

May Your Business Require Employees Not to Mask?

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As more and more businesses mandate that workers return to the workplace, management is wondering about masking requirements. Some business owners feel strongly that they don't want to require their employees to wear masks. Others do not want to create the impression that the location isn't safe for customers and feel that this might be exacerbated by masked public-facing employees. Some feel strongly that it's their right as an employer to impose a no-mask policy for other reasons. Is that a good idea?

If an employee decides to defy the no-mask policy, they may have a legal claim (backed by science) if the business fires them for disobeying the policy. The CDC (Centers for Disease Control) is still recommending public masking. An employee might even bring a whistleblower claim under state law if the employee complains about the safety of the workplace to management and/or health authorities. An employee could also complain to OSHA. Although the Supreme Court struck down the OSHA Emergency Temporary Standard requiring safety measures, OSHA will still enforce a masking policy if it determines that the location is unsafe (at least for certain employees) without masking. Finally, it bears repeating that an employee with a disability who's protected by the Americans with Disabilities Act (or equivalent state law) and whose healthcare provider advises that masking is required should be allowed to mask. That claim (depending upon the exact facts, of course) would make it past a motion to dismiss and cost the business a lot to litigate.

I haven't seen a case on this topic yet, but for these reasons, I wouldn't advise a mandated no-mask policy right now. Why not create a mask-optional policy if the business feels strongly? It might yield very similar results.

[Update on last week's blog on the no-poach agreement criminal trial](#): the jury found the defendants not guilty. However, this was a criminal trial, and it's easier to prove liability in a civil case (remember, O.J. Simpson).

It's still ok to mandate mask-wearing on the job.