

Do State Bans on Local Mask Mandates Apply to the Workplace?

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Although many public health officials now recommend or require everyone to wear masks in public indoor spaces—whether or not they're vaccinated against the coronavirus—some states have limited or banned mask mandates in certain circumstances. But employment law attorneys said such bans generally don't affect private businesses.

"What we are seeing with state mask mandate bans is that they generally restrict the ability of local governments and political subdivisions from implementing mask mandates," said Alana Ackels, an attorney with Bell Nunnally in Dallas. "Private businesses remain free to implement mask requirements for employees and customers."

For example, executive and legislative actions in some states (<https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html>), including Arkansas, Florida, Iowa, Montana, South Carolina, Tennessee and Texas, aim to block local governments and school districts from reinstating mask orders, according to AARP.

Notably, some states have gone in the opposite direction by enforcing stricter pandemic-related safety rules. For example, California requires masking for unvaccinated people (and recommends mask wearing for vaccinated people) in retail stores, restaurants, theaters and other indoor public places.

The Golden State allows local jurisdictions to enforce stricter rules. In light of the recent surge in COVID-19 cases, some places such as Los Angeles are requiring everyone to wear masks in public indoor settings.

The rules will depend on the jurisdiction, explained Pascal Benyamini, an attorney with Faegre Drinker in Los Angeles. "This is very fluid," he said. "Almost every day—and sometimes several times a day—we are getting new information from local governments and states throughout the country."

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

Carefully Review the Rules and Recommendations

Todd Logsdon, an attorney with Fisher Phillips in Louisville, Ky., said employers generally must follow the legal mandates of state and local governments, but employers must discern whether the local "directives" are legal requirements or guidance, and whether they apply to the workplace.

In Iowa, for example, Gov. Kim Reynolds signed a bill that prohibits local governments from requiring business owners to enforce mask mandates. Business owners, however, may still choose to require employees and customers to wear face coverings.

"Places without mask mandates have put the onus on businesses to implement their own COVID-19 prevention measures," Ackels said. While these employers have the freedom to implement measures suitable for their workforces, she noted, companies should always look to the U.S. Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) as "the gold standards" for determining what prevention measures are reasonable and prudent.

At the federal level, the CDC requires masking on all forms of public transportation. In response to the highly transmittable COVID-19 delta variant, the agency is recommending that all people, including those who are fully vaccinated (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/cdc-masks-indoors.aspx), wear masks indoors if they are in locations with high or substantial COVID-19 transmission rates.

Transmission levels vary by geographic location, but nearly 90 percent of all U.S. counties have been identified by the CDC as having a "high" or "substantial" level of community transmission. Employers can view a map (<https://covid.cdc.gov/covid-data-tracker/#county-view>) on the CDC's website with county-specific data.

In June, OSHA issued a COVID-19 Emergency Temporary Standard (ETS), which applies only to health care settings where coronavirus patients are treated, including hospitals, nursing homes and assisted living facilities. The measure requires covered employers to provide some employees with N95 respirators or other personal protective equipment.

Most employers that are not covered by the ETS or involved with public transportation "no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure," except when measures are "required by federal, state, local, tribal or territorial laws, rules, and regulations," according to OSHA.

Even in jurisdictions that limit mask mandates, Benyamini noted, employers still have an obligation under OSHA to provide a safe work environment.

OSHA said employers should continue taking steps to protect unvaccinated and otherwise at-risk workers who may have a weakened response to the vaccine.

The agency said its guidelines "are intended to assist employers in recognizing and abating hazards likely to cause death or serious physical harm as part of their obligation to provide a safe and healthful workplace."

Although federal OSHA's directives (outside of health care and public transportation) are mostly guidance, some state agencies, such as the California Division of Occupational Safety and Health (Cal/OSHA), have issued emergency temporary requirements in response to the COVID-19 pandemic.

Employers generally should follow the law that is most protective of employees, Benyamini said. Cal/OSHA currently isn't requiring indoor masking for fully vaccinated workers, but the agency allows jurisdictions to take more-restrictive measures.

Tips for Employers

What are some best practices for employers as they deal with the recent uptick in COVID-19 cases and a mix of vaccinated and unvaccinated workers?

"The most conservative approach for employers would be to require universal masking at this point," Logsdon said.

For those jurisdictions that do not have requirements, Benyamini said, employers will have to look at the rate of infection, follow those numbers closely, and determine what works best for their work environment. He noted that an employer with a small number of employees reporting to the worksite might have different rules than a large employer with many employees working onsite in close quarters.

Ackels said employers should continue to monitor the spike in cases and adapt their policies as needed. Many businesses started relaxing COVID-19 prevention measures when the CDC loosened its recommendations for fully vaccinated people, she noted. In areas with substantial or high transmission rates, employers may need to tighten prevention measures again, she said, which could include limiting in-person meetings and requiring mask wearing when social distancing is not feasible. Additionally, some employers are now considering mandatory vaccine programs (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx).

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