Client Alert: New Mask Mandate Affords Employers a Right of Inquiry For Employees Who Ask For Exemption

BY ROBERT G. YOUNG • NOVEMBER 5, 2020

On November 2, Governor Baker issued a Revised Order Requiring Face Coverings in Public Places. Under the Revised Order, all persons over 5 years of age must wear face masks at all time when in any place open to the public, including while at work (presumably, only if the work area is open to the public – the non-exhaustive list of examples of places "open to the public" in the Revised Order includes grocery stores, pharmacies, other retail stores, taxis, and public streets and ways, but does not expressly mention non-retail office buildings). There are, however, certain enumerated exceptions to this rule, including where the individual claims to have a medical condition that prevents him or her from wearing a mask. In this area, the Revised Order treats masks to be worn at work differently than it treats masks to be worn out in the public-at-large.

Persons out in the general public are *not* required to provide proof of their medical condition when invoking that exemption from the Revised Order (so, for example, an individual walking down the street unmasked need not substantiate a medical condition to an inquiring official in order to invoke the medical exemption). However, when an employee claims to be unable to wear a mask at work because of a medical condition, the employer may require medical documentation of that condition. In such cases, employers would be wise to follow their general policies and practices for disability accommodations, including requiring that the certification come from a licensed medical professional (note: a card purchased online from the so-called "Freedom to Breathe Agency" won't suffice) and maintaining the confidentiality of the information. Employers also should ensure that any disciplinary action issued for failing to comply with the mask mandate (including refusing to provide any required medical certification) falls in line with the disciplinary action handed down for similar offenses.

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