Face Off: Businesses’ Legal Considerations When Requiring Face Coverings

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As many states continue to gradually re-open businesses and lift certain pandemic-related restrictions aimed at containing the spread of COVID-19, businesses now find themselves charged with navigating myriad legal considerations while resuming operations. Central to these concerns is the extent to which establishments and other institutions including health care providers, schools, government agencies and other essential businesses must, and may, enforce social distancing policies – with none quite as prominent as employees’, patrons’, students’ and other visitors’ wearing of face coverings.

The Centers for Disease Control and Prevention (CDC) recommends the use of face coverings, especially in areas of significant community-based transmission. Notably, the CDC recommends wearing cloth face coverings in public settings “where other social distancing measures are difficult to maintain,” calling out grocery stores and pharmacies in particular. While N95 masks — which block 95 percent of particles 0.3 microns or larger — are the most successful at dropping wearers’ risk of
infection, studies have found that surgical and cloth face coverings can also be highly successful at reducing exposure to disease particles, with efficacy between 50 and 80 percent.

In considering the appropriate policy for requiring face coverings, organizations should consider the potential liability associated with the risk of transmission within the confines of their business or institution. Businesses should evaluate whether the use of liability waivers is practical or reasonable, as well as consider how to enforce social distancing. Ultimately, all business owners will need to balance supporting viability of their ongoing operations with complying with certain applicable requirements and recommendations to protect customers, vendors and employees.

**State and Municipal Requirements**

The majority of states are entering the summer season in the second or third step of a phased re-opening plan. Despite this measured relaxation of physical distancing interventions, many of these states and/or local jurisdictions have continued to recommend – if not require – that individuals wear cloth face coverings. Where and on whom face coverings are required varies greatly between jurisdictions. For example:

- Connecticut, Illinois, and New York are among the states that currently mandate wearing face coverings in indoor and outdoor public places when social distancing requirements are not or cannot be maintained.

- Certain states, including Massachusetts and Virginia, mandate face coverings be worn by employees and only encourage or recommend that individuals wear face coverings in public, but still mandate face coverings be worn by employees.

- Some states, including Kentucky, require all employees, generally, to wear face coverings to the extent practicable, while others require face coverings only when employees are “facing the public” or “in the presence of others” (e.g., Colorado and Vermont).

- California and Tennessee are among the states with no state-wide order directing people to wear face coverings, but where many county or municipal jurisdictions do impose such requirements.

- Some state orders speak directly to enforcement. For example, Texas recommends individuals to wear face coverings, and authorizes private businesses in Texas to request or require that patrons wear face coverings, but specifies that local jurisdictions cannot impose any civil or criminal penalties for failure to wear a face covering. Businesses in Ohio may allow patrons to wear face coverings if they choose, but they are not authorized to require patrons to do so.

- For up-to-date information on states’ re-opening plans, including face covering requirements, see our COVID-19 Response Team’s interactive map, available here.
Occupational Safety and Health Act

Under the Occupational Safety and Health Act, employers have a general duty to provide a workplace free from recognized hazards likely to cause serious physical harm or death. Employers can help ensure compliance with their legal duties regarding COVID-19 by carefully tracking the CDC recommendations, communicating hazards and agency recommendations to employees, and training employees on safety measures such as including PPE.

Americans with Disabilities Act

Business owners readying their social distance policies must be particularly mindful of the Americans with Disabilities Act (ADA). Title I of the ADA requires employers to provide “reasonable accommodation” for employees with disabilities unless the employer would suffer an “undue hardship” as a result. It is possible that an employee may cite a legitimate health condition in objecting to wear a face covering. Employers must be prepared to offer reasonable accommodations - such as alternative covering for the employee (e.g., a facial shield or “sneeze guard”) or the option to work remotely - that allow the employee to do his or her job, and which protect the health and safety of its other employees and patrons.

Title III of the ADA also requires a business constituting “public accommodations” to remove barriers of entry and to provide reasonable accommodations to guests as long as those reasonable accommodations do not create unreasonable risks of harm or danger to other guests or employees. Business owners must anticipate the need to balance the rights of patrons who cannot wear face coverings due to a legitimate health condition against the health and safety of its employees and other patrons. Certain states also provide similar protections for individuals who cite a medical reason for inability to wear a face covering. Some of these state laws also provide protection by prohibiting a person seeking to enforce a face covering mandate from inquiring about the nature of the underlying medical condition. While these “medical necessity” provisions are protective and necessary for individuals with legitimate needs, the provisions also provide opportunity for others to feign a medical condition in order to refuse use a face covering.

Premises Liability

Premises liability is typically front-of-mind for business owners, with COVID-19 presenting new hazards connected with disease exposure. The legal concept of premises liability provides that property owners, managers, and occupiers have the duty to provide a reasonably safe environment for those who visit or reside on their premises, such as customers, patrons, service personnel, or residents. An owner’s failure to address a potentially dangerous condition could constitute negligence in a personal injury case.

Business owners may mitigate their risk of liability for COVID-19-related premises liability claims with a thoughtful approach to determining what protective measures will be implemented for incoming patrons, vendors and employees, such as limiting occupancy, distancing customers, and implementing additional cleaning procedures. Overall, owners must closely monitor federal, state, and local guidance on social
distancing, and, following evaluation of those requirements and facts specific to their organizations’ ongoing operations, implement those required or recommended protective measures. Given the CDC’s aforementioned recommendation that individuals wear face coverings to curb the spread of COVID-19, an owner’s decision to request – if not require – that customers and employees don a face covering would be a demonstrable example of hazard mitigation.

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