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Client Alert: Florida Governor Ends Local COVID Safety Requirements, But Federal Requirements May Still Linger: What Employers Should Know

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On May 3, 2021, Florida Governor Ron DeSantis signed Senate Bill 2006 (SB 2006) and Executive Orders 21-101 and 21-102, immediately suspending all existing city and county emergency COVID-19 restrictions, such as mask and social distancing requirements. Additionally, the Governor prohibited cities and counties from enacting any new emergency restrictions. As a result, businesses are now free to decide what, if any, COVID safety measures to require. This has led many to believe that businesses may now lift all COVID-19 safety restrictions without risk. However, as discussed below, employers and businesses should think twice before eliminating their COVID safety measures.

Florida Statute § 768.38 and the Continuing Need to Comply with Federal Health Standards and Guidance

Florida employers and businesses still face several risks in lifting their COVID safety requirements in response to the Governor's executive actions. First, failing to implement COVID safety requirements might prevent employers and businesses from claiming immunity against COVID-related lawsuits. As we detailed in a recent [Client Alert](#), Governor DeSantis recently signed into law Florida Statute § 768.38, which grants employers and other businesses immunity against COVID-related lawsuits. However, to be eligible for such immunity, the business must have "made a good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance." The law defines "authoritative guidance" to include non-binding recommendations from a federal, state, or local governmental entity. The Governor's Executive Orders arguably eliminated all Florida state and local COVID health standards and guidance. However, federal health standards and guidance arguably remain. Consequently, to claim immunity from COVID-related lawsuits under Florida Statute § 768.38, employers likely will still need to prove their good faith effort to rely upon the health standards and guidance promulgated by federal agencies, such as the Centers for Disease Control and Prevention (CDC) and the Occupational Health and Safety Administration

(OSHA). Currently, both the CDC and OSHA recommend mask wearing, social distancing, and other COVID safety measures. Consequently, failing to comply with current CDC and OSHA guidance regarding masks, social distancing, and other restrictions could prevent Florida businesses and employers from claiming immunity under Florida Statute § 768.38.

OSHA and the Continuing Duty to Provide a Safe Workplace

COVID restrictions, such as mask wearing are also still arguably required under current OSHA laws and regulations. Under the OSH Act's "General Duty Clause," employers must provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." According to OSHA, the most effective way to provide a safe workplace during the pandemic is to implement a "COVID-19 prevention program." OSHA recommends that an effective COVID-19 prevention program contain 16 specific elements, including mask wearing, social distancing, and other restrictions. Employers who do not follow OSHA's guidance risk potential OSHA inspections and violations. OSHA has been tasked with increasing its number of on-site inspections in 2021 and is required to conduct four times as many COVID safety inspections in 2021 than were conducted in 2020. OSHA has identified the following industries that will be the primary focus of such on-site inspections: health care providers, restaurants, meat and poultry processing facilities, grocery stores, discount department stores, warehouse and storage facilities, temporary help services, and correctional facilities.

Employers should also be aware that employees in limited circumstances have the right under the OSH Act to refuse what they reasonably believe to be dangerous work. In short, employers who disregard OSHA's guidance and eliminate COVID safety requirements risk giving their employees a legal right to refuse work. Employers are also prohibited from retaliating against employees who raise or object to workplace safety issues.

In addition to the above, OSHA is expected to issue *binding* COVID-19 standards in the next few weeks. It is anticipated that these standards will require the use of face masks where social distancing is not possible (among other requirements). Therefore, employers may want to consider delaying the elimination of face mask requirements until such standards are issued.

The NLRA and Employee Complaints, Protests, and Refusals to Work

Another consideration for businesses removing COVID-19 safety restrictions is that doing so may increase the likelihood of employees grouping together to complain or protest about their working conditions. Such "concerted activity" may be protected under the National Labor Relations Act (NLRA), which applies to most private employers. Additionally, the NLRA also permits employees to participate in a concerted refusal to work as long as the refusal is based on the employees' "honest belief" that working conditions are unsafe.

Title I of the ADA and the Continuing Duty to Provide Reasonable Accommodations

Even though Florida appears to have eliminated all state and local COVID restrictions, employers with 15 or more employees are still required under the Americans with Disabilities Act (ADA) to provide reasonable accommodations to employees with a disability. Smaller employers may also be required to grant accommodations under applicable city and county ordinances. For example, employers who eliminate mask requirements for customers or employees might be required to allow certain employees to continue wearing masks or work from home if they have underlying medical conditions requiring them to do so.

Title III of the ADA and Customer Refusals to Wear Masks

In light of the above, businesses should be cautious before eliminating any of their COVID safety requirements in response to the Governor's actions on May 3, 2021. However, businesses that continue to require their customers to wear masks should be prepared to receive an increased number of complaints and requests from customers about the mask requirements. After the Governor's executive actions on May 3rd, many customers might be under the impression that businesses are no longer permitted to require masks. In fact, in 2020, multiple class action lawsuits were filed against businesses claiming that the businesses were prohibited from requiring customers with alleged medical conditions to wear masks under Title III of the ADA. Title III of the ADA, which applies to most businesses, prohibits places of public accommodation from discriminating against customers on the basis of disability. When these claims were filed last year, businesses had a strong defense that masks were required by local law or that unmasked customers presented a "direct threat" to others. However, these defenses might have been weakened by the Governor's executive actions on May 3, 2021. Consequently, it is imperative that businesses prepare now on how they will handle complaints and requests for accommodations from customers, including what they can and cannot ask such customers about their alleged disability under Title III of the ADA.

Conclusion

Despite the Governor's actions on May 3, 2021, employers and businesses should exercise caution before eliminating their COVID-19 safety restrictions. Failing to do so could expose businesses to multiple areas of liability. Consequently, before taking any action in response to the Governor's executive actions, employers and businesses would be wise to consult with counsel familiar with the various, complex, and ever-evolving laws in this area. Should you have any questions, Shumaker is here to help.