

I Don't Want to Wear a Mask...Part 2: How Businesses Can Enforce the Policy Requirement

Labor & Employment Law Update

on July 24, 2020

With COVID-19 cases surging in numbers, the legal implications of face mask policies for businesses have taken center stage again.

First a quick recap, from my prior article, ADA Implications, I Don't Want To Wear a Mask...:

- Businesses can require employees to wear masks at work and customers to wear face masks when coming into businesses;
- Businesses can refuse entry or ask customers to leave if they refuse to wear a face mask;
- For both employees and customers that say they cannot wear a face mask due to a disability or medical condition, the business must engage in the ADA interactive process. The interactive process is different for employees than it is for customers.
 - For employees, the business can request medical documentation.
 - For customers, the business should not ask for medical documentation. Rather, the business may ask limited questions such as whether the individual has a disability and whether the disability restricts him or her from wearing a mask.
- For both employees and customers, a business should try to provide a reasonable accommodation, but may take into consideration safety issues/concerns and whether the requested accommodation is an undue burden.

Next, what other legal concerns are there for a business that requires face masks? The major issue facing many businesses is how to safely enforce a mask policy. As we have seen from viral videos, asking a customer to put on a face mask can lead to threats of legal action, verbal confrontations and even physical altercations or violence. If an employee is injured during a confrontation with a customer, it will likely qualify as a workers' compensation claim. Similarly, if the customer threatens to spit or cough on the employee and then, within the next 14 days, the employee has symptoms of or tests positive for COVID-19, there is

the possibility that the employee's illness could qualify as a workers' compensation injury if they can show it resulted from that interaction. Alternatively, if a customer is hurt, there is the potential for the customer to pursue a personal injury case. Finally, there is the risk of a discrimination claim, if the business selectively enforces its mask policy based upon a protected status, such as race, age, national origin, etc., or does not take steps to address a customer whose behavior includes making discriminatory or harassing comments.

The best way to limit your exposure to these types of claims is to train employees on your policy, how to communicate your policy and how to address these situations to limit the risk of someone being hurt. The training should address the following:

- The business' policy on face masks – including your posters and where they are located.
- Understanding business' ADA obligations – e.g. questions that customers may be asked regarding their reason for not wearing a mask, how to respond if a customer has a disability and understanding that posters/flyers alleging that the ADA prohibits businesses from requiring face masks are false and not issued by the EEOC or Department of Justice.
- Determine how the business will enforce the policy – i.e. whether an employee will monitor entrances, whether only certain employees or members of management should be involved in addressing compliance issues with customers, etc.
- Address what employees should do if a customer comes in without a mask – e.g. notify management and other employees before addressing the issue with the customer.
- Remind all employees to be polite and respectful at all times when discussing the mask requirement with customers, even if the customer gets argumentative.
- Methods to avoid conflict – e.g. asking the customer to discuss the issue outside of the store, and not raising your voice even if the customer does.
- Methods to de-escalate conflicts – e.g. being polite, even if the customer is not, having more than one employee present, so if the customer starts verbally or physically threatening one employee, that employee may step back and the other employee can redirect the customer to try to de-escalate the situation.
- Alternative methods of providing services/products to a customer who has a disability and cannot wear a mask – e.g. employee gathers products and brings to customer outside of the store, etc.
- When and how to contact law enforcement to address compliance issues.
- Understand the proper way to document any incidents and preserve evidence, including incident forms, witness statements, taking pictures of

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where incidents occurred, and if applicable, securing security videos of incidents.

The list above is not exhaustive—and businesses with additional questions regarding mask policy enforcement should contact legal counsel to discuss how best to resolve such questions.

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