

Do Your Employees Need to Wear Face Masks?

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Some essential businesses have remained open during the coronavirus pandemic and others are preparing to reopen as soon as state and local officials lift restrictions. Employers should be aware that in some locations employees need to wear a facemask or cloth face covering.

Some states and cities are recommending face coverings and others are requiring them (<https://www.littler.com/publication-press/publication/facing-your-face-mask-duties-list-statewide-orders>). "As we have seen with much of the coronavirus legislation, it often has to be clarified, so any company will also need to keep track of the additional information provided," said Kathy Dudley Helms, an attorney with Ogletree Deakins Columbia, S.C.

Cloth face coverings are meant to stop the wearer from spreading respiratory droplets and remind people not to touch their faces. The U.S. Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) have issued guidance (<https://www.osha.gov/Publications/OSHA3990.pdf>) that employers should review.

"Employers should provide employees with instructions or training on how to wear, maintain and clean their face coverings," said Alka Ramchandani-Raj, an attorney with Littler in Walnut Creek, Calif., and Devjani Mishra, an attorney with Littler in New York City. "Employees need to know that they must securely cover their noses and mouths, should not reverse, move or remove their face coverings unnecessarily in the workplace, should not share their face coverings with others, and must keep them clean."

They noted that single-use face coverings must be properly and safely discarded after each use. "Employers that opt to provide employees with single-use coverings must provide a sufficient supply to enable employees to replace them as needed, which may be more than once a day," they said.

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Should Employers Pay for Masks?

"This depends first on the specific language of the order," explained Todd Logsdon, an attorney with Fisher Phillips in Louisville, Ky. "We are aware of some orders specifically requiring the employer to provide or pay for the masks for employees and to make sure employees are wearing the masks," he said.

Employers in New York must provide and pay for face coverings for workers in essential, public-facing roles. New Jersey food service businesses and certain public employers must provide and pay for face coverings and gloves. "Other jurisdictions, such as Los Angeles, do not specify who should provide or pay for face coverings," Ramchandani-Raj and Mishra said.

Some orders, however, have specifically included language that the employer doesn't have to pay for the masks. In some locations, other existing state laws may require employers to pay for the masks when required by the order, Logsdon noted. For example, the California Labor Code requires employers to reimburse employees "for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."

Additionally, OSHA generally requires employers to provide or pay for personal protective equipment (PPE), such as safety glasses, that employees must wear to protect themselves from workplace hazards.

There are some exceptions for PPE that is not specialized, and the employee may wear outside of work, Logsdon noted, such as basic steel toe boots. "There would be an argument that if the order requires all individuals in public to wear a mask, then the employee will presumably be wearing the mask outside of work and therefore, the employer is not required to pay for it under OSHA regulations," he said.

Unlike N95 respirators and surgical masks (<https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/n95-respirators-and-surgical-masks-face-masks>), cloth face coverings are not worn so much to protect the wearer from exposure to the virus but are more intended to protect others from respiratory droplets. "From this standpoint, a facemask is not PPE," Logsdon said. "Surgical and procedure masks may be considered PPE, however, because they may provide some protection for the wearer from splash of bodily fluids, and depending on the rating of the mask, could provide some protection from exposure."

Both OSHA and the CDC have said in guidance documents that homemade cloth face coverings are not PPE (<https://www.osha.gov/memos/2020-04-03/enforcement-guidance-use-respiratory-protection-equipment-certified-under>). "This is presumably because they provide the wearer little to no protection from exposure to the virus," Logsdon observed. "If they are not PPE, then under OSHA regulations, at least, the employer would not be required to pay for it."

Ramchandani-Raj and Mishra noted that face coverings are just one protective measure, and not a substitute for social distancing, personal hygiene and additional cleaning protocols.

Can an Employee Refuse to Wear a Mask?

If an employee refuses to wear a mask that has been required by state or local order or is otherwise strongly advised by OSHA or the CDC, then the employer should first attempt to explain the requirement to the employee and convince the employee of the need to wear the mask, Logsdon said. If an employee continues to refuse the legal or safety requirement, the employer may be able to suspend the employee.

Helms noted that the employer needs to determine if a worker's disability prevents him or her from wearing a mask. If so, the employer should engage in the normal interactive dialogue under the Americans with Disabilities Act, verify that the employee cannot wear a mask and state what possible accommodation would allow the employee to work.

"If the employee finds a mask uncomfortable or prefers not to wear one, that is likely insufficient and an employer can require it as a condition of employment," she said, noting that union settings may be different, and employers should consult their collective bargaining agreement.

'Ever-Evolving Requirements'

"It can be very trying for employers operating in multiple locations to keep up with the varying orders, which are often updated or replaced as the situation changes," Logsdon said. Employers should consider consulting with employment attorneys who are keeping up with these orders or assigning someone to monitor the respective locations.

In addition to complying with the law and doing what is right for employee safety, employers should keep in mind that some employees will be very anxious about working during this time, he noted. Providing the right equipment and training employees on the use, care and limitations of the equipment can help the employees stay safe and reduce some anxiety.

"This is all new and unknown, and mistakes are going to be made," Helms said. "Companies need to follow the ever-evolving requirements as best they can."

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