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# Face masks and facial coverings

## *Guidance for clients during the COVID-19 pandemic*

The COVID-19 pandemic has created many challenges for employers and health officials. And, although many businesses are closed, those that remain open are grappling with how to keep employees and non-employees safe. One of the most common steps that is being implemented is the requirement that employees (especially those who interact with the public) to wear masks or face coverings.

In general, these requirements come from one of two sources:

- A state (or local) ordinance, and/or
- An employer's own policy

This paper will look at both types of rules, as well as provide some ADA considerations for when an employee refuses to wear a mask.

### STATE AND LOCAL ORDINANCES

As of July 23, 2020, there was no federal requirement that employees wear masks, though on April 10, 2020, the [Centers for Disease Control recommended](#) that “everyone wear a cloth face covering in public settings where other social distancing measures are difficult to maintain, especially in areas of significant community-based transmission.”

Regarding states and localities, the mask/face covering rules and regulations change frequently. As of July 23, 2020, 40 states, the District of Columbia and dozens of localities had enacted laws that require at least some workers wear masks or face coverings. Many others have recommended usage. As you may imagine, each law has different requirements regarding which employees and businesses are affected, so it is important ascertain which laws apply to your individual situation. Littler Mendelson P.C. provides regular state updates on mask/face covering rules at [this link](#).

If your business falls within the jurisdiction of one of these state or local ordinances, you must follow the law's requirements.

### EMPLOYER POLICIES

Some businesses have chosen not to wait for legislation and instead have implemented their own policy requiring the wearing of face masks or coverings — without regard to whether they are required to do so by law. 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 COVERINGS

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:** Delaware, Connecticut, Maine, Massachusetts, Nevada, New Jersey, New York State, North Carolina, Pennsylvania and Virginia prohibit requesting medical documentation in such a situation (and as of June 29, 2020 are the only states that have such a prohibition).

Also, should you not be able to come up with an alternative accommodation, do you 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.