

New CDC Guidelines Relaxing Masking and Other COVID-19 Protocols

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

Eric J. Conn, *Conn Maciel Carey LLP* (www.connmaciell.com)

As governors and big city mayors across the country have been allowing indoor masking mandates to expire over the last few weeks, on Friday (February 25th), the CDC unveiled a brand-new approach to assessing COVID-19 risks and setting mask and distancing recommendations. The CDC's old tool, which measured the number of COVID-19 cases to determine the relevant level of virus transmission in each community had lost its usefulness as it rendered nearly the entire country as high-risk (95% of all counties), even as the number of people getting seriously ill had dropped precipitously this year.

CDC's new guidelines measure the impact the pandemic by looking at three factors week over week:

- (1) New cases per capita (as with the prior guidelines; but also
- (2) New COVID-19 related *hospital admissions*; and
- (3) The percentage of area hospital beds occupied by COVID-19 patients.

Each county will have a weekly "COVID Community Level Rating" that is either Low (green), Medium (yellow) or High (orange). Each level/color has recommended mitigation strategies, set in the table below:

What Prevention Steps Should You Take Based on Your COVID-19 Community Level?

Low	Medium	High
<ul style="list-style-type: none">Stay up to date with COVID-19 vaccinesGet tested if you have symptoms	<ul style="list-style-type: none">If you are at high risk for severe illness, talk to your healthcare provider about whether you need to wear a mask and take other precautionsStay up to date with COVID-19 vaccinesGet tested if you have symptoms	<ul style="list-style-type: none">Wear a mask indoors in publicStay up to date with COVID-19 vaccinesGet tested if you have symptomsAdditional precautions may be needed for people at high risk for severe illness

Here is a link to CDC's tool to identify the level in your county:

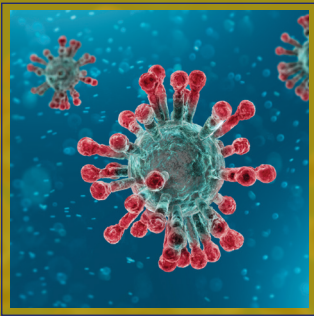
<https://www.cdc.gov/coronavirus/2019-ncov/your-health/covid-by-county.html>

The big news is that CDC recommends the everyone be masked indoors only in those counties that are currently rated "high," and the CDC's new threshold for new cases to constitute High community spread quadrupled from 50 new cases per 100,000 people to 200 cases per 100,000 in the new guidelines. The rationale for the much higher trigger approach is that the as the total number of Americans have immune protection either from vaccination or infection, hospitalization rates and deaths will continue to decline, even if case



1201 Pennsylvania Ave. NW
Suite 1200
Washington, DC 20004
202-991-6300 • www.necanet.org

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counts are higher. As a result of the CDC's new tool to measure community spread, today less than a third of the country is experiencing High community spread, a dramatic shift from a few days ago, when most of the country was still in the High category.

Shifting to evaluate these issues on a more local level, rather than at the state-wide level as it has been, makes a lot of sense, but on the other hand, these new guidelines represent a shift from relying on leading indicators (just case counts) to a metric that is 2/3rds based on lagging indicators (hospitalizations and hospital capacity). If we encounter a future variant that is more virulent or more easily evades immune protections from vaccination or prior infection, the new CDC system could result in too slow of a trigger to reinstitute COVID-19 protocols.

So where does this leave employers? If there are no state or local masking requirements, and there are very few of those left now, and the CDC has designated the county where your workplace is located to be in the low or medium category, you have no obligation to require your employees to be masked in the workplace. Of course, you may continue do so, but you would not have to adhere to CDC's guidelines. And now that federal OSHA is without a COVID-19 regulation, as Secretary of Labor Walsh indicated, OSHA's only option for enforcement of COVID-19 related issues is the General Duty Clause and some existing standards (e.g., PPE and respiratory protection). Throughout the pandemic, whenever OSHA has issued a General Duty Clause citation, it has referenced general compliance with CDC recommendations as the feasible means of abatement the employer could and should have undertaken to address workplace spread of the virus. Accordingly, the big shift in CDC guidance about masks and other COVID-19 protocols should result in the same shift in expectations from OSHA.

The big takeaway is, absent any state or local masking requirements (see, e.g., the status of Virginia OSHA's COVID-19 rule discussed below), we recommend that you evaluate each of your workplace locations on a weekly basis and remain agile to return to mask requirements if and when the COVID Community Level is or reaches the new High Level designation.

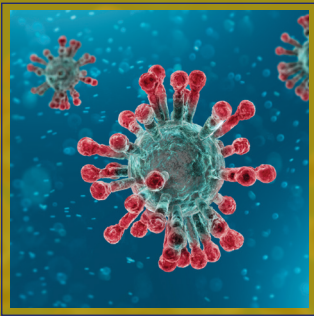
What about Federal Contractors?

For federal workers and contractors, the Safer Federal Workforce Task Force guidelines designated two categories of COVID-19 risk – federal employees and contractors in areas of high or substantial levels of community transmission are required to wear masks in federal workplaces; and in areas of low or moderate levels of community transmission, only the unvaccinated federal contractor employees are required to wear masks. Though there is a national federal court injunction currently barring federal agency enforcement of the vaccination mandate aspect of the Executive Order 14042, but not other COVID-19 safety requirements under the EO, a notice on the [Safer Federal Workforce Task Force Guidelines](#) webpage indicates that all of the requirements under the EO are only currently being enforced on federal property; i.e., proof of vaccination or recent negative test, masking, social distancing, etc. The Task Force website has not been updated yet to conform to CDC's most recent guidance, but we expect that to happen very soon.

VOSH Begins the Process of Withdrawing its “Permanent” COVID-19 Rule

Last Wednesday (February 16th), at the direction of Virginia's new Governor, Virginia OSHA's Safety and Health Codes Board voted to withdraw VOSH's COVID-19 Regulation. The Board's vote came after VOSH recommended that COVID-19 no longer constituted a “grave danger,” the legal showing required to justify an emergency rule. Procedurally, the board vote was just the first step. Next is a 30-day public comment period,





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followed by a public hearing, then a final Board vote. If the measure is in fact repealed after the final Board vote, then Virginia employers would no longer have to require employees who work indoors to wear a face covering; social distance; provide employee training; improve or maintain ventilation systems; or inform the VA Department of Health about outbreaks.

Although this move comes in lock step with Friday's CDC announcement that it is rescinding mask guidance, along with other states like California and New Jersey rescinding their mask mandate, on January 15th Virginia's newly elected Governor Glenn Youngkin issued an [Executive Order](#) instructing the Board to consider whether the standard was still needed. The Rule also contained a sunset provision tied to fed OSHA's COVID-19 Emergency Standard for the healthcare industry, requiring the Board to decide whether the rule was still needed if OSHA withdrew its COVID-19 healthcare standard. Of course, on December 27, 2021, federal OSHA announced it was no longer enforcing the healthcare standard. Finally, Jay Withrow, VOSH's career Director of the Division of Legal Support, cited a University of Virginia forecast calculating the rate of new infections in the state by late April to be below the state's previous low in the summer of 2021 as yet another reason for withdrawing the rule. Moreover, although the Omicron variant is more contagious than previous variants of COVID-19, it is significantly less likely to cause deaths or hospitalizations, per CDC studies. That said, Withrow did not foreclose the opportunity of the Board enacting a new standard, explaining that if the forecasts are wrong, or a new variant of COVID-19 emerges that poses a grave danger, the Board could enact a new emergency standard.

The key take away is VOSH is on the path to joining several other agencies in rescinding COVID-19 rules, but until then, the rule remains in effect and enforceable. We will be sure to keep you posted as that withdrawal moves through the process.

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