

Face masks and facial coverings

Guidance for clients during the COVID-19 pandemic

Despite the widespread availability of vaccines to combat COVID-19, there are still many persons who have not been vaccinated or cannot get vaccinated. In fact, as of August 5, 2021, only 49.8% of the U.S. population has been fully vaccinated. In addition, the number of COVID-19 is increasing at a rate not previously seen in months.

Thus, some states have re-imposed facial covering requirements. We anticipate this number to increase and we will update this guidance every few weeks.

STATE AND LOCAL ORDINANCES

As of August 5, 2021, there was no federal requirement that employees wear masks, except for federal employees and contractors. The [Centers for Disease Control \(CDC\) recommends](#) that “unvaccinated people wear a cloth face covering in public settings, at gatherings and events, and anywhere they will be around other people.” In addition, the CDC is clear: face shields are not recommended as a substitute for masks.

Regarding states and localities, the mask/face covering rules and regulations change frequently. As of August 5, 2021, Washington, DC, Hawaii, Louisiana and Nevada require all employees to wear masks or face coverings. In addition, many cities and other localities have such requirements. Many others have recommended usage. As you may imagine, each state has different requirements regarding which employees and businesses are affected, so it is important to ascertain which laws apply to your individual situation. Littler Mendelson P.C. provides regular state updates on mask/face covering rules at [this link](#). We encourage you to stay apprised of the local requirements wherever you have employees.

NOTE: As noted above, the CDC does not recommend face shields in lieu of cloth masks. Thus, we strongly discourage allowing employees to wear just a face shield if masks are required.

EMPLOYER POLICIES

Some businesses, even in the absence of state or local requirements, have chosen to continue requiring face masks or coverings. Employers are free to do this; they may enact whatever policy they want to, presuming that policy isn't in conflict with federal, state or local law.

Should an employer do this, they should be very clear about the details of the policy, including which employees are affected and what type of mask or face covering is required. Further, [legal guidance](#) indicates that an employer can, and likely should, designate mask/face coverings as Personal Protective Equipment (PPE).

EMPLOYEES' REFUSAL TO WEAR MASK OR FACE COVERING

Whether the requirement is based upon a statutory requirement or an employer's own policy, a business must decide how it will respond if an employee refuses to wear a mask or face covering. This section will focus on two scenarios: employees who prefer not to wear a mask and employees who request a disability accommodation to be exempted from the policy.

First – the employee who just doesn't want to wear the mask. Employers may choose to address this as a performance issue, as they might do with an employee that chooses to not follow a dress code or attendance policy. There is no need to have this employee call Sedgwick.

However, the second scenario can be trickier. Presume you have an employee who, because of an underlying health condition (e.g., asthma) refuses to wear the mask because it would unduly inhibit her breathing. By telling you this, the employee has invoked her rights under the Americans with Disabilities Act. Thus, you (or Sedgwick) must interactively dialogue with her to explore this with her further to determine whether there are options that might reduce or eliminate her barriers to wearing the mask. And, while every situation is different, options like extended breaks or different shifts may provide a solution. Please refer that employee to call Sedgwick if accommodation management is part of your current service offering.

When the employee calls, we will work with her to better understand the barrier preventing her from wearing a mask. If, after the dialogue, the employee indicates the barrier hasn't been overcome, and she has a medical reason why she can't wear the mask (in this case, asthma) we would process as an accommodation request and require medical documentation pursuant to the standard ADA accommodation process.

It is important that the process for COVID-19 mask or face covering accommodation be handled consistently, and we may need guidance from you on how you want to handle these situations. For example, will you require documentation that the underlying condition renders medically infeasible the employee's wearing of the mask, as explained above? **NOTE:** As of August 5, 2021, Nevada is the only state that prohibits requiring documentation; this list may change as time goes on.

Also, should you not be able to come up with an alternative accommodation, do want to offer the employee an unpaid leave? Or perhaps have them file for short-term disability (STD) claim?

For some judicial perspective, the issue of Personal protective equipment (PPE) was addressed in the recent case of *Sharbono v. Northern States Power Co.* 8th Cir., 2018. In that case, an employee who worked as a lineman for a power company could not wear the required steel toed boots due to having had several of his toes amputated. He requested an accommodation to be allowed to return to his lineman position without the need to wear the boots. After an accommodation process designed to consider alternatives the company and the employee couldn't come up with an alternative, and the court ruled in the employer's favor.

CONCLUSION

Regarding COVID-19 and the wearing of masks or face-coverings, it is important that an employer be aware of its statutory obligations, as well as the process for handling employees who refuse to wear the masks. If you have any questions about this, please reach out to your Sedgwick client services representative.