

U.S. COVID-19: MASK AND FACIAL COVERING ORDERS—FOUR THINGS EMPLOYERS NEED TO KNOW AND DO TO COMPLY WITH NEW OBLIGATIONS

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Across the country, state and local governments are considering safe ways to “reopen” their economies and revise some of their strict shelter-in-place orders. One such consideration includes masks and “face coverings,” with many implementing a requirement that members of the public, including employees reporting to work, wear such coverings. Below are four things that employers should do now to be prepared to comply with mask and face covering requirements as they “reopen” their businesses.

1. Continue to Monitor Public Health Guidance

Public health authorities at the federal, state, and local levels are likely to continue revising their recommendations on face coverings as they learn more about COVID-19. For example, last month, the federal Centers for Disease Control and Prevention (“CDC”) issued [guidance](#) recommending that individuals wear “cloth face coverings”^[1] in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies), especially in areas of significant community-based transmission. The CDC makes clear that the purpose of such coverings is primarily to “help people who may have the virus and do not know it from transmitting it to others.” In other words, a face covering primarily protects others from an asymptomatic wearer.

Although the CDC’s guidance is only a recommendation - and thus not binding - a variety of local and federal agencies rely on the CDC’s guidance generally to identify “best practices” for employers, including the Equal Employment Opportunity Commission (“EEOC”) and the Occupational Safety and Health Administration (“OSHA”). State and local public health departments have also issued guidance and best practices when it comes to face coverings and other best practices to limit transmission of COVID-19 in the workplace. As such, employers should be sure to monitor CDC, OSHA, and applicable local/state public health authorities’ guidance on the topic as they begin to return employees to the workplace.

1. Understand Obligations Under State and Local Orders

While the CDC guidance is not mandatory, many state and local governments have issued orders requiring members of the general public to wear masks and/or facial coverings (the type varies by order) if they leave their homes or go to certain locations, such as the workplace. Additionally, many of the orders specifically require employees to wear masks or face coverings if they work in “critical” or “essential” businesses that are permitted to continue operations during the pandemic.

While these orders vary in scope and impact, below are examples of the relevant state and local government orders (issued by either the governor or designated public health official responsible for COVID-19 management) that specifically require employees returning to work to wear masks or face coverings:

- **Colorado:** All employees of “Critical Businesses,” as defined in the state’s Order, who work in close proximity to other employees or with the public must wear “a medical or non-medical face covering” at work. While Colorado’s Order does not explicitly require employers to provide masks to their employees, it does state that employers “should make every effort to provide their workforce” with facial coverings.
- **Georgia:** While the state’s Order does not require specific workers to wear face coverings, it does require businesses reopening to provide “personal protective equipment as available and appropriate to the function and location of the worker within the business location.”
- **Illinois:** As of May 1, manufacturing employers and essential retail stores (e.g., groceries, hardware stores) must provide employees with “appropriate face coverings” and require that employees who are able to medically tolerate a face covering wear one where a six-foot social distance cannot be maintained at all times. Additionally, other “Essential Businesses” must take proactive measures to ensure “Social Distancing Requirements,” and should, among other things, “[p]rovid[e] employees with appropriate face coverings and requiring that employees wear face coverings where maintaining a six-foot social distance is not possible at all times.”
- **Maryland:** “Retail Establishments” and “Foodservice Establishments” maintaining operations during the pandemic must require their staff members to wear face coverings while working. “Face Coverings” are defined broadly to include “a covering that fully covers a person’s nose and mouth, but is not a Medical-Grade Mask” and specifically includes scarves and bandanas “without limitation.” Finally, the state’s Order urges Marylanders to reserve medical masks (surgical masks and N95 respirators) for use by health care workers and first responders.
- **Michigan:** All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers. As with similar orders, Michigan advises that “[s]upplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers who interact with the public.”

- **New Jersey:** Essential retail businesses that maintain in-person operations, manufacturing businesses, warehouse businesses, and businesses engaged in essential construction projects must, among other things, require workers to wear cloth face coverings and gloves while on employer premises, except where doing so would inhibit that worker's health. Businesses must provide, at their expense, such face coverings for their employees.
- **New York:** All essential businesses or entities with employees present in the workplace must provide, at the businesses' expense, face coverings to employees who are in direct contact with customers or members of the public. In [Interim Guidance](#), the state clarified that "face coverings" include, but are not limited to, cloth (e.g. homemade sewn, quick cut, bandana), surgical masks, N-95 respirators, and face shields. Additionally, the guidance makes clear that if an employer is unable to procure, fashion, or otherwise obtain face coverings for their employees, they may consult with their local office of emergency management to determine if extra supplies exist within the municipality for this purpose and, if so, they may submit a request for face coverings. Not being able to source face coverings does not relieve an employer of its obligation to provide such face coverings to its employees.
- **Pennsylvania:** Businesses authorized to maintain in-person operations must provide masks for employees to wear during their time at the business, and make it a mandatory requirement to wear them. Alternatively, employers may approve masks obtained or made by employees in accordance with Department of Health guidance.
- **Rhode Island:** The state's Department of Business Regulations ("DBR") put out detailed guidance based on Governor Raimondo's Order 20-24. Employees of any business continuing in-person operations must wear cloth face coverings. The DBR's guidance contains industry specific requirements. For example, the construction industry need not provide masks that would lead to potential safety hazards. Businesses must ensure all employees have a face covering, and must, at their expense, provide their employees with: a cloth face covering that covers the nose and mouth or the materials to create a face covering.

In addition to these state orders, some local and city governments are issuing similar orders requiring face coverings and masks. For example, [Miami-Dade County, Florida](#) requires all persons working in or visiting grocery stores, restaurants, pharmacies, construction sites, public transit, vehicles for hire (cabs and Ubers), and "locations where social distancing measures are not possible" to wear "facial coverings" as defined by the CDC guidance. Similarly, [Sonoma County, California](#) employers must ensure that their employees comply with the County's mask/face covering order while on duty by either supplying employees with face coverings, ensuring that employees have access to face coverings, or ensuring that employees are using their own face coverings.

Notably, the above list is **not** exhaustive. Moreover, as with most COVID-19 guidance and legislation, authorities are evaluating and reevaluating their shelter-in-place orders, including face covering

requirements. As such, employers should be sure to consult with legal counsel on this rapidly evolving topic and be prepared to comply with any applicable orders.

1. Be Prepared To Provide Accommodations

Some employees may state that because of a disability, or a religious belief, they cannot or will not wear a face covering or mask. Recent guidance from the EEOC reminds employers to consider requests by an employee with a disability for a reasonable accommodation under the Americans with Disabilities Act (“ADA”). As an example, the EEOC notes that some employees may need modified face masks for those who communicate with the employee, if that employee is deaf and relies on lip reading to communicate. Additionally, under Title VII of the Civil Rights Act of 1964, an employee may request a religious accommodation for modified face coverings due to religious garb. An employer should discuss the requested accommodation, and provide a modification or an alternative if feasible and not an undue hardship on the operation of the employer’s business. Flatly refusing a request for modifications may lead to liability.

1. Consider How OSHA Regulations and Guidance May Apply to Your Workplace

Employers are obligated by OSHA to maintain a safe and healthy workplace. As part of those obligations, if worker equipment qualifies as personal protective equipment (“PPE”) under OSHA regulations, before an employer may require employees to wear the equipment, they must, among other things, perform a hazard assessment, train employees in the use and care of the equipment, and train employees how to clean and maintain the equipment, including replacing worn or damaged PPE.

Unfortunately, OSHA has not yet published definitive and clear guidance as to whether face coverings constitute PPE. Thus, it is unclear whether employers must comply with *OSHA PPE requirements* when employers take steps to comply with *state and local face covering requirements*.

Certain guidance from OSHA and the CDC suggest that cloth face coverings may be distinguishable from PPE based on whom the equipment is intended to protect. Specifically, PPE is generally intended to protect the wearer of the equipment. In contrast, as the federal agencies’ guidance points out,^[2] face coverings are intended to protect the general public from asymptomatic carriers of the coronavirus (rather than the wearer). On the other hand, OSHA’s COVID-19 Guidance lists examples of what it considers PPE, and the list specifically includes “face masks.” Given the absence of clear guidance on this point, before requiring employees to wear face coverings (either because of compliance with local/state orders or because an employer voluntarily chooses to do so), employers should consult with legal counsel to determine whether the PPE hazard assessment and training requirements may apply.

The fact that an employer provides its employees with a cloth or other face covering in compliance with local/state orders, however, may not satisfy the employer’s broader obligations under OSHA to maintain a safe and healthy workplace. OSHA guidance advises all employers to assess the risk of

exposure to COVID-19 in their workforce, and take appropriate action, including issuing PPE (such as respirators (N95)) where required. Additionally, if employers allow employees to wear N95 masks or other respirators to work, OSHA regulations, including but not limited to PPE requirements, may be triggered. For employers who may be required to take such steps, or are considering allowing their employees to wear respirators to work, BCLP addresses that topic, along with other OSHA considerations, [in a separate blog post](#).

The COVID-19 pandemic and its impact on the workplace is rapidly evolving. As more state and local authorities consider easing their shelter in place orders, and “reopening their economies,” new orders regarding masks and face coverings for employees may be issued. Employers should regularly consult with legal counsel, the CDC’s website, OSHA’s website, and state and local health departments to ensure they have the most up-to-date information and guidance.

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at <https://www.bclplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>

[1] As discussed in greater detail elsewhere in this post, the CDC’s recommended face coverings are not surgical masks or N95 respirators, because the CDC considers those materials to be “critical supplies” that should be reserved for healthcare workers and other medical first responders.

[2] For example, [OSHA’s COVID-19 Guidance](#) notes that when a sick or potentially sick person wears a face covering, the face covering does not qualify as PPE, because the intended purpose of the covering is to contain potentially infectious secretions from spreading. Similarly, the [CDC recommends](#) that cloth face coverings be worn in public, in part to “help people who may have the virus and do not know it from transmitting it to others.” Most recently, [guidance](#) from OSHA and the CDC to meat and poultry processors explicitly notes that cloth face coverings do not qualify as PPE. The guidance also notes that “Cloth face coverings are intended to protect other people—not the wearer.”

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