



CDC Recommends Face Masks: What Employers Need To Know

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Now that the U.S. Centers for Disease Control (“CDC”) has recommended that the public wear cloth face masks to help prevent the spread of COVID-19, we anticipate that employees will increasingly seek to use face masks in the workplace. Employers that do not normally provide face masks or other protective equipment should keep in mind that the Occupational Safety and Health Administration (“OSHA”) has published standards governing personal protective equipment (“PPE”) and respiratory protection that can apply when an employee asks to wear a face mask, even *voluntarily*. Although we do not anticipate that OSHA will be aggressively chasing employers that are making the best of a difficult situation *in good faith*, we wanted to provide you with FAQ guidance on the applicable standards, so that you do not get inadvertently tripped up on compliance with applicable requirements. You can also review our updated FAQs regarding other OSHA-related concerns arising in response to COVID-19 here.

Q: I keep reading about different types of face masks, such as N95's and surgical masks. Are they different? Does it matter?

A: Yes, they are different, and it does matter. Employers need to know whether OSHA considers a particular face mask to be a “respirator.” What makes a face mask a “respirator” is a little complicated. But, in brief, a respirator is a device that protects you from inhaling dangerous substances, such as chemicals and infectious particles. It is tight-fitting and should not allow air to flow between the sides of the mask and the user's

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face – the air flow should be through the filtering media only. There are many types of face masks that OSHA considers respirators, including the now famous N95 respirator. OSHA refers to the N95 respirator and other filtering faceplate masks as dust masks. Face masks that are respirators are subject to both: (1) the OSHA PPE Standard and (2) the OSHA Respiratory Protection Standard, which itself has different requirements for different types of respirators.

However, a loose-fitting mask that is not intended to filter air, including what OSHA refers to as “surgical” masks, are not considered respirators. These types of face masks would likely be subject to the OSHA PPE Standard (at least when the employer requires their use), but not the OSHA Respiratory Protection Standard. As discussed below, meeting OSHA Standards may be more involved than employers might expect.

Q: Are the “do it yourself” (DIY) cloth face masks referred to by the CDC regulated by OSHA? Are they “respirators”?

A: Possibly, yes. As of now, OSHA has not weighed in on the CDC’s new guidance, but employers should keep in mind that OSHA may consider a DIY mask to be a respirator if it fits snugly against the wearer’s face, so that the only air coming in or out would be filtered by whatever the employee selected as a filter, particularly in workplaces where respirators are already required, but unavailable. If air can come in between the wearer’s face and the DIY mask, it is probably not a respirator. Loose-fitting surgical or medical masks, for example, are not respirators because they allow air to flow around the mask itself.

Our recommendation is that employers comply with the voluntary use requirements described below if employees ask to use DIY cloth face masks (or face masks that are already considered respirators, such as N95’s and other dust masks) in response to the CDC’s recommendations. Regardless of whether it would be considered a respirator, employers may also be required to evaluate whether the employee’s DIY cloth face mask creates other workplace hazards. For example, if an employee is not cleaning a mask, is having problems breathing while wearing a mask, or is otherwise creating a safety concern, an employer should respond appropriately.

Q: Can an employer *require* employees to wear face masks in the workplace?

A: Yes, of course. But the emphasis in the question is on “require” for a reason. Many face masks, including dust masks and the N95 respirator, are subject to requirements of both: (1) the OSHA PPE Standard and (2) the OSHA Respiratory Protection Standard.



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Under the OSHA PPE Standard, which applies to all PPE (e.g., face masks, gloves, smocks, etc.), before an employer can require an employee to put on PPE, such a face mask, the employer must, among other things, perform a hazard assessment, consider other alternative options to protect employees (e.g., install plexiglass barriers between the worker and the customer in a retail business, as some grocery stores have done), identify and provide appropriate PPE for employees, train employees in the use and care of PPE, clean and maintain PPE, including replacing worn or damaged PPE, and prepare a plan that is periodically reviewed, among other steps, including employee specific requirements. The employer pays all costs for the PPE as well.

The requirements of the OSHA Respiratory Protection Standard are even more onerous. The employer also needs to provide training, work with employees to make sure that the masks fit correctly, and provide medical exams, among many other requirements. The gist of the issue is that employers should reduce the possibility of inadvertently creating additional hazards for employees by providing equipment that is not appropriate, does not fit, or is incorrectly used. Possible issues can be as simple as making sure that employees do not infect themselves when taking off a mask. An additional concern is that employees with respiratory conditions or other medical issues may not be able to physically tolerate wearing a mask, which is why a medical exam needs to be provided at the employer's expense.

Before *requiring* employees to use face masks, employers need to review OSHA's applicable standards and follow them.

Q: Are there different requirements when an employer allows employees to wear face masks on a voluntary basis?

A: Yes. OSHA has long recognized that although employees may work in conditions that do not trigger obligations under the OSHA PPE or Respiratory Protection Standards, employees still may want to wear face masks. This is permissible, but subject to a few "Voluntary Use Requirements" under OSHA's Respiratory Protection Standard. The following is a summary of the Voluntary Use Requirements.

First, when an employee asks to wear a face mask, such as an N95, the employer normally should determine whether there is a hazardous condition such that the employer actually must require this type of PPE. In the case of COVID-19, OSHA and the CDC have both stated that respirators are not necessary in the workplace, outside of healthcare settings. For these reasons, in most cases, a request to wear a mask based on concerns about COVID-19 would not result in a mandatory program.



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Second, the employer needs to make sure that the employee is not creating a separate hazard in the workplace by wearing a mask. At this time, because many individuals may need to use a DIY cloth mask in order to have a mask available, employers should be sure that the employee is not wearing something that could get snagged in machinery or moving parts, fall off, obstruct vision, or otherwise present its own hazard. Employers also should make sure that employees are using clean masks, so as to avoid possible health issues associated with wearing a dirty face mask (such as dermatitis). Employees also should not be sharing masks.

Lastly, the employer must provide specific written information that was prepared by OSHA about wearing a dust mask (which, again, includes an N95 face mask and possibly a DIY cloth face mask). Your Laner Muchin servicing attorney can provide you with information about the steps required to comply with this obligation, as well as different rules that apply to different types of masks that are being voluntarily used. In addition to the information that OSHA requires be given, we recommend that employers provide information to employees about any other safety guidelines or practical considerations that may apply in their workplace, in the event that employees ask to wear masks on a voluntary basis.

Q: Are there different Voluntary Use Requirements based on the type of mask or respirator that the employee asks to use?

A: Yes. There are actually two tiers of Voluntary Use Requirements for respirators. We described above the requirements that apply when an employee is using a face mask that would include a filtering faceplate mask, like the N95 respirator or other dust mask. If the employee is asking to use a different type of respirator, such as a mask that has replaceable cartridges, the employer may be required to ensure that the employee was medically qualified to use the respirator and that these respirators were being properly cleaned and stored, among other things.

Also, as we noted above, if the employee is wearing a loose-fitting mask that is not intended to filter air and is not a respirator, which may include a lot of the types of masks that employees are able to assemble on their own, the OSHA Respiratory Protection Standard discussed above may not apply. On the other hand, the employer may be required to comply with OSHA's PPE Standard, also discussed above, if employees are using surgical masks or other masks that are not respirators. Check with your servicing Laner Muchin attorney for further information based on what employees have proposed.

Q: Do I need to require employees who are using face masks on a voluntary basis to shave?



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A: No. The facial hair question is driven by the fact that respirators like the N95 are intended to be tight-fitting to the face and create a seal. An N95 respirator likely cannot seal against the face of a user who has facial hair, which means that under OSHA's Respiratory Protection Standard, many employees end up needing to be clean-shaven for work when required to wear a respirator. Nevertheless, OSHA does not require employers to prohibit employees from having facial hair when wearing a face mask on a voluntary basis.

Q: If the employer pays for the masks and provides them to employees, is this still a *voluntary* program?

A: Yes. Employers that are able to obtain masks for their employees can do so without creating a situation where OSHA Standards for the mandatory use of respirators would apply. If an employer pays for the masks, the employer should tell employees in writing that the masks are not required and are voluntary. Employers are not required to pay for masks that are used by employees on a purely voluntary basis but may.

Q: The CDC is recommending the use of cloth masks in public – so do employers have to mandate masks or can employers still operate under a *voluntary* use set of rules?

A: The CDC *recommended* cloth masks for use when in public settings. Employers outside of the healthcare arena have not been *required* by the CDC to mandate the use of respirators in the workplace. Under the current situation, an employee's use of a DIY cloth mask in the workplace would not result from the employer's determination that respirators are needed to address a hazard to employees. So, for now, we are assuming OSHA will say the Voluntary Use Requirements apply and this is not mandatory. Your Laner Muchin servicing attorney will be monitoring OSHA's recommendations in case OSHA's position changes.

Q: Do I need a formal policy now? Can I wait to decide until employees show up at work in masks?

A: It may be a good idea to put a written policy or employee communication in place. Employers should anticipate that if OSHA is called onto a job site due to an employee complaint and sees employees walking around in masks, OSHA may incorrectly conclude that the employer has mandated masks and has not complied with the applicable Standards. And, as you can see, even voluntary face masks and other PPE are more complicated than many employers realize. So, getting a head of the issue is a good idea.

Q: Can I tell employees they are not allowed to wear face masks?



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Telling employees they cannot wear masks when the CDC has just said they should be worn in public may create employee relations issues or result in a phone call from OSHA. Although there may be exceptions to this rule, we generally recommend that employers heed OSHA's advice that employees are more likely to show up to work when they feel safe on the job. If an employee is creating a significant concern with the self-made mask, whether it may be a safety concern or because it violates some other standard of appearance, seek advice from your servicing Laner Muchin attorney.