



COVID-19: Recommendations and requirements to use face coverings are on the rise, so are employer obligations

By Rachel Conn and Shelagh Michaud

Following a recent trend among public health organizations, the Centers for Disease Control and Prevention (CDC) recently released [guidance](#) recommending that the general public wear cloth face coverings (homemade cloth face masks, scarves, bandanas, etc.) in public settings where other social distancing measures are difficult to maintain. This was a dramatic shift in guidance, as the CDC had previously advised against face coverings unless the individual was sick. The CDC specified that the new recommendation is to prevent the spread of COVID-19 from an asymptomatic wearer, who may have the virus but may be contagious. The CDC had previously [advised](#) that the capacity of cloth face masks to protect against the virus is unknown.

Importantly, the CDC still is not recommending that people wear surgical masks or N-95 respirators, which should be reserved for health care workers. The CDC also has emphasized that face coverings are in addition to, not in place of, other measures meant to stop the spread of COVID-19, including frequent hand washing, maintaining at least six feet social distancing, and limiting public interactions.

Some states and municipalities are issuing similar recommendations, with some jurisdictions even legally requiring face coverings for the public and/or employees in some or all businesses and organizations.

Whether recommended or required, the use of face masks raises difficult new questions for employers related to employees' use of such face coverings at work.

Are cloth face coverings considered respirators or other personal protective equipment (PPE) subject to detailed occupational safety and health regulations?

Cloth face coverings will likely not be considered respirators or PPE under occupational safety and health regulations. In December 2017, the U.S. Occupational Safety and Health Administration (Fed/OSHA) [issued a letter of interpretation](#) stating:

...[s]urgical masks are not considered respirators by OSHA and, as such, are not covered by 29 CFR 1910.134. Surgical masks are fluid resistant, disposable, and loose-fitting... They are commonly used in health care settings for the protection of the patient, and they are also often used to prevent splashes from contacting the face of the wearer. However, surgical masks do not seal tightly to the wearer's face, nor do they provide a reliable level of protection from inhaling smaller airborne particles.

The same logic would also apply to cloth face coverings, which are also loose-fitting protection, which is primarily intended for the protection of others from a wearer and does not provide reliable protection from inhaling airborne particles.

The CDC also expressly notes that “the cloth face coverings [recommended](#) are not surgical masks or N95 respirators.” It has also stated that cloth face coverings are [not PPE](#).

Some states, like California, have their own occupational safety and health regulations, and while they can follow federal regulations and guidelines, they are able to make interpretations and rules that are more protective than federal standards. On this topic, however, state occupational safety and health programs generally have reached similar conclusions, while others have remained silent on the issue. As an example, the California Division of Occupational Safety and Health (Cal/OSHA) in its [Interim Guidelines for General Industry on COVID-19](#) states:

Surgical and other non-respiratory face masks do not protect persons from airborne infectious disease and cannot be relied upon for novel pathogens. They do not prevent the inhalation of virus particles because they do not seal to the person's face and are not tested to the filtration efficiencies of respirators.

While it does not appear that cloth face coverings will be considered respirators or PPE, employers should also review state and local government and public health guidance.

Where face coverings are not required, should employers allow employees to voluntarily wear such cloth face coverings?

Allowing employees' voluntary use of cloth face coverings would be in accordance with CDC and various local government recommendations. However, in workplaces where cloth face coverings are worn, employers need to conduct a safety analysis to determine what types of cloth face coverings are safe for what positions and job duties. What may be safe in an office environment may not be safe in a manufacturing environment because some face coverings may be too loose-fitting to use around powered equipment. And cloth face masks will typically not be flame resistant (FR) where FR clothing is required. Employers need to ensure that employees can safely perform their job functions while wearing a face covering and that the face covering does not present a safety or health hazard.

Employers will also need to provide information on safe usage of cloth face coverings in the workplace, including how to wear the face coverings, how to safely don and doff them, how to properly maintain, clean and sanitize them, and if there are any health conditions or medical conditions that would prevent the use of them.

What should employers do if state or local orders require employees to wear cloth face coverings in the workplace?

Recommendations and orders are changing quickly, but many states and local governments have issued orders requiring that employees wear cloth face coverings in some or all businesses or other

organizations, and many more have indicated that the use of cloth face coverings will be part of plans to re-open businesses. If the use of cloth face coverings is mandatory, it is critical that the employer makes clear that it requires employees to wear cloth face coverings to comply with an applicable state or local public health order and not as PPE in that workplace. In communications to employees, employers should stress that cloth face coverings do not prevent the wearer from becoming exposed to or infected with COVID-19.

If this is not done, Fed/OSHA or state occupational safety and health programs may claim that an employer is providing cloth face coverings as PPE and require the employer to comply with respiratory protection or other PPE standards. This could subject the employer to citations, as a cloth face covering is almost certainly not going to be compliant with those standards for the reasons noted above.

Employers should also be prepared for situations where although the face coverings are required by a government or public health order, an employee may refuse to wear one. Subject to a medical or safety justification for not wearing one, employers risk non-compliance with the respective order if an employee refuses. Thus, employers should be clear that refusal to wear one may result in the employee being sent home and/or terminated.

Are employers required to provide or pay for cloth face coverings to employees?

If the employer or state or local order requires face coverings, it's likely that the employer must pay for the cloth face covering. Some states, like California, also may have laws that require reimbursement of certain expenses. Additionally, some states have eliminated any question and included the requirement that employers pay for or provide the cloth face covering or materials to make the cloth face covering in their respective executive order.

What if an employee says he/she cannot wear a cloth face covering for health reasons?

Employees who may not be able to wear cloth face coverings because of health-related issues may require reasonable accommodation under the Americans with Disabilities Act (ADA). The requirement that employees wear face coverings does not change an employer's obligations under the ADA. Employers should engage in the interactive process as they would with any other request for a reasonable accommodation. Employers should work to find arrangements that accommodate the employee's health-related need while also satisfying the reasons for the mandate and continuing to provide a safe work environment during the COVID-19 crisis. Additionally, please note that some states have provided exemptions to requirements for cloth face coverings for employees whose health would be damaged by wearing the face covering.

And, of course, this issue is just part of the overlapping web of issues facing employers as a result of the COVID-19 pandemic. Our Nixon Peabody team will continue to provide updates on other issues facing employers and solutions to assist them in navigating through these turbulent times^[1]. To learn more, register for our webinar [Coming Back From COVID-19—Employment Issues To Consider Now Before Reopening Eventually](#), live on Wednesday, April 29, 2020, at 12:30pm EST.

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^[1] See our alerts: [“Families First Coronavirus Response Act: What employers need to know about the COVID-19 paid leave law,”](#) (March 26, 2020); [“U.S. Department of Labor’s new guidance on CARES Act’s Pandemic Unemployment Assistance program and \\$600 weekly Federal Pandemic Unemployment Compensation”](#) (April 8, 2020).