Executive Institute materials and the February 4, 2021 memorandum we issued to M.A.S.S. on vaccinations.

As you know, since mid-June, several governmental sources or agencies with varying degrees of medical expertise and political autonomy have issued masking guidance, summarized below.¹ Related vaccination issues are also discussed herein, particularly relative to Section “K” of the Equal Employment Opportunity Commission’s guidance last updated on June 28, 2021.² We have included **recommendations for specific action steps in section IV, B. 3 below, on page 6.**

In short, absent a local Board of Health mandate, school committees currently have the authority to adopt district mask policies as they see fit, the implementation of which is subject to bargaining relative to any changes to unionized staff’s working conditions. Any student or staff member who elects to wear an appropriate face mask should be allowed to do so, regardless of whether the individual is required to mask under a district’s mask policy. Please note that universal masking of staff and students remains required on school transportation

¹ The full text of all mask guidances summarized herein (note that guidance may have changed since this writing), is readily available on the issuing entities’ websites. See DESE guidance at <https://www.doe.mass.edu>, CDC guidance at <https://www.cdc.gov>, American Academy of Pediatrics guidance at <https://www.aap.org/en-us/Pages/Default.aspx>, and MA DPH guidance at <https://www.mass.gov>.

² See EEOC guidance available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>, revised June 28, 2021, particularly Section “K.”

vehicles and in school health offices, and that an individual may be exempt from mask wearing under medical, behavioral, or religious exemption(s). *SCHOOL COMMITTEE DECISION/MUST BE BARGAINED

Because specific questions may involve local collective bargaining agreements or practices, please consider this advisory to be a general survey of existing requirements and guidance. *District specific questions should be directed to local counsel.*

II. SUMMARY OF PREVIOUS MASK GUIDANCE **(UPDATED SINCE ISSUED, SEE SECTION III. BELOW)**

A. June 19, 2021: Massachusetts Department of Elementary and Secondary Education's ("DESE") clarification to school superintendents

DESE clarification that "all health and safety guidance including masking" is lifted for the fall, and that DESE will collaborate with the Massachusetts Department of Public Health ("DPH") to issue any additional recommendations as necessary.

B. July 9, 2021: U.S. Centers for Disease Control and Prevention ("CDC"), updated K-12 school guidance

Recommended masking of all individuals who are not fully vaccinated (teachers, staff and students) age two (2) and older when indoors;

Recommended masking outdoors for those not fully vaccinated when in crowded outdoor settings or when in sustained close contact with others who are not fully vaccinated while outdoors;

Statement that, based on community needs, school administrators may opt to make masking universally required, regardless of vaccination status; Reasons for such a policy include but are not limited to: students not yet age eligible for vaccination (grades K-6); increasing, high or substantial COVID-19 transmission within a school or community; increasing transmission of a variant impacting children or adolescents; lack of a system to monitor vaccination status; difficulty monitoring or enforcing a non-universal mask policy; low vaccination rates in a school or community; response to community input indicating that participation in in-person learning will hinge upon universal making.

III. SUMMARY OF MOST RECENT, UPDATED MASK GUIDANCE TO DATE

A. July 19, 2021: American Academy of Pediatrics ("AAP")

Recommended that all students older than age two (2) and all school staff mask in school, regardless of vaccination status.

B. July 27, 2021: CDC updated mask guidance

Recommended that even fully vaccinated individuals, regardless of whether personal risk factors or household member risk factors apply, mask when indoors in public when in an area experiencing “substantial” or “high” transmission;³

Statement that even fully vaccinated individuals “might consider” wearing masks when indoors (other than at home) if other risk factors are present, such as: a weakened immune system, an increased risk for severe disease because of age or an underlying medical condition, or if a household member has a weakened immune system, is at increased risk for severe disease,

³ The CDC currently recommends using a minimum of the following 2 metrics to determine transmission level in an area: the number of new cases per 100,000 persons and percentage positive rates. If these two metrics differ in transmission level, it is the CDC’s position that the higher of the two metrics should be used for decision-making. The CDC considers “substantial” transmission to be 50.00-99.99 new cases per 100,000 persons in a county or other administrative level over the past 7 days or 8.00-9.99% positive tests of all nucleic acid amplification tests performed in the county or other administrative level in the past 7 days. The CDC currently considers “high” transmission to be 100 or more new cases per 100,000 persons in a county or other administrative level in the past 7 days or 10% or higher positive tests of all nucleic acid amplification tests performed in the county or other administrative level in the past 7 days. As of August 4, 2021, only two Massachusetts counties, Franklin and Hampshire, are considered by the CDC to be below these levels. MA RATES AS OF 8/8/21

Search for the status of your town:

Search

City/Town	Risk Level	Cases last 14 days	% positive last 14 days	Rate per 100K	Total case count
Westborough		11	0.96%	4.2	1601
Westfield		42	2.41%	7.1	3214
Westford		41	3.62%	12.1	1412
Westhampton		1	2%	4.2	71
Westminster		5	1.69%	4.9	563
Weston		19	2.01%	9.8	567
Westport		27	4.38%	10.7	1644
Westwood		17	1.77%	7.8	1107
Weymouth		73	2.42%	8.3	5344
Whately		0	0%	0	67
...	

Municipalities marked with an asterisk (*) have either a long term care facility, institution of higher education and/or correction facility with 1) more than 10 confirmed cases in the last 14 days and 2) these cases make up more than 50% of the total cases for that municipality in the last 14 days.

All information, including rankings, provided by data released by the Massachusetts Department of Health. Updated weekly after 5 p.m.

8:46 AM 8/8/2021

or is unvaccinated (including children under 12 years old who are not currently age eligible for vaccination);⁴

Recommended that fully vaccinated people who have been in close contact with a suspected or confirmed COVID-19 positive individual mask in public indoor settings for 14 days or until they test negative for COVID-19;

As a change to the CDC's former K-12 mask guidance, issued July 9, 2021, which previously considered vaccination status, recommended universal indoor masking for all staff and students in schools, regardless of vaccination status;

Continued recommendation that unvaccinated individuals mask.

C. July 30, 2021: Massachusetts DPH, updated mask advisory

Referencing the CDC's July 27, 2021 updated mask guidance, recommended that even fully vaccinated individuals wear masks when indoors (other than at home) if other risk factors are present, such as: a weakened immune system, an increased risk for severe disease because of age or an underlying medical condition, or if a household member has a weakened immune system, is at increased risk for severe disease, or is an unvaccinated adult. The state's updated mask advisory does not expressly address transmission levels, but does provide a link directly to the CDC's July 27, 2021 updated guidance.

D. July 30, 2021: DESE / MA DPH updated COVID-19 guidance for Fall 2021

Strongly *recommended* that all K-6 students mask when indoors, except while eating; Masks are not necessary outdoors;

Strongly *recommended* that unvaccinated staff in all grades, unvaccinated students in grades 7 and above, and unvaccinated visitors mask indoors, in alignment with the state mask advisory;

Recommended that schools allow vaccinated students to remain unmasked.

Individuals at higher risk for severe disease from COVID-19 or with a household member who is at high risk are encouraged to mask regardless of vaccination status, in alignment with the state mask advisory.

All staff and students are **required** to wear masks on school buses and in school health offices.

⁴ The CDC's July 27, 2021 updated mask guidance does not limit its unvaccinated household member risk factor to an unvaccinated *adult* household member; CDC guidance simply states, "or is unvaccinated." In contrast, the Massachusetts DPH's July 30, 2021 mask advisory limits its unvaccinated household member risk factor to *adult* household members, stating "or is an unvaccinated adult."

IV. ANALYSIS: Masking and Vaccination Issues

A. No Federal or State Mask Mandates Currently in Effect; School District Policy Controls (Absent Local Mandate)

While mask guidances and recommendations have evolved from mid-June through the present, the common and consistent thread to date is that, as of this writing, *no federal or state mask mandates or requirements have been imposed on K-12 schools (other than on school transportation vehicles and in school health offices, as noted)*. As such, decisions whether and when to require masks to be worn by staff and/or students in school buildings, and whether to impose different requirements based on vaccination status and/or grade level, are local **school committee policy decisions**. At least for the time being, this decision has in most cases been left up to each district and its school committee, absent applicable local requirements imposed by a particular municipality, and subject to M.G.L. c. 150E requirements. Legislation that would, if passed, mandate universal masking of students and staff is currently pending. *Currently, in the absence of a local mandate, school committees have the authority to: 1) require all students and staff to wear masks in school buildings, provided that legitimate medical, religious, and behavioral exemptions are allowed, 2) adopt mask requirements based on grade level and/or vaccination status or, 3) make masking entirely optional.* **SCHOOL COMMITTEE DECISION ABSENT LOCAL OR STATE MANDATES**

B. Development of District Mask Policy

Whether and when a particular school committee should require universal masking, require masking only of the unvaccinated (referred to herein as a “differentiated masking policy”), or make masking entirely optional requires careful consideration of many complexities. These may include: vaccination rates in the school and greater community; rates of COVID-19 and severe illness in the school and greater community; whether a school or community is disproportionately at risk; the prevalence of the Delta variant or other variants impacting children or adolescents; evidence of school or community transmission; the feasibility and efficacy of other layered mitigation strategies in the district, such as optional mask wearing, social distancing, good ventilation, and availability of useable outdoor space; whether and how to monitor vaccination status; working and learning conditions; and stakeholder input, including from local boards of health.

3 TYPES OF MASK POLICIES

1. UNIVERSAL
2. DIFFERENTIATED
3. OPTIONAL

Further complicating districts’ analyses is that *masking decisions impacting staff working conditions will require school committees to engage in bargaining with local unions, even though, as discussed below, the Massachusetts Teachers Association has publicly advocated for mandated universal masking*. Finally, *another challenge is presented by the fact that mask guidance and COVID-19 conditions are not only subject to change, but are very likely to change, as we approach and start the fall term*. The policy adopted by the school committee

should contain provisions for an ongoing review and state it may be subject to further change based on various factors.

1. ADA and Privacy/Medical Records Concerns

It is generally the Equal Employment Opportunity Commission's ("EEOC") position⁵ **that employers may ask employees about their COVID-19 vaccination status, and request evidence of third party administered vaccination such as a vaccination card**. According to the EEOC, such an inquiry is not a disability related inquiry under the ADA, nor does such an inquiry violate an employee's privacy or compromise the confidentiality of their personal medical information, provided that some conditions are met. (K.9) The employer must treat an employee's vaccination status and any related documentation as confidential medical information, and the employer should not request or receive any additional medical or disability related information along with the employee's vaccination status.

Best practice in districts choosing to implement differentiated mask requirements based on voluntary vaccination status would be to implement a policy under which a staff member must produce a vaccination card if requesting an exemption. This practice would not likely be deemed to violate employees' privacy or stigmatize employees with "unvaccinated" status, as it would be unknown to others whether a particular employee is masking due to being unvaccinated, or out of a desire to mask in addition to vaccinated status. Under a differentiated policy, it would be apparent to others that unmasked employees had provided evidence of "vaccinated" status, however. While vaccinated status may be stigmatizing in certain communities and parts of the country, it is unlikely to be stigmatizing in the vast majority of communities in Massachusetts, given the state's high vaccination rates. Further, employees could elect to mask despite not being required to do so to avoid being transparent about their vaccinated status.

At this writing, we are not aware of any law or requirement applicable in Massachusetts suggesting that a differentiated mask policy may not be applied to students as well as staff. **We are currently of the opinion that, if handled correctly, with vaccination status and related documentation being safeguarded and narrowly produced, school committees choosing to do so can implement and carry out a differentiated mask policy without disclosing confidential medical information or otherwise infringing upon staff or student privacy.** That being said, opting for either a universal masking policy or an entirely optional masking policy will be logistically easier to implement and enforce in comparison to a differentiated policy based on vaccination status. Also, new public health information documenting vaccinated individuals' transmission of the Delta variant has raised concerns about differentiated mask policies. ***It should be considered, however, that the imposition of a universal mask mandate could potentially disincentivize vaccination, which public health authorities unanimously agree is the most effective line of defense against severe illness or death from COVID-19.***

2. Bargaining

⁵ See EEOC guidance, revised June 28, 2021, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>, particularly Section "K."

According to the Massachusetts Teachers Association, its Board of Directors unanimously voted on August 1, 2021 in support of and to call for mandatory universal masking of staff and students in grades K-12 and in higher education, regardless of vaccination status.⁶ Be prepared for union pressure and demands surrounding school committee masking policy, the implementation and enforcement of the policy, and working conditions. While districts can adopt and implement health and safety related vaccination policies during a pandemic, see *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (Discussed at length in our February, 4, 2021 memorandum), even in the absence of public health requirements, **school committees are obligated to bargain with unions regarding these policies relative to staff working conditions. Negotiated agreements should not restrict or limit ongoing committee review or modification of policy based on consideration of various factors.**

3. Immediate Next Steps Regarding Mask Policy– Act Now

Public discourse on all sides of the masking debate is growing more divisive as the school year approaches. In the very short window between now and fall school reopenings, we advise that school committees *immediately* take the following steps, if they have not already done so:

- as soon as possible, schedule two public, open session school committee meetings, the first to discuss a committee mask policy, and the second to take a committee vote to adopt a particular mask policy;⁷
- a sizeable portion of the agenda for such meetings should be set aside for public comment regarding masking, and providing significant opportunity for stakeholder input from educators, union representatives (be sure to formally invite union leadership to participate), and parents/students, as well as input from local medical professionals, local public health officials, and other community members;
- begin all such meetings with the committee’s statement of its primary objective of providing a safe and healthy educational and work environment for students and staff, while keeping as many students as possible in school buildings and engaged in productive in-person learning;
- include a committee statement at the onset of such meetings that the purpose of the meeting is to gather public input on the various mask or vaccination policy options being considered, to assess the most recent CDC, MA DPH, AAP, DESE, and local board of

⁶ Some individual educators and MTA “locals” have complained publicly that the MTA did not poll its membership prior to the Board taking this vote, and there is evidence that individual educators have varied opinions about the MTA Board’s vote and the prospect of mandated universal masking in schools.

⁷ Take care to act in compliance with the Open Meeting Law.

health recommendations regarding COVID-19 and masking, and to vote on a district mask policy;

- * emphasize that infection rates are currently unstable, that it is still unknown when students under age 12 will become eligible for vaccination, that all policies will be reviewed and updated as COVID-19 data and public health information continue to evolve, and that policies are subject to applicable bargaining rules under M.G.L. c. 150E

We also advise districts to *immediately* reach out to union leadership to schedule meetings as soon as possible to negotiate expectations and working conditions relating to masking and vaccinations, and the policy ultimately adopted. Districts should be expeditious in scheduling meetings with unions and engaging in good faith bargaining over any mask or vaccine policy related impacts to working conditions, being mindful of the very little time remaining between now and when policies will need to be implemented upon fall return.

Be very clear about your implementation date. As noted above, maintain maximum school committee flexibility relative to amending the policy. Consult local counsel on impact bargaining, declaration of impasse, and implementation procedures.

C. EEOC Guidance on Mandatory Staff Vaccination

Given the high rates of voluntary educator and school staff vaccination in Massachusetts, a discussion of mandated staff vaccination may be a primarily academic pursuit in most districts. **First and most significantly, the EEOC concluded that federal law does not prevent an employer from requiring employees physically entering the workplace to be vaccinated for COVID-19, subject to reasonable accommodation provisions of Title VII, the ADA and other EEOC considerations. (K.1).** The Jacobson case, although decided in 1905, stands for the proposition that the “police power” of the government includes the power to order mandatory inoculations or vaccination against disease.

There has yet to be much movement across the state on the prospect of districts mandating staff (or student) vaccination, but this is an issue to watch closely, as it seems that full FDA approval of COVID-19 vaccines may be on the horizon. **While the legality of employer mandated employee vaccination does not seem to hinge upon progression from the current emergency authorization to full FDA approval,⁸ full FDA approval would likely make the prospect of mandated staff vaccination more palatable in some circles.** The EEOC guidance referenced, last updated on June 28, 2021, sets forth an extended discussion of vaccine related issues in a “Frequently Asked Questions” format, outlined in Section “K” of that guidance.

⁸ See the U.S. Department of Justice’s Memorandum Opinion for the Deputy Counsel to the President, July 6, 2021, opining that federal law does not prohibit employer mandated vaccination purely on the basis that the FDA provided approval of COVID-19 vaccinations under the emergency use provisions of FDA enabling legislation, acknowledging the EEOC’s current position that employers can mandate employee vaccination, and emphasizing that state and local law must be consulted, available at: <https://www.justice.gov/sites/default/files/opinions/attachments/2021/07/26/2021-07-06-mand-vax.pdf>.

If implementing a staff vaccine mandate, employers must still provide reasonable accommodations relative to qualifying conditions, including pregnancy⁹ (protected under Title VII), and must consider religious and medical objections to vaccination unless the requested accommodation presents an undue hardship. (K.1). The existence of an undue hardship can be determined by assessing the cost or the difficulty of implementing the request. See K.5, regarding employer obligations where employee vaccination is mandated and an employee has demonstrated a qualifying disability or exemption. Reasonable accommodations for unvaccinated employees that do not impose undue hardship might include, for example, mask wearing and/or social distancing in the workplace in lieu of vaccination. (K.2). **Given DESE's decision that remote learning no longer satisfies instructional time requirements, be careful responding to requested accommodations seeking a remote assignment. An employer must not apply a vaccine mandate in a discriminatory manner, and should avoid any application of the policy in a manner that could have a disparate impact.** (K.1).

The EEOC has stated that an employer may establish qualification standards for a return to work on a safety related basis, consistent with business necessity. If an employee cannot satisfy a qualification standard due to a disability, compliance cannot be compelled unless the employee's presence constitutes a "direct threat" to his or her own health and that of other employees. If the employer believes the employee's presence constitutes such a threat, an individualized inquiry must accompany the analysis. The employer must consider: 1) the duration of the risk, 2) the nature and severity of the projected harm, 3) the likelihood that the harm will occur and, 4) the imminence of the potential harm. (K.5). In the face of a direct threat posed by the presence of an unvaccinated employee with a qualifying disability or exemption, the employer should, again, consider whether there are reasonable accommodations that can be made without undue hardship.

OSHA considerations also come into play when weighing mandated staff vaccination. OSHA's "general duty clause" requires employers to provide employees with a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." See Occupational Safety and Health Act of 1970, § 5(a)(1). **While the data bears out that serious injury from a COVID-19 vaccine is highly unlikely, an adverse reaction to an employer mandated vaccine would likely be presumed work related.** Also, employees may refuse to work if they believe they face work related death or serious injury, have tried to obtain corrective relief from the employer, and the circumstances are so urgent that filing a complaint with OSHA is not possible. See OSHA refusal to work provisions, 29 C.F.R. 1977.12(b)(2), which were referenced by the Massachusetts Department of Labor in the 2020 Andover strike investigation case, discussed in the Summer 2021 Executive Institute materials.

Of course, any staff vaccination mandate would also be subject to bargaining with unions.

V. CONCLUSION

⁹ Pregnant employees may lawfully choose to refuse vaccination and must be treated the same as other employees, including the employer's consideration of job modifications. (K.13).

School Committees and Superintendents should keep current on the rapidly evolving public health information surrounding COVID-19, masking, and vaccination, as well as any changes to related federal, state, or local recommendations or requirements. Consult with your local board of health regarding best medical and public health practices for the fall.

Given the seemingly constant shifts in “guidance,” and the abdication of responsibility by elected political leadership, it is no surprise that Superintendents are experiencing an overwhelming sense of exasperation. Paraphrasing Aristotle’s *On Politics*, good leadership is often more important than well intended half measures and “guidance.”