

IS IT TIME TO MASK UP AGAIN? WHAT PHILADELPHIA'S RESURRECTED MASK MANDATE CAN TEACH EMPLOYERS ACROSS THE COUNTRY

Insights
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Is it the first unwelcome step down a treacherously slippery slope or just a minor blip on the path towards a return to normalcy? That's what we're all trying to figure out as Philadelphia announced yesterday the return of a mask mandate for all indoor public spaces that will take effect on April 18, the first major U.S. city to reinstitute such a requirement. **[Ed. Note: The Board of Health abruptly rescinded the mandate on April 21, citing "decreasing hospitalizations and a leveling of case counts."]** Regardless of whether you have operations in Philadelphia, yesterday's news certainly should cause you to take a moment to determine whether you might need to reevaluate your own organization's mask policy. What are some considerations you should take into account in determining what to do with your own policies?

Mask Up, Philadelphia

Amid rising cases over the past few weeks, Philadelphia public health officials just announced a return to mandatory indoor facemasks. As of March 29, the city had reported an average of just 89 new COVID-19 cases over the previous seven-day period. By April 9, that number had increased to 142. For sure, it comes nowhere near the Omicron peak on January 4 that saw over 4,000 new cases per day, but it was still troubling enough for officials to announce the reinstated mandate.

The city hasn't required masks since March 2, but the rise of the BA.2 Omicron subvariant changed the calculus. "If we fail to act now, knowing that every previous wave of

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infections has been followed by a wave of hospitalizations and a wave of deaths, it'll be too late for many of our residents," Health Commissioner Dr. Cheryl Bettigole said while announcing the new mandate on Monday.

Face coverings will be required in all indoor public spaces, including businesses, restaurants, government buildings, childcare settings, and schools, beginning April 18.

[According to](#) James Garrow, Communications Director for the Philadelphia Department of Public Health, "Businesses, restaurants, and offices don't have to enforce the mask mandate if they require proof of vaccination from customers and employees."

The mandate will remain in place until the city metrics fall into the "All Clear" category, which takes into account average daily COVID-19 cases, hospitalizations, and case increases over a 10-day period.

[Ed. Note: As noted above, the Board of Health rescinded the mandate on April 21.]

What Should You Do?

Obviously, if your business is located in Philadelphia or one of the other locations across the country with a mask mandate, you should determine whether you need to adjust your policies and protocols to require employees and visitors to comply. But if you are in a state without a mandate and are considering whether to resurrect your mask mandate, 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. Here are some considerations to take into account before dropping your mask mandates.

What Does the Law Say?

Let's start with the baseline: 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

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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 to continue to require masks, regardless of vaccination status, in places of high transmission and to continue to track the [CDC Data on Community Transmission Levels](#) to make sure your workplaces are not in a place of high transmission. In places of “medium” 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.

Pros 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.

- 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 of Lifting Mask Requirements

- 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.
- As Philadelphia's situation demonstrates, cases are beginning to tick upwards in many locations across the country. 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. Therefore, not requiring masks increases the chances of employees getting the virus, which could place stress on your workforce (and perhaps require you to provide paid leave in some locations, such as in Philadelphia following last months' implementation of the third iteration of the Public Health Emergency Leave [law](#)).

Conclusion

To ensure you stay up to speed with the latest developments, make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information and check out our [FP Vaccine Resource Center For Employers](#). For further information, contact your Fisher Phillips attorney, any attorney in [our Philadelphia office](#), or the authors of this Insight.