

A human rights approach to mask-wearing during the COVID-19 pandemic


A message from B.C.'s Human Rights
Commissioner

Updated Apr. 23, 2021

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NOVEMBER 2020 (UPDATED APRIL 2021)

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British Columbia's
Office of the Human Rights
Commissioner

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**To the Indigenous peoples of this
place we now call British Columbia:
Today we turn our minds to you and
to your ancestors. You have kept
your unceded homelands strong. We
are grateful to live and work here.**

MESSAGE FROM B.C.'S HUMAN RIGHTS COMMISSIONER, NOVEMBER 2020 (UPDATED APRIL 2021)

A human rights approach to mask-wearing during the COVID-19 pandemic

AS THE GLOBAL PANDEMIC CONTINUES, many of us are weary of worry.

Throughout the pandemic, we have worried about our parents and grandparents getting sick, about our children growing up in isolation and about our own risk of illness and loneliness. We continue to worry about our neighbours falling into poverty, about the well being of community members facing homelessness and about the state of job security and the economy.

Some of us are also weary of wearing masks. The question of wearing cloth or disposable face masks in public spaces to minimize the spread of COVID-19 has become a controversial topic. Perhaps because the pandemic has disturbed so much of our lives for so long, whether or not to wear a mask may seem like one of the few things we can control.

And it is: for people who are able to wear masks, following current public health guidance is an important way they can help keep others as safe as possible, especially the most marginalized and medically vulnerable people among us.

Indeed, the surest way to guard against inequality and injustice during the pandemic is to ensure that all of our actions are evidence-based.

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At the beginning of the pandemic, I issued a [policy statement on human rights during the COVID-19 pandemic](#). This provided guidance to employers, landlords, service providers and individuals about how to ensure human rights are protected and balanced against urgent public health priorities.

As I wrote in that statement, human rights principles must be at the core of our response to the pandemic. Following health and safety guidelines to prevent and reduce COVID-19 transmission should not generally cause concern or give rise to a complaint under [B.C.'s Human Rights Code](#) except where someone has a medical condition or disability that makes it difficult for them to follow the guidelines.

This advice applies to wearing masks. We need to ensure there is balance between the rights of people who cannot wear a mask on the basis of [protected grounds](#) in B.C.'s *Human Rights Code* (such as disability) and the public health risks, especially to people who are at risk of more severe illnesses.

On Nov. 24, 2020, B.C.'s Minister of Public Safety and Solicitor General [ordered mandatory mask-wearing](#) in all indoor public spaces, including in retail stores and in workplaces (in shared common areas of office buildings). This was reiterated in a [subsequent order](#) on Jan. 8, 2021. The orders include a number of critical exemptions which I urge duty bearers to respect.

The following people are exempt from the orders:

- children under 12 years old¹
- anyone who is unable to wear a mask because of a health condition or impairment (whether that health condition or impairment is physical, psychological, behavioural, cognitive or emotional)
- anyone who is unable to put on or remove a mask without help from another person

Masks are particularly important as some of us are more vulnerable to COVID-19 than others due to conditions that could result in more severe illness or complications from the virus—for example, the elderly and people who are immune-compromised or who have underlying medical conditions.

Advice as you develop mask-wearing policies

Now that duty bearers—that is, those who have a legal obligation or responsibility to respect, protect and fulfil human rights, including employers, housing providers and other service providers—are implementing mandatory mask-wearing policies and procedures in their work, shared living and service spaces to help reduce the risk of spreading COVID-19, here is my advice:

I strongly encourage you to take into account the protected grounds covered under B.C.'s *Human Rights Code* by ensuring that exemptions and accommodations are clearly articulated within your policies. For example, you may need to state that your policy does not apply—or applies differently—to people with a medical condition, such as a severe respiratory issue, or a disability that inhibits their ability to wear a mask, such as being unable to place or remove a mask without assistance.

Masks could also be a barrier to people with hearing disabilities who rely on lip reading or facial expressions to communicate. They may also not be suitable for children and adults with certain physical, intellectual or developmental disabilities.

The [provincial health directive](#) supports this approach by stating that people “who cannot put on or remove a mask on their own are exempt.”

If someone identifies a reason they are unable to wear a mask that is based on a protected ground under B.C.'s *Human Rights Code* (again, such as disability), you may have a duty to accommodate their needs.

An inability to access or use a mask or other equipment or an inability to follow a health and safety procedure must not lead to automatic negative consequences such as employee discipline or termination, complete denial of service or eviction from housing. If someone is not wearing a mask, I recommend engaging with the person to see if they are unable to wear a mask based on a protected ground *before* considering refusal of entry or service.

The duty bearer should first work with the individual to come up with an accommodation that respects their human rights as well as public health directives.

¹ It is important to note that indoor spaces in schools are not considered indoor public spaces, and that masking orders differ. On Mar. 31, 2021, the order for mask use in schools was [updated](#) such that all students in grades four through 12 are required to wear a mask in indoor areas.

This does not apply if someone is able to wear a mask but chooses not to as a matter of personal preference.

I strongly recommend that duty bearers proactively develop options to accommodate those who cannot wear a mask or face covering. Some examples of accommodations include:

- offering curbside pickup, which may allow a person to receive a retail service even if, because of their disability, they are unable to wear the mask required to enter a store
- determining whether an employee can work remotely
- increasing ventilation in enclosed spaces

Where there is a longer-term relationship between the duty bearer and the individual — such as in the case of an employer and employee or a housing provider and tenant — duty bearers may need additional information to support an accommodation. However, medical information should only be sought to the extent necessary to determine the limitations and restrictions an individual has in relation to mask wearing and how they can be accommodated. Employers and housing providers must keep this medical information confidential and share it only to the extent necessary to implement the accommodation.

Where the relationship is brief, I recommend duty bearers accommodate those who are unable to wear masks without requiring them to provide medical information, as this is sensitive personal information.

Notably, in an April 2021 decision,² the BC Human Rights Tribunal stated that they have “not yet had the opportunity to decide how much information a customer must give a retailer in order to qualify for an accommodation.” However, a person filing a human rights complaint about being unable to wear a mask due to disability will have to inform the Tribunal of their particular disability.

No one should have to be exposed to the virus — or excluded from public spaces — because others refuse to follow public health directives merely as a matter of personal choice.

In addition, duty bearers should:

- clearly describe possible exemptions or accommodations in the mask wearing policy and provide training for employees who are most likely to come into contact with people unable to comply with the mask wearing policy. This will ensure that employees fully understand the limits of a mandatory mask policy in relation to their organization’s human rights responsibilities and the need to accommodate in some situations
- implement policies that focus on education, rather than just enforcement
- visibly display mask wearing policies, including exemptions and accommodations, throughout the work space, common housing areas or service locations so that people who are unable to wear masks are not harassed by other employees, tenants or service users
- provide free masks for those who do not have access to masks

There are limits to how far duty bearers have to go to accommodate the needs of employees, tenants

² *The Customer v. The Store*, 2021 BCHRT 39.

or clients. Duty bearers should take every step possible to address the needs of people who require accommodation, unless taking those steps would amount to “undue hardship” for the duty bearer.

Undue hardship depends on the circumstances of each case. For example, certain duty bearers may find some accommodations to be inordinately expensive. Duty bearers can claim undue hardship as the reason why certain policies or practices need to stay in place, even though they may have a negative effect on the people they serve. Duty bearers will need to provide “sufficient and objective” evidence to prove undue hardship in the context of defending a human rights complaint.

We have choices: now and always, we can choose to be compassionate, kind and respectful of our rights and differences.

Employers and housing and service providers should ensure any restrictions on employees, tenants and clients are consistent with the most recent advice from public health officials and that they are justified for health and safety reasons.

Advice for those with medical concerns about mask-wearing

As duty bearers and rights holders, we must recognize our mutual responsibility to keep each other safe, and we must do so in a way that respects and promotes human rights for all. If you have a medical issue and are concerned about how the requirement to wear a mask might impact you, here is my advice:

Talk to a medical professional to get their advice and suggestions. They will be able to work with you to determine what your specific needs and mask-wearing limitations may be.

When a mandatory mask policy is in place, consider notifying the person responsible for upholding the policy if you are unable to wear a mask due to a protected ground under B.C.’s *Human Rights Code* in order to start a conversation about potential accommodations.

Ultimately, no one should experience harassment or other discrimination as a result of the response to COVID-19 due to a disability or medical condition. Additionally, no one should have to be exposed to the virus—or excluded from public spaces—because others refuse to follow public health directives merely as a matter of personal choice.

In the face of a continuing global pandemic, what we do as individuals, families, organizations and communities has a profound impact on the greater good. Our collective action is essential to uphold human rights for all.

While right now many of us may feel aspects of our lives are beyond our control, we do have choices: now and always, we can choose to be compassionate, kind and respectful of our rights and differences.

Sincerely,




Kasari Govender
B.C.’s Human Rights Commissioner

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