

Businesses That Mandate Masks For Employees And Customers Need To Consider ADA Issues

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As more businesses begin to reopen, businesses face many difficult questions about requiring employees and customers to wear protective face coverings? However, businesses should not forget that, despite the onset of COVID-19 and drastic measures taken by local, state, and federal governments, the provisions of the Americans with Disabilities Act (ADA) still apply to employers and places of public accommodation. What do you need to know about this issue to avoid legal liability?

The Basics About Masks

For most Americans, this is the first time they have been asked to wear masks publicly. According to psychologists, a mask mandate may result in unintended consequences because “people naturally rebel when they’re told what to do, even if the measures could protect them.”

Regardless of personal misgivings, the Centers for Disease Control and Prevention (CDC) recommends as of May 12 that **all** individuals wear cloth face coverings in public settings where social distancing measures are difficult to maintain, especially in areas of significant community-based transmission. Almost 40 states have face covering requirements for certain sectors of employees or all individuals who go out in public. Numerous cities and counties have adopted additional face covering requirements with many more strongly recommending face coverings in public if not outright requiring it.

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The myriad of laws and guidance concerning face coverings come with their own enforcement mechanisms, specifics, and expiration dates, only adding to the stress employers may feel when determining how to address protecting their employees and customers. The below serves as general guidance and is divided into **considerations for employees** and **considerations for customers**, specifically regarding ADA protections.

Note: Some of the suggestions below may already be required by local and/or state law, so please contact your local Fisher Phillips attorney to verify your specific requirements and options.

ADA Considerations For Employees

The EEOC recently re-released guidance originally implemented during the H1N1 pandemic which states that employers may require employees to wear personal protective equipment such as gloves and masks during a pandemic. However, if an employee with a disability requests a reasonable accommodation under the ADA, the employer must still provide one.

An employer, however, may deny even a reasonable accommodation if it is an undue hardship or a direct threat. Undue hardship may be based on financial hardship, significant disruption to business operations, or hardships imposed on co-workers. The undue hardship determination is extremely fact-specific and the employer must prove it in litigation. Consequently, you should contact your Fisher Phillips attorney if you believe that the reasonable accommodation the employee has requested will be an undue hardship.

Employees may assert that they have a medical condition that prevents them from wearing a mask. You must remember that you have an obligation to engage employees in the interactive process to determine any reasonable accommodations. Reasonable accommodations for employees who cannot wear masks may include things like reassignment of positions so that they are not near other employees or work from home arrangements, if possible.

Generally, working from home is not a reasonable accommodation unless all the essential functions of the employee's position can be performed from home. Employers who choose to mandate masks must: (1) have a clear policy; (2) know their policy, which involves ensuring employees and supervisors are aware of and knowledgeable about the policy; and (3) uniformly enforce their policy, while being cognizant of and responsive to ADA accommodations.

ADA Considerations For Customers

As mentioned, the CDC recommends that all individuals wear masks in public, which would include retail businesses. Additionally, state and local government agencies may require masks be worn in public. CDC guidance provides several exemptions for who should **not** wear masks: "Cloth face coverings should not be placed on young children younger than 2 years of age, anyone who has



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trouble breathing, or is unconscious, incapacitated or otherwise unable to remove the cover without assistance.”

Businesses who want to follow the CDC’s guidance may require customers to wear masks to protect other customers and employees. However, they should be aware of the potential backlash from such a policy. Some individuals may see mandated masks as an affront to their personal liberties. Others may think the government guidelines are too stringent. Still others may refuse thanks to psychology — they just don’t like being told what to do.

Importantly, in deciding to mandate masks, businesses must provide reasonable accommodations for customers who are unable to wear masks due to a disability, *even during a pandemic*. The Department of Justice (DOJ), which is tasked with enforcing the ADA in the context of public accommodations has not explicitly addressed face covering mandates and COVID-19. However, on April 27, the DOJ issued a memorandum directing United States Attorneys to “be on the lookout for state and local directives that could be violating the constitutional rights and civil liberties of individual citizens,” and on April 9, the Assistant Attorney General for the Civil Rights Division wrote an op-ed emphasizing that the “[t]he Justice Department’s pandemic-related work includes enforcing disability-rights laws....” In other words, the ADA is still fully functional and applicable during COVID-19.

Generally speaking, the ADA requires businesses that are open to the public to provide individuals with disabilities equal access to business’s goods and services. What this means is that businesses that are open to the public must make reasonable modifications to their policies, practice, and procedures to ensure equal access for individuals with disabilities. As a result, business must: (1) include reasonable accommodations as integral components of their policies and procedures; and (2) ensure that all customers have equal access, including those who cannot wear a mask. However, if an individual’s refusal to wear a mask is based on mere social objection, employers may refuse entry.

For retailers and grocery stores, reasonable accommodations might include online or phone ordering and curbside/contact-free pickup, specified shopping hours, or by notifying them they can enter at another time if they are wearing a full clear face shield. Businesses can tailor their accommodations based on their functions while still providing enhanced levels of safety and should be advised that there is no one-size fits all approach. However, businesses should remember that their websites and any apps are required to be accessible to individuals with disabilities under Title III of the ADA.

Signage can also further support a business’s goal of enhanced protections. You can post notices at all entrances stating that customers must wear masks, and that the business reserves the right to refuse entry if the requirement is not followed. These notices should also contain a statement about



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requests for accommodation to avoid ADA-related violations. Your Fisher Phillips attorney can help you tailor these notices and answer any other questions you may have on a decision to require masks.

Additionally, businesses should avoid requiring guests to provide doctor's notes if they cite a medical condition makes it difficult to wear a mask. Individuals will likely not be carrying a doctor's note with them, and some state and local public health orders prohibit requiring medical documentation. Further, while the ADA does not specifically address face masks, the Department of Justice previously provided some guidance on this issue in the context of requiring medical documentation for individuals with service animals entering places of public accommodation. It concluded that requiring "persons with disabilities to obtain medical documentation and carry it with them any time they seek to engage in ordinary activities of daily life in their communities" would be an "unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA." It is likely the Department of Justice would interpret the ADA similarly in the context of requiring medical documentation in the context of face masks.

Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our Post-Pandemic Strategy Group Roster.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.