

YOUR STATE NO LONGER REQUIRES FACE COVERINGS IN THE WORKPLACE – BUT SHOULD YOU CONTINUE TO MANDATE THEM?

Insights
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As the COVID-19 pandemic (mercifully) starts to retreat, many states have begun rolling back face-covering mandates, which often relieve employers of the obligation to require masks for employees and visitors in the workplace. However, the Centers for Disease Control and Prevention (CDC) still [recommends](#) their use in most workplaces, and the Occupational Safety and Health Administration (OSHA) likewise still encourages employees to [wear masks](#). Because of this dynamic, you should think twice before eliminating any workplace rule that requires mask-wearing as you could run the risk of a federal workplace safety citation. What should you consider when determining whether to adjust your own workplace policies in light of these potentially confusing and conflicting developments?

Employers Caught Between a Rock and a Hard Place?

The inconsistency between state guidance and federal guidelines can cause employers headaches, especially when you are attempting to implement or modify work rules as employees return to your physical locations. You may be especially concerned about whether OSHA, a federal agency, can issue citations to your business for failing to require or provide masks, even though a state order has eliminated the requirement to wear a face covering.

This is a particular concern in states like Texas, [Florida](#), [Georgia](#), and Mississippi, where the state has eased COVID-19 related restrictions, but the federal government has jurisdiction over workplace safety through OSHA. Other states where the state government has jurisdiction over

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workplace safety – like Virginia, Michigan, Oregon and California – have adopted their own COVID-19 OSHA standards, which include additional heightened mandates for employers in the workplace.

There is good reason for concern – and good reason for you to retain and enforce mask mandates regardless of what some state governments may announce. Even though there is currently no federal OSHA standard directly addressing COVID-19, federal OSHA can use the Occupational Safety and Health Act's [general duty clause](#) (GDC) in [states](#) where it has jurisdiction to enforce employers' obligation to provide a safe workplace, even when there is no OSHA standard directly on point (e.g., employer violations of the [CDC's COVID-19 guidance](#)).

Federal OSHA's General Duty Clause

The GDC contains the generic requirement that employers ensure their workplaces are “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” OSHA can cite employers for violation of the GDC if a recognized serious hazard exists in their workplace and the employer does not take reasonable steps to prevent or abate the hazard.

OSHA can use the GDC to cite an employer if the company was aware of a potential hazard in virtually any manner, including information gained from a state or local order, industry requirement, or even common sense. OSHA only needs to show that the hazard is “recognized,” which the agency defines broadly in its internal [field operations manual](#) to include, as examples, non-regulatory publications from the Environmental Protection Agency (EPA) and National Institute of Occupation Safety and Health (NIOSH), OSHA Hazard Alerts, and the OSHA Technical Manual. OSHA must also show that the hazard was causing or was likely to cause death or serious physical harm, and there was a feasible and useful method to correct the hazard.

CDC guidance on COVID-19 demonstrates that employee exposure to the virus in the workplace is a recognized hazard and meets the knowledge element of a GDC citation. Thus, if you do not follow the CDC guidance on wearing masks in the workplace, OSHA could cite your business under the GDC, even if your state eliminated the face-covering mandate.

Steps You Can Take to Prepare for Possible OSHA Inspections/Citations

To ensure your workplace is ready for an OSHA inspection during this unusual time of inconsistent mandates at the state and federal levels, take the following steps to protect your employees and avoid or defend OSHA citations.

- 1. Take a Fresh Look at CDC and OSHA Guidance.** Like the first several months of the COVID-19 pandemic, CDC and OSHA guidance is now constantly changing given the availability of a vaccine and the return of workers to physical workplaces. Dedicate a team in your company to consistently (e.g., on a daily basis) review CDC and OSHA updates on safe COVID-19 practices in the workplace. Guidance will continue to evolve likely over the next two to three months and understanding current requirements will help avoid citations.
- 2. Carefully Review State Guidance.** Don't just read the news headlines containing new workplace safety guidance in a particular state. Often the specific details concerning the requirements of a state order or guidance document are not easily gleaned from a newspaper article. As an example, [Florida recently passed a new COVID-19 liability protection law for businesses](#). Although generally favorable to businesses, the law requires they make a "good faith effort to substantially comply with authoritative or controlling government-issued health standards" to gain protection. Even though its meaning is not fully known at this time, a business may be protected from COVID-19 related liability by following CDC guidance even when a particular requirement has been eliminated at the state level.
- 3. Conduct a Hazard Assessment of the Workplace.** OSHA's personal protective equipment standard requires employers to assess their workplace to identify hazards and ways to eliminate them. The COVID-19 pandemic has highlighted how important risk assessments are because each task in your workplace likely has a different level of exposure to the virus. Examine each task in your facility and ensure that employees are protected from each hazard identified, through means of personal protective equipment, administrative controls, design, or otherwise.
- 4. Communicate With and Train Employees.** Any COVID-19 related OSHA inspection will focus on how your COVID-19

protocol has been communicated to employees. Begin training employees now on any COVID-19 policies you have in place, whether verbally or in writing.

Communicating with employees regarding the measures you have taken to keep them safe will not only help with handling an OSHA inspection but also ease any concerns employees may have about their potential exposure to COVID-19.

- 5. Prepare a Written COVID-19 Response Plan.** When OSHA arrives for an inspection, it will ask for your written COVID-19 protocols and response plan. If you haven't already, begin to formalize your COVID-19 workplace policies in written form. The [model Virginia COVID-19 response plan](#) is a good starting point for preparing your federal COVID-19 plan. Having written materials makes training employees on your policies easier and more effective.

Conclusion

Inconsistent guidance at the state and federal levels will be a common issue for employers over the next several months, with federal OSHA and the CDC mandating certain requirements and more and more states eliminating certain required measures. Be proactive in assessing the governing guidelines to ensure your workplace protects workers and minimizes the risk of an OSHA inspection or citation. Create a written COVID-19 program, continue to communicate your COVID-19 policies to employees, and listen to and address any concerns they may have about worker safety.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For a more thorough analysis of the many issues you may encounter, we recommend you visit our [COVID-19 Resource Center for Employers](#). If you have further questions, contact your Fisher Phillips attorney or the authors of this Insight.