

## **Biden Mask Mandate Fills Gap, But Enforcement Still Murky**

By **Linda Chiem**

*Law360 (February 1, 2021, 9:11 PM EST)* -- The Biden administration has delivered a long-anticipated federal mask mandate seeking to smooth out a patchwork of state and local requirements and company policies, but the order could bring its own share of controversy, especially if authorities opt to charge violators or place them on no-fly lists.

Effective 11:59 p.m. Eastern time Monday, all U.S. travelers must wear face masks on planes, ferries, trains, subways, buses, taxis and ride-shares — or face the threat of fines and penalties under the new policy, augmenting the arsenal available to transportation providers and agencies to curb the spread of COVID-19.

The U.S. Centers for Disease Control and Prevention's late Friday order applies to passengers and workers in all modes of public transportation, as well as hubs such as airports, bus and ferry terminals, train and subway stations, seaports and ports of entry.

The policy builds on a Jan. 21 executive order from President Joe Biden by making it a violation of federal law to refuse to wear a mask while using public transportation. The policy comes with the threat of civil fines and criminal penalties, but experts say it remains to be seen just how robust enforcement will be.

### **What Changes Under the Mandate?**

After nearly a year of mixed or lax enforcement in the absence of a federal mandate, the CDC order sends a strong signal that the federal government is fully supporting commercial airlines, trains, buses and other transportation providers that have already implemented their own face mask policies, experts say. Those rules now have more teeth.

"Relative to enforcement, it will be easier to say, 'The feds say we have to require this,' rather than just, 'It's our policy to require this,'" said Shayna M. van Hoften, chair of Hanson Bridgett LLP's public transit and transportation practice group. "From my perspective, the federal government is giving them cover, and also is providing new and better guidance on when exceptions apply for disability-related and similar reasons."

The mask mandate does not apply to children under the age of 2, people with a disability who cannot safely wear a mask because of their disability, as defined by the Americans with Disabilities Act, and

those for whom a mask would create a risk to workplace health, safety or job duty, as determined by relevant workplace safety guidelines or federal regulations, according to the CDC.

Mask-wearing has become a particularly fraught issue at airports and on commercial flights, where confrontations between passengers and flight crews have been recorded and widely shared on social media.

"The industry has long pushed for a federal mask mandate, and while airlines have had very robust and thoughtful policies regarding the wearing of masks, having the failure to cooperate with them be an underlying federal violation — that gives airlines, flight crews and others the necessary tool in their regulatory enforcement arsenal," Anita Mosner, co-chair of Holland & Knight LLP's transportation industry group, told Law360. "To some extent, it will help drive compliance by actually being able to cite to something in black and white."

Amna Arshad, special counsel in Freshfields Bruckhaus Deringer LLP's aviation group, agreed, saying, "Airlines have been, since the beginning of the pandemic, trying to innovate in novel, unique ways for the benefit of their customer base to make travel safe."

"This is one way the government can support efforts at compliance," she said. "It gives airlines' mask policies a little more teeth because of the fact that passengers have not been federally required to wear masks."

Beyond potentially being banned from traveling on one specific carrier, violators of the mandate could now be red-flagged across other modes of transportation.

"The reality though is that there is now more risk for an individual who does not want to wear a mask when flying, riding a train or taking an intercity bus than in 2020," said Michael D. Wong, a partner with SmithAmundsen LLC. "Instead of simply being banned by one airline or transporter, they could face federal criminal charges and be put on a no-fly list, etc. While individuals could then legally challenge it, in all likelihood, it would be some time before it has progressed through the court system."

The CDC said in a footnote that it reserves the right to enforce its order through criminal penalties but doesn't intend to rely on them, as it is strongly encouraging and anticipating widespread voluntary compliance. However, it is still unclear what the minimum or maximum penalties would be for violators.

On Jan. 13, the Federal Aviation Administration adopted a stricter policy concerning unruly airline passengers, saying those who interfere with, physically assault, or threaten to physically assault aircraft crew or anyone else on an aircraft could face fines of up to \$35,000 and imprisonment.

The agency said the rule was in response to increased incidents involving passengers refusing to wear masks and to the Jan. 6 riot at the U.S. Capitol.

"The airlines were left on their own. It's almost like the policy at a restaurant — 'no shoes, no shirt, no service' — where it was 'no mask, then no flying on my airline,'" Eduardo A. Angeles, managing director and senior counsel in Clark Hill PLC's government and regulatory affairs group, told Law360. "The theory is you're going to get the attention of people who want to politicize this mask [or] no-mask bit by saying, 'Hey, you're violating the law, and we're going to come after your pocket or come after your freedom.'"

### **What Will Enforcement Look Like?**

The U.S. Department of Homeland Security's Transportation Security Administration will take the lead on enforcing the requirement, which covers the domestic network of airports; passengers and crew members aboard planes operated by domestic and foreign carriers with inbound flights to the U.S.; and surface transportation modes such as passenger rail and public bus systems, as well as commercial buses operating on scheduled fixed routes, like Greyhound.

Various U.S. Department of Transportation agencies, including the FAA, Federal Transit Administration, Federal Railroad Administration and Federal Motor Carrier Safety Administration, have updated their websites with FAQs about the new requirements.

But much of the responsibility will still fall to companies and operators themselves.

Thomas P. Gies, a labor and employment litigation partner with Crowell & Moring LLP, said transportation companies will have to come up with a thoughtful compliance plan since there are areas where enforcement is still left to the discretion of the business.

For example, issues left to be ironed out include what kinds of masks should be worn, how long the masks can come off while people are eating, and what to do about those who ask for exemptions on short notice.

"The most obvious legal implications of these interpretative questions involve claims of discrimination and selective enforcement," Gies said. "Another compliance issue may be responding to individuals who may be inclined, for ethical or political reasons, to resist the requirement."

Some companies may face considerable resistance from employees who don't want to be put in uncomfortable situations, Gies added.

"That said, most companies typically don't relish having their employees take on what amounts to a law enforcement function," he said. "The support of labor unions and other worker rights advocates will be critical."

Wong of SmithAmundsen said the part of the order that references disabilities is also significant because, before this, "the EEOC and federal government has not exactly come out and stated a clear position on addressing the implications of face masks and disabilities."

Yet the order states that refusing to wear a mask based on disability is a "narrow exception" that applies to those who, for example, do not understand how to remove their mask due to cognitive impairment, cannot remove it on their own due to dexterity/mobility impairments, cannot communicate promptly to ask someone to remove it due to speech impairments or language disorders, or cannot wear one because doing so would impede the function of assistive devices and technology.

--Editing by Philip Shea and Jill Coffey.