



# Transportation Mask Mandate Struck Down: What it Means for Employers

Insights

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After the news yesterday that a federal court judge struck down the CDC's mask mandate for airplanes, mass transportation, and transit hubs, many employers immediately wondered what it might mean for their business. Though masks have been lifted in most workplace settings, we still live in an uncertain time where some businesses have continued to require employees and visitors to wear masks, and the CDC recommends mask-wearing in some locations based on the spread of COVID-19 in local regions. Some localities have even reinstated indoor masking requirements. Does this latest development signal that it's time for your business to drop your workplace mask mandate? Or should you continue to impose your own mask requirement for business travel even if masks may no longer be required on airplanes? This Insight will explore a few of the considerations you may want to take into account when determining your next steps.

## First Things First: What Happened and Where are We with Transportation Masking Requirements?

The Centers for Disease Control and Prevention (CDC) first issued a public health order that required members of the general public to wear masks while on interstate transportation (most significantly including airplanes) and at transit hubs (most significantly including airports) in February 2021. Meanwhile, U.S. airlines have required passengers to mask onboard since May 2020. The Transportation Security Administration (TSA) enforced the CDC's order through its own directives, and you have undoubtedly seen videos on social media and the news of disagreeable airline passengers being dragged off planes by TSA agents for refusing to mask up during travel.

While it appeared last month that the CDC might end the transportation mask mandate by mid-April given the rapid decline in Omicron cases in the first quarter of 2022, a recent uptick in COVID-19 cases due to the BA.2 subvariant led the CDC to extend its mandate for an additional 15 days. In other words, air travelers would be required to wear masks through at least May 3. Until yesterday's news changed the calculus completely.

Judge Kathryn Kimball Mizelle, a federal court judge in Florida who has been on the bench for about a year-and-a-half, issued a broad ruling on April 18 striking down the CDC's order on a nationwide basis. She determined that the agency exceeded its authority and failed to justify the mask requirement. That ruling led to a cascading series of events that is still rapidly unfolding:

- The TSA announced that it will no longer enforce the COVID-19 mask mandate on planes and other forms of public transportation.
- Many airlines and airports announced that mask-wearing is now optional for passengers and travelers.
- Some public transit agencies across the country followed suit, while others announced they will continue to impose their own mask mandates.
- Uber and Lyft announced that they will no longer require masks for riders and drivers.
- The CDC still recommends that travelers wear masks on public transit.
- The Biden administration announced it was disappointed with the ruling and was determining whether it would appeal the decision – or ask an appeals court to reinstate the mask mandate while any appeal was pending.

### **What Should You Do in Response?**

Even if you're not in the transportation industry, yesterday's ruling might require you to take some affirmative steps.

### ***How Does This Impact Your Mask Mandate?***

Outside of your premises, air travel was one of the last public places beyond healthcare settings where your workers were required to mask up. Not that you have to give into peer pressure, but you want to give serious consideration about whether to maintain your company-imposed mask mandate or risk upsetting employees – and perhaps even lose workers to other employers who offer their workers more freedom. If you lift or relax existing mask mandates, that may raise questions about other COVID-19 protocols you have in place. The questions may become even more complex if you have either a vaccination requirement or a “vax or test” policy in place. Each of these decisions raises questions about the potential impact on employee morale, recruitment, and retention, as well as the effect that policy changes may have on any pending administrative charges or litigation that your company is facing. Regardless of your ultimate decision, these issues merit serious consideration.

Before you do anything else, we recommend taking the pulse of your workplace and business circumstances, since there are masking requirements in certain places and that apply to certain workplace settings, to help determine next steps. You need to take into account various factors such as the CDC community level in your area, recognizing that those in the red “high” areas might still want to impose a mask mandate. You also need to take into account the standards of practice in your industry and the level of exposure your workers have to members of the general public. Those in retail or hospitality settings, for example, may want to add in an extra level of protection, as opposed to those in distinct office settings with little to no public interaction.

From a liability perspective, employers who don't follow CDC mask recommendations 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 “recognized hazard” portion of 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.” 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 – and has not yet altered any recommendations based on yesterday's court ruling. OSHA has, in fact, repeatedly made clear that it does not regard the pandemic as being over. It may therefore be prudent to continue to require masks in some places, especially in areas of high transmission.

### ***What About Business Travel?***

While the TSA will no longer require your employees to wear masks while on airplanes and public transit, you still have the option of requiring your workers to mask up while on business travel. There could be circumstances where such a requirement could be justified – if you are in the healthcare field, for example, or are requiring workers to travel to and from communities considered areas of “high” transmission. While yesterday's ruling means the government can't force travelers to wear masks, nothing in the ruling impacts your ability to impose your own workforce rules.

Consider, however, that enforcement of such a rule might be nearly impossible. And it could cause workplace tensions that outweigh the rewards of any such rule.

### ***Will Judge Mizelle's Ruling Stand?***

As mentioned, it is unclear how long the ruling that broadly struck down mask mandates will stand if the Biden administration chooses to challenge it. It may even be set aside during the pendency of any appeal that might happen. The controversial decision was certainly unexpected in many circles. And as other recent cases have repeatedly demonstrated, things can change quickly when it comes to COVID-19 mandates.

In evaluating your options, it is worth moving thoughtfully and considering how you would respond if the masking requirement is quickly reinstated. In view of the tremendous pressures that most employers face to attract and retain a qualified workforce, as well as the public's apparent hunger for mandates to end, companies face compelling momentum to implement policy changes soon. On the other hand, OSHA will expect you to err on the side of workplace safety. And employees who remain concerned about the threat of the virus may be very reluctant to return to the workplace if masking requirements or other protocols are lifted.

### **Conclusion**

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In short, deciding how your company should proceed should involve weighing a variety of considerations, some obvious and others that are not as clear. In any event, your Fisher Phillips attorneys stand ready to assist you in identifying and assessing the issues that are likely to be most impactful to your workplace.

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