

When Should Employers Consider Lifting Mask Mandates?

By Lisa Nagele-Piazza, J.D., SHRM-SCP

April 22, 2021

Employers may want to lessen their COVID-19 safety protocols as vaccines become more widely available and state and local governments ease their restrictions, but employment law attorneys caution employers not to move too quickly.

"Conflicting mask rules understandably created a ton of confusion for employers and workers," said David Weldon, an attorney with Barnes & Thornburg in Chicago. Employees may be wondering why they are still required to wear masks at work if mandates have been lifted, he said, but employers maintain the right to regulate the workplace and set safety standards.

"The goal still is to reduce the spread of the virus," said Stephanie Rawitt, an attorney with Clark Hill in Philadelphia. Although some state and local governments lifted mask mandates, the U.S. Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) continue to advise employers to require masks and follow other COVID-19 safety protocols.

"Keep looking at what CDC and OSHA, as well as other health authorities, recommend with regard to masks," Rawitt suggested.

SHRM RESOURCE HUB PAGE

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Monitor Ongoing Duties

Some states, such as Alaska, Florida and Georgia, never had statewide mask mandates (<https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html>), though some local jurisdictions in those states continue to require face coverings in public. Other states, such as Alabama, New Hampshire and Texas, recently lifted their mask mandates. And some states, including Texas, bar local governments from enforcing such mandates.

In most jurisdictions, however, workplace health and safety protocols have not been lessened or reduced. "Whenever there is conflicting guidance between federal, state and local regulators, employers should follow the highest-level guidance," said Mark Goldstein, an attorney with Reed Smith in New York City.

Employers should keep in mind that OSHA standards cover pandemic-related safety risks. Under the Occupational Safety and Health Act's general duty clause, all employers must provide a work environment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." OSHA has also released COVID-19-specific guidelines for limiting workers' exposure to the coronavirus.

"OSHA is the workplace safety czar," Weldon noted. The agency still recommends that employees wear masks and makes clear that social distancing is not a substitute for mask wearing.

Devjani Mishra, an attorney with Littler in New York City, explained that if an employer reports a workplace COVID-19 incident to OSHA, the agency will want to know what safety measures the business had in place.

OSHA allows states to develop their own workplace health and safety plans, as long as those plans are "at least as effective" as the federal program. Some states go further than the federal government in requiring employers to follow specific coronavirus safety rules.

California, for example, requires everyone to wear masks (<https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-128.aspx>) in "most settings outside the home," and the California Division of Occupational Safety and Health (which is known as Cal/OSHA) has implemented COVID-19-specific workplace safety standards. Notably, Cal/OSHA requires employers to provide paid, job-protected leave (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/understanding-cal-osh-covid-19-exclusion-pay-mandate.aspx) if certain events occur that may have exposed employees to the coronavirus at work.

Cal/OSHA has issued multiple citations (<https://www.dir.ca.gov/dosh/COVID19citations.html>) against health care employers for COVID-19-related safety violations. One hospital accumulated (<https://calmatters.org/health/coronavirus/2021/02/kaiser-fined-covid-worker-safety-violations/>) nearly \$500,000 in fines. Federal OSHA recently issued a \$136,000 citation against a business owner in Massachusetts (<https://whdh.com/news/lynn-business-facing-136k-fine-for-allegedly-prohibiting-employees-customers-from-wearing-masks/>) who refused to let employees and customers wear masks.

Don't Rush

In most jurisdictions, employers must still adhere to the same protocols that governed prior to the availability of vaccines approved by the Food and Drug Administration (FDA). In fact, Goldstein said, federal agencies, such as the CDC and the FDA, have not issued guidance as to how employers should proceed with COVID-19-related safety measures when all (or a large portion) of their workforce is vaccinated.

"Until such guidance is issued, therefore, employers should continue to adhere to all applicable health and safety guidance, regardless of industry or headcount," he said.

Mishra also said she doesn't recommend lifting mask restrictions now.

"This thing is far from over," she said. The CDC is still reporting (https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases) a rolling average of more than 60,000 new COVID-19 cases and 600 deaths a day.

If employers lift their mask mandates now, Mishra said, they may have to reinstate policies later, depending on how the pandemic develops. Additionally, she said, many workers are still waiting to be vaccinated.

Many locations only recently opened vaccine appointments to younger and healthier adults, and some people don't have the time or energy to constantly refresh their Web browser to get the next vaccine appointment, she observed.

Treat the mask mandate like any other safety rule, Mishra suggested. Explain that the policy is based on the information that is currently available.

"It's like looking both ways before crossing the street," she said. "It might slow you down a bit, but it's what you have to do to be safe."

Communication Is Key

"While there's a lot of confusion out there about what states are doing, there shouldn't be a lot of confusion about what employers are doing," Rawitt said. Employers should set clear policies and make employees aware of what disciplinary action could be taken if masks are not properly worn.

But employers should have a conversation with employees before taking disciplinary action. Rawitt noted that employers should explore reasonable accommodations if employees object to wearing a mask because of a medical condition or other legally protected reason.

Additionally, mask use may create or exacerbate hazards for some workers, including those that handle chemicals or perform strenuous activities outdoors in the heat. OSHA recommends that employers explore alternatives for those workers, such as face shields and respirators.

However, attorneys caution against lifting restrictions based on general objections to mask wearing. Employers may be setting themselves up for a lawsuit if someone gets ill from COVID-19 or dies, Weldon said. "So it's better to be ready to explain why you made the decision to enforce a mask policy, particularly in light of OSHA and CDC guidance."

Employer-specific considerations may be taken into account, too. In a retail setting, for example, customers may not feel comfortable if employees aren't wearing masks.

Weldon emphasized that communication is key. "Be clear and transparent with employees when you announce whatever changes and policies are being made."

HR DAILY NEWSLETTER

News, trends and analysis, as well as breaking news alerts, to help HR professionals do their jobs better each business day.

Feedback

**CONTACT US (WWW.SHRM.ORG/ABOUT-SHRM/PAGES/CONTACT-US.ASPX) | 800.283.SHRM
(7476)**

© 2021 SHRM. All Rights Reserved

SHRM provides content as a service to its readers and members. It does not offer legal advice, and cannot guarantee the accuracy or suitability of its content for a particular purpose.

[Disclaimer \(www.shrm.org/about-shrm/Pages/Terms-of-Use.aspx#Disclaimer\)](http://www.shrm.org/about-shrm/Pages/Terms-of-Use.aspx#Disclaimer)