

ADA Implications: I Don't Want to Wear a Mask....

Labor & Employment Law Update

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During the COVID-19 pandemic we have seen multiple shifts in views by the public and employees. Initially, the issue was what to do if an employee requested a face mask.

However, businesses are now facing different questions:

1. Can you require employees to wear a face mask?
2. Can you require customers or members of the public to wear a face mask when coming into your business?

What most do not realize is that both of these questions raise potential ADA issues.

EMPLOYEES – The short answer is, YES. A business can require its employees to wear a face mask or covering and other personal protective equipment (PPE) as a workplace rule. In order to do so, the business would want to be able to show a legitimate business reason as to why the rule is in place. Under the current circumstances, requiring the use of a mask and PPE to address safety concerns related to the COVID-19 pandemic would likely be considered a legitimate business reason. In fact, some employers are being ordered to make it a requirement pursuant to local or state mandates.

However, what if an employee reports that he or she has a medical condition that makes it so he or she cannot wear a face mask or covering? This would then trigger the business' obligation to engage in the ADA interactive process.

In going through the interactive process, the business may send the employee home pending completion of the interactive process. As part of the interactive process, the employer may request additional information and medical documentation from the employee regarding his or her medical condition and restriction of being unable to wear a face mask or covering.

After receiving the additional information and medical documentation from the employee, the business would have to evaluate whether the employee requires a reasonable accommodation, and if so, what reasonable accommodation works best for the business. For example, if the employee provides a legitimate medical reason for not being able to wear a face mask or covering, reasonable

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accommodations could include the following:

- Providing the employee an unpaid leave of absence until face masks or covering are no longer required at work;
- Allowing the employee to work remotely; or
- Providing an alternative face mask or covering that is allowed by the employee's medical condition.

In cases that have addressed a business' requirement that an employee wear PPE and an employee's objection based on a disability, courts have ruled it is not an ADA violation for an employer to require an employee to wear PPE to address a safety hazard as part of an essential function of the job/position, where the business is addressing a safety concern.

It should be noted that any unpaid leave of absence based upon the employee's inability to wear the face mask would likely not be covered by the FFCRA and so the employee likely would not be eligible for Paid Sick Leave or Emergency Paid FMLA leave. However, that is something that should be reviewed carefully, as they may qualify under certain circumstances.

CUSTOMERS/PUBLIC – Many states have issued executive orders requiring the public and businesses to require the use of face masks. However, almost all have an exception for individuals under certain ages and when a medical condition impacts the individual's ability to wear a mask. For example, Illinois' executive order states that "an individual who is over age two and **able to medically tolerate** a face-covering (a mask or cloth face-covering)" must wear a face covering when in public indoor spaces, such as stores.

So what can a business do if a customer says that he or she cannot wear a face mask and, possibly go so far as to allege that requiring one is a violation of the ADA for the business to refuse to allow him/her in? Unfortunately, there is no simple answer.

First and foremost, it is important to remember that this implicates the ADA. Unlike with employees, businesses are very limited in what questions and/or documentation they can ask the customer to provide regarding a disability under the ADA. For example, when dealing with a customer who brings a dog into a business, under the ADA a business is limited to asking two questions:

- Is the dog a service animal required because of a disability?; and
- What work or task has the dog been trained to perform?

Businesses are not allowed to inquire as to the nature of the person's disability, request documentation of the dog being a service animal, or require that the dog demonstrate its task.

With regard to masks, generally the ADA prohibits places of public accommodation having restrictions that would limit access to an individual with a disability. However, the ADA does allow restrictions when an individual would pose a direct threat to the health or safety of others.

As of March 2020, the EEOC has declared that the COVID-19 pandemic meets the direct threat standard, based on guidance from the CDC and public health authorities regarding the risk of community spread and institution of restrictions. **IMPORTANT** – This standard may change and so businesses must stay up-to-date.

Since the COVID-19 pandemic is currently considered a direct threat by the EEOC, a business would likely be on solid ground to require customers to wear face masks or covering when entering into their premises. That said, a business would not have the absolute right to refuse to provide a customer service based upon the customer's refusal to wear a mask. When faced with a customer who is refusing to wear a face mask or covering, businesses should likely limit any questions to the following:

- Are you unable to wear a mask because of a disability?

If the answer is “Yes,” then instead of additional questions regarding the disability or demanding documentation, the business should consider moving to engaging the customer in an interactive process to determine possible alternative methods of service that would allow the business to keep its employees and other customers safe, while still providing service/goods to the customer.

In order to address these issues, we recommend providing information, action plans and training to managers, supervisors and employees on how to address these situations and avoid heated confrontations and/or potential litigation. Of course, involving legal counsel in reviewing or putting together your training, documents and action plans will further help limit potential legal problems and costly litigation down the road.

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