



Pandemic planning – what you need to know about masks

This guide covers the various issues and considerations related to asking employees or third parties (such as customers, clients, vendors, etc.) to wear masks when on your premises, including the following:

- Are masks legally required?
- Does the First Amendment give people the right to refuse to wear masks?
- What happens if someone claims to have a health condition that prevents them from wearing a mask?
- Are there any other implementation considerations?

In the Appendix at the end of this guide is a sample employee mask policy, along with sample language that can be used for publicly posted signage.

Are masks legally required?

Part of the answer depends on where you have physical locations, as some states, counties, or cities specifically require masks, as well as other safety measures, such as formally adopting a pandemic-related business plan. Where local orders are in place, you must carefully review them, since compliance can take very specific shapes, such as posting requirements, spaces where masks must be worn versus those where they should be worn, etc.

However, even if your workplace isn't subject to such a local order, OSHA's General Duty clause almost certainly applies to your workspace (and some employers, such as hospitals and nursing homes, may have additional, more specific regulatory requirements). Under the General Duty clause, you are required to assess any safety risks that might exist in your workplace (such as the risk of COVID transmission), and implement whatever steps are reasonably necessary to control or eliminate the risk.

Although the General Duty clause doesn't explicitly address masks, if you are ever subject to an OSHA inspection, you should be prepared to explain how you determined which safety protocols to adopt. As part of doing so, you should demonstrate that you gave due consideration to all the safety options at your disposal (including such things as physical distancing protocols, cleansing procedures, reconfiguring physical spaces, reconsidering employee common areas, and mask practices) and why it is that you chose some over others.

Does the First Amendment give people the right to refuse to wear masks?

Wearing or not wearing a mask can be considered a form of expression or speech. As a result, those who don't want to wear a mask will often state that they have a right under the First Amendment not to do so, and thus that you can't make them do so.

Private employers. The First Amendment protects speech from being suppressed by *the government*. Private employers aren't bound by any such restrictions. As a result, you have the right to impose whatever masking requirements you want on anyone who enters your premises. In the case of employees, that means you have the right to discipline and/or terminate anyone who refuses, and in the case of third parties, you have the right to bar or escort non-compliers from your premises.

Public employers. While the First Amendment applies differently to public (i.e., governmental) employers¹, in many cases, public employers should have the same general rights as private employers when it comes to mandating that employees wear masks. Broadly speaking, in order for a public employee's speech to be protected, several requirements must be met, chief amongst which is that the speech has to involve a matter of public concern. Although it hasn't yet been tested in court, it's hard to see how choosing not to wear a mask involves a matter of public concern in the manner the courts have applied that expression in the past. Arguably, *wearing* a mask is more a matter of public concern than not wearing one.

However, even if not wearing a mask somehow does involve a matter of public concern, a public employer can still take action if it can show that its interest in effectively providing services to the public outweighs the employee's interest in not wearing a mask. Because some employees, as well as some members of the general public who come into your buildings, are likely to be in one or more high-risk categories in connection with COVID-19, requiring masks would seem to supersede an employee's interest in not wearing a mask in order to make a statement.

When it comes to members of the general public, governmental entities may be allowed to suppress speech if doing so is in the interests of public health. The classic example used by the Supreme Court is that you don't have a right to shout "Fire!" in a crowded movie house, since the ensuing panic would surely cause people to get hurt. Similarly, it seems likely that governmental entities should be able to mandate mask wearing in public spaces if it's determined that the public health interest in doing so exceeds the putative harm resulting from suppressing someone's right to express themselves by not wearing a mask.

What happens if someone claims to have a health condition that prevents them from wearing a mask?

For **employees** claiming to be unable to wear a mask due to a health condition, treat this like any other request for accommodation in the workplace. Start by requiring them to provide a note from a doctor that identifies the underlying condition, confirms that the employee is medically incapable of wearing a mask at work, and asking about what sort of accommodation might enable the employee to function safely in the workplace.

In getting medical information, make sure that the employee's doctor provides responses on a questionnaire that you have created, and include whatever supplementary information you think would be helpful to the doctor's determination. Examples of such information could include whether or not social distancing is possible throughout the day, how often the employee may be in situations where the mask can be removed (if any), and the fact that you're only requiring simple cloth or surgical masks, and not more restrictive masks such as N95 respirators.

If the doctor confirms that the employee truly is medically incapable of wearing a mask, you will need to explore what accommodations might be reasonable, such as face shields, erecting barriers, working from home or other options. However, if there is no reasonable accommodation available, then the employee is no longer protected by the ADA, and you can terminate employment.

For **third parties** who claim that health conditions prevent them from wearing a mask, your obligations may vary depending on whether you are considered to be a "public accommodation" versus a "commercial enterprise."

¹ Notwithstanding the information that follows, public employers who are going to mandate mask wearing in the absence of a law or ordinance requiring masks should consider consulting with their attorneys as part of implementing such a practice.

- *Public accommodations* are those organizations that serve the general public, such as banks, restaurants, or retail establishments. Public accommodations are required to adopt specific policies, remove barriers, provide aids and services, and otherwise make active changes to their environments in order to make them fully accessible to individuals with disabilities.
- *Commercial enterprises* are those businesses where the only third parties who enter your premises are vendors and other specific business invitees, such as factories, warehouses, or wholesale operations. Commercial enterprises generally don't have to implement any active changes to their environments, but do need to take into consideration the needs of individuals with disabilities any time they make formal alterations to their environments, such as during remodeling and new construction.

Unlike with employees, you can't make third parties prove they have a medical condition that prevents them from wearing masks, and generally need to take them at their word. At the same time, you have a right to determine what safety protocols are necessary to continue to open your doors to third parties.

Where those two things are in conflict, if you are considered a public accommodation, you will have to consider offering accommodations. Accommodations can be similar to those offered to employees (e.g., face shields or barriers), or can be different ways of accessing your goods or services, such as by online shopping or phone assistance.

If you are considered a commercial enterprise, you may have less of an obligation to offer accommodations, but as a practical matter you should consider doing so, since there's a reason the person is seeking to come onto your premises.

However, in both cases, if an accommodation isn't possible, you should have the ability to bar or remove the person from your premises if they refuse to wear a mask.

Are there any other implementation considerations?

What masking practices will you adopt? Whatever you decide to do should be memorialized in formal policies and procedures that are communicated to all impacted parties. For instance, if you will be requiring masks on anyone entering your premises, including non-employees, you should have clear postings by your entryways and other high traffic areas. Plus, if you are subject to a local mask mandate, you will likely have to require masks under many/most circumstances.

Amongst other things, your masking procedures should address the following questions:

- *Will you require masks or just encourage them?* Encouraging them means that a substantial percentage of people entering your premises may not be wearing masks, which means that the goal of minimizing the risk of transmission could be impaired.
- *Will your mask practices apply differently to different groups of employees?* While having a uniform rule is probably easiest to administer (and is least likely to engender feelings of resentment), it's permissible to apply different practices to different groups of employees. For instance, masks may be less critical for employees who primarily work in individual offices with doors that can be closed versus employees who work side-by-side on an assembly line where physical distancing isn't possible.
- *Will your mask practices apply to employees, but not third parties?* It can be easier and less controversial to manage your employees than managing third parties who come onto your premises. However, if transmission reduction is your goal, both parties wearing masks is the best practice.

- *Will you provide masks to employees and/or third parties?* If you are going to mandate masks, you should be prepared to provide them to anyone who shows up without one, since the only other option is to ask the person to leave your premises.

What are the consequences of noncompliance? Rules without consequences are basically just lip-service, so if you're going to require masks, you should have an enforcement plan. Employees failing to wear masks should be treated like any other violation of your rules and procedures (e.g., warnings, discipline, being sent home, termination, etc.).

Third parties who don't wear masks should be offered a mask, and if they refuse, should be asked to leave your premises. If that becomes necessary, it isn't fair or realistic to expect your front-line employees to police your policy. Instead, that responsibility should fall either on a designated safety compliance person, or on someone in management.

Sample employee mask policy

In the interests of public health and your safety, we have adopted a policy that requires you to wear a cloth or similar face covering anytime you are performing work (unless otherwise set forth in this policy). In addition, for any of our locations that are in cities or states with mask mandates that are stricter than this policy, we will comply with the stricter features of the mandate.

Face coverings are just one protective measure, and are not a substitute for physical distancing, regular hand washing and hand sanitizing, and additional cleaning protocols.

Examples of when face coverings are required include:

- When entering or exiting buildings
- When traveling in a vehicle with another person for work purposes
- When using or traveling through any common areas and shared spaces in buildings, such as:
 - Restrooms
 - Kitchens and kitchenettes
 - Break rooms
 - Elevators
 - Conference rooms
 - Hallways and corridors
 - Shared workspaces and offices
 - Private offices when more than one person is present
 - Any work area where consistently maintaining proper physical distancing isn't possible **[Note to employers: If you are subject to a local mask mandate, this provision may not be compliant. Choosing two states for illustrative and comparative purposes, this statement wouldn't be compliant with either Minnesota's or Colorado's mask orders.]**

Employees are not required to wear face coverings when:

- Working in a private and enclosed office or workspace that is not shared with another individual (although you should have a mask close by in case someone enters the enclosed space).
- Working outdoors and proper physical distancing can be maintained.
- Working in a non-enclosed office or cubicle space, if the office or cube has walls higher than face level and physical distancing can be maintained.
- Eating or drinking in a common dining area or break room that has been set up or marked for proper physical distancing protocols which are being observed. **[Note to employers: If you are subject to a local mask mandate, either or both of these provisions may have to be removed as non-compliant. For instance, the first provision regarding cubes is compliant with Minnesota's mask order, but not Colorado's. The second wouldn't comply with either of those two states' orders.]**

Face coverings must securely cover your nose and mouth, should not be reversed, moved or removed unnecessarily, should not be shared with others, and must be kept clean. Single-use face coverings must be properly and safely discarded after each use.

[Note to employers: Select the option below you will be using. If you are subject to a local mask mandate, make sure your selection complies with the applicable mandate. All three options would comply with Minnesota and Colorado orders, since neither obligates employers to purchase masks for employees or visitors.]

[Option #1] We will provide face coverings to all employees, and, where necessary, will make face coverings available to visitors.

[Option #2] You should feel free to use your own face covering when coming to work. If you do not have a mask or would like us to provide you with one, please contact the Human Resources Department.

[Option #3] Face coverings may be fashioned from household items or made at home from common materials at low cost. They may also be purchased from multiple locations.

Consequences

If you refuse to wear proper face covering, you will be asked to leave the facility immediately, and may be subject to discipline for failure to comply with this policy, up to and including termination of employment.

Inquiries regarding this policy should be directed to the Human Resources Department. Reports of any violations of this policy may be made to the Human Resources Department or any manager.

If you have concerns about adhering to this policy for medical reasons, please contact the Human Resources Department to discuss options. This discussion will usually involve us obtaining paperwork from your medical provider that we will use to evaluate what types of face coverings might work for you.

Sample language for publicly posted signage

If you are subject to a local mandate, choose the signage option that best meets the terms of the mandate. For instance, Option 3 would not satisfy either Minnesota's or Colorado's orders.

<p>Option 1</p> <p>Face Masks Required</p> <p>For the safety of you and our employees we require anyone entering our facilities to wear a facemask.</p>
<p>Option 2</p> <p>Face Masks Required</p> <p>For the safety of you and our employees we require anyone entering our facilities to wear a facemask. If you choose not to wear a mask, you will be asked to leave our premises.</p>
<p>Option 3</p> <p>Face Masks Recommended</p> <p>For the safety of you and our employees please wear a facemask.</p>