

The Lifting of the Mask Mandate in Virginia – What We Know

(June 14 update) Executive Order No. 70 superseded Executive Order No 72 described below. More changes are expected as of June 30, 2021.

For now, Employers should keep in mind the following:

The Final Permanent (COVID) Standard issued by Virginia Department of Labor and Industry (“Virginia DOLI”) is still in effect – at least through the end of June as the Governor has announced he intends to end the state of emergency in the Commonwealth by June 30th.

To determine current mask requirements, Virginia employers should review the following FAQ’s found on the Virginia DOLI website:

FAQ #50: Effective May 29, 2021, covered employers must assure compliance with 16VAC25-220. Except as otherwise noted in the Final Permanent Standard or in these FAQs, 16VAC25-220 generally requires that employees who are unvaccinated or not fully vaccinated practice physical distancing where feasible, or wear a face covering.

Refer to 16VAC25-220-40.H, which provides “When it is necessary for employees solely exposed to lower risk hazards or job tasks to have brief contact with others inside six feet (e.g., passing another person in a hallway that does not allow physical distancing of six feet), a face covering is required.”

However, also see 16VAC25-220-60.C.11 which provides “Employers shall provide and require employees in customer or other person facing jobs to wear face coverings.”

FAQ #54: Fully vaccinated employees in non-healthcare workplaces need not wear face coverings except as otherwise noted (e.g. in schools; places of public transport; correctional facilities; or if an employer determines that the job hazards that employees are exposed to must wear a face covering).

Also note that [Virginia.gov FAQs](#): Employees must wear masks in accordance with the Department of Labor and Industry’s Permanent Standards while at work. However, employers who are subject to the Americans with Disabilities Act or other comparable federal laws must continue to follow mandates that require reasonable accommodations for employees when necessary.

Governor Northam lifted Virginia’s mask mandate to align with CDC Guidance effective May 15, 2021. Virginia’s Universal Mask Mandate had been in place since May 29, 2020 – for nearly one year. This alert is intended to provide your business with a summary of the relationship between the Governor’s Seventh Amended Executive Order No. 72, the Guidelines For All Business Sectors (“Guidelines”), CDC Guidance and the Virginia Occupational Safety and Health Board’s Permanent Standard for Infectious Disease Prevention (“VOSH Standard”). This alert will also discuss some questions that are currently unanswered.

WHAT WE KNOW:

[Seventh Amended Executive Order No. 72](#) (“EO 72” or “Order”) became effective **midnight May 15, 2021**.

Section II of the Order allows Virginia businesses to follow the CDC guidance regarding mask wearing for employees. The most recent CDC Guidance (also linked in the Order) states, “fully vaccinated people no longer need to wear a mask or physically distance in any setting, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.” However, in Virginia, the VOSH Final Permanent Standard for Infectious Disease Prevention has not expired. That will not occur until (i) after the Governor issues an end to the State of Emergency, and (ii) after VOSH reassesses the need for the standard, which reassessment will occur within 14 days after the end of the State of Emergency. The Governor [has indicated](#) the State of Emergency will remain in place at least through June 30, 2021.

Although the Occupational Safety and Health Administration (OSHA) has now also [instructed](#) employers to follow the updated CDC Guidance, Virginia is what is called a “State Plan State,” which means that OSHA has authorized Virginia to regulate occupational safety and health within the Commonwealth. The state has exercised its authority and issued the VOSH Standard, and it is that standard that employers must look to in addition to EO 72. Pursuant to VOSH, employers have a legal obligation to provide “safe employment and a place of employment which is free from recognized hazards,” including COVID-19.

For Virginia Employers, this means:

1. Fully vaccinated employees of all businesses in non-healthcare settings do not need to wear a mask at their place of employment.
2. Fully vaccinated employees of all businesses in non-healthcare settings do not need to physically distance.
3. **Employees (of all businesses) who are not fully vaccinated must continue to wear masks and physically distance.**
4. Employers may require all employees to wear masks while in the workplace, or at least keep such stricter requirements in place until all employees are fully vaccinated.
 - For instance, employers may want to implement a mandatory mask policy to protect their employees from customers who may not be fully vaccinated, as this goes to their duty of keeping a safe workplace.
 - If employers choose not to require their employees to wear a mask at the workplace while interacting with the general public, employers should consider the risks of such a decision and the effects it may have on their business continuity plan.
5. Virginia Department of Labor and Industry (“VDOLI”) updated their [Frequently Asked Questions](#) on May 19, 2021 regarding the VOSH Standard. VDOLI has clarified that both VDOLI and the Department of Health agree that fully vaccinated non-healthcare employees can safely resume indoor and outdoor workplace duties without wearing a face covering or physically distancing.
 - Note: “fully vaccinated” for the purposes of VOSH Guidance, refers to people who have been vaccinated for COVID-19 ≥ 2 weeks after they have received the second dose in a 2-dose series (Pfizer-BioNTech or Moderna), or ≥ 2 weeks after they have received a single-dose vaccine (Johnson & Johnson [J&J]/Janssen).
6. The VOSH Standard still applies for aspects such as the infectious disease preparedness plan, hazard assessments, training certifications, return to work protocols, etc.

7. Businesses must still follow the requirements in the VOSH Standard [pertaining to notifications](#) to the VDH and Virginia Dept. of Labor and Industry for positive cases and for recording positive cases that are deemed to be work related.
8. **In order for employers to comply with the directive that unvaccinated employees must still wear masks in places of business, employers must know which employees are vaccinated and which employees are not.** Businesses can ask employees to show proof of being “fully vaccinated” pursuant to [Equal Employment Opportunity Commission \(EEOC\) Guidance](#) which was last updated on December 16, 2020 prior to the CDC’s updated guidance for fully vaccinated individuals. Employers must be careful not to obtain health related information if they ask for proof of vaccination. Employer questions beyond requiring proof of vaccination may be considered a “disability-related inquiry” which are prohibited.
9. Businesses can implement a mandatory vaccination policy provided that it can show that an unvaccinated employee would pose a direct threat to due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. 1630.2(r). Employers who implement such a policy should be aware of the pros and cons of such implementation which our team addressed [here](#).

WHAT REMAINS UNCLEAR (FOR NOW):

- **Whether businesses must (still) use certain physical distancing practices.**
 - The [Guidelines for All Business Sectors](#) is incorporated into and required by the Order. These Guidelines still state that businesses should:
 - Limit in-person work-related gatherings and trainings, but that if such gatherings/trainings should occur, businesses should limit the number of employees in attendance and use physical distancing practices.
 - For Social Gatherings, such as office parties, etc. reconfigure seating areas to allow six feet of physical distance between individuals.
 - What is unclear is whether these guidelines still govern if there are both vaccinated and unvaccinated employees present.
- **Whether businesses must let employees continue teleworking, especially if six feet of distance cannot be maintained between unvaccinated workers.**
- The Guidelines for All Business Sectors provides that it is a “Best Practice” to encourage telework wherever possible. Where it is not feasible, businesses should temporarily move or stagger workstations to ensure six feet of separation between co-workers and between members of the public.

NOTE: There is a provision in the Order that states that where conflict occurs with other state requirements, the Order governs.

However, although the Order states that it takes precedence, it does conflict with the requirements of the VOSH Standard (a “permanent rule”) and therefore questions have been raised as to whether or not the Governor’s order can legally take precedence. To date, there has been no clarification from either the Governor’s office or the Virginia Attorney General. However, the state Agency’s guidance from the Department of Labor and Industry has indicated that that Agency is following the Governor’s Order. Employers will need to decide for themselves whether they determine to follow the harsher VOSH Standard or follow the Agency’s guidance which is to implement the Order even though some argue that it is contrary to the “law.” Please return to our website for updated information as this situation develops.



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