



# Should Employers Rescind Their Mask Mandates? A Pros and Cons List to Consider Before Dropping Your Pandemic Policies

Insights

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As expected, state and local mask requirements continue to be lifted following the CDC's loosening of its masking recommendations last month. As of today, only 10 states require masks – and many of those requirements apply only in certain limited settings, such as in the healthcare context, shelters, residential care facilities, and schools. The lifting of these governmental mask mandates raises the question of whether employers should continue to require masks in the workplace as a matter of internal policy. There's no "one size fits all" answer to this question. Rather, each business should weigh the pros and cons of requiring masks in their workplace and decide what's best for their particular locations and circumstances. This Insight will review the current state of the law and offer considerations to take into account before dropping your mask mandates.

## What Does the Law Say?

Importantly, the CDC still *recommends* that masks be worn in places of high transmission. As of today, that covers only about 15% of the country and that number has been decreasing. As we've advised throughout the pandemic, however, employers who don't follow the recommendations of the CDC (and applicable state and local health departments) do so at their own peril. That's because OSHA or a state OSHA agency can – and often does – cite employers under the "General Duty Clause," using the failure to follow recommended safety measures (i.e. CDC recommendations) as the basis for the alleged violation.

The General Duty Clause of the OSH Act broadly requires that employers provide a work environment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." This clause has served as OSHA's COVID-19 workhorse, as the agency has not successfully issued new specific pandemic-related standards applicable to most employers but repeatedly cited employers under the General Duty Clause for failures related to masking.

While OSHA looks to CDC recommendations in issuing its own guidance documents for employers related to COVID-19 and workplace safety, it has not yet updated them to reflect the CDC's recent relaxation of masking recommendations.

It is therefore prudent for employers to continue to require masks, regardless of vaccination status, in places of high transmission and to continue to track the CDC Date on Community Transmission Levels to make sure your workplaces are not in a place of high transmission. In places of "medium"

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or “low” transmission, the CDC does not currently recommend masks (except in areas designated as “medium,” where it recommends that those who are immunocompromised or at high risk for severe illness should confer with their doctor about whether to wear a mask). That means in these areas it is up for the employers to decide what to do.

Finally, before brainstorming about possible next steps, make sure you understand the lay of the land in your own state. FP’s Innovation Center maintains [a 50-state map laying out the state-by-state laws that exist in your local area](#). You should consult with it before taking any steps.

## **Pros and Cons of Lifting Mask Requirements**

Once you understand the lay of the land, you’re ready to consider the various pros and cons associated with removing mask requirements at your business.

### **Pros:**

- Many employees are ready to stop wearing masks and have begun doing so when not at work.
- As other employers lift their mask mandates, not doing so could hurt efforts to attract and retain talent. In today’s competitive labor market, this is a particularly relevant concern.
- Mask mandates are difficult to enforce, especially if the requirement is based on vaccination status.
- Mask mandates may create resentment from and between employees, especially if based on vaccination status.

### **Cons:**

- As noted, it is prudent to keep masks in place at least in areas of high transmission. For national employers, this may mean different policies in different locations which can create logistical and communication issues.
- Recognize that you could open yourself up to an OSHA inspection ([which you can track here](#)) or a General Duty Clause citation if you drop your mask mandate too quickly or in an inopportune setting.
- While COVID-19 cases have been decreasing steadily, this was also the case in mid-2021. While we hope not to endure another dramatic spike in cases (reminiscent of the Delta and Omicron variants), one certainly could arise. So employers who lift their mask mandates need to accept the risk that they may have to reinstate them at some point (at least in some areas). As we’ve seen with stay-at-home recommendations, for example, putting the genie back in the bottle is not easy.
- While not everyone agrees on the degree of protection, masks clearly help in preventing transmission of COVID-19. As such, not requiring masks increases the chances of employees

getting the virus, which could place stress on your workforce (and, in some locations, require you to provide paid leave).

## Conclusion

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