

Blog Post

About-Face on Face Masks

April 13, 2020

On Sunday, April 12, 2020, New York became the latest jurisdiction to require employers to supply cloth or surgical masks to employees who are essential workers interacting with the public. The development is the latest reflecting how rapidly guidance on face masks has changed with the COVID-19 pandemic.

In the beginning of the outbreak, the Center for Disease Control (CDC) said only sick people and their caretakers should wear face masks; abruptly, the CDC did an about-face on April 3 and now recommends that everyone wear protective cloth face coverings when they leave their homes. The CDC's original advice was grounded in an effort to preserve medical-grade face masks for healthcare personnel who need them most, but it left both employers and employees wondering what they should do.

Surgeon General Jerome Adams famously tweeted on February 29, 2020, that people should “STOP BUYING MASKS!” saying that they “are NOT effective in preventing [the] general public from catching #Coronavirus, but if healthcare providers can't get them to care for sick patients, it puts them and our communities at risk!”

Employers initially relied on that guidance in discouraging or even refusing to allow employees to wear face masks of any kind. Indeed, many were concerned that allowing the use of masks would

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frighten co-workers and customers. On April 3, 2020, however, the CDC reversed course and issued a recommendation that everyone should wear cloth face coverings “fashioned from household items or made at home from common materials,” when they go out in public. The cloth face coverings the CDC recommends for the general public are not surgical masks or N95 respirators. Surgical masks are federally regulated medical-grade masks that are generally loose fitting and disposable, intended to block large particle droplets, splashes, spray, or splatter. N95 respirators, on the other hand, provide a close facial fit and filter out 95 percent of small airborne particles. The CDC continues to recommend surgical masks and N95 masks for healthcare workers who need them most.

The CDC even offers instructions for making your own masks.

Why this significant departure from prior guidance? It turns out that even non-medical face masks – made of t-shirts, dishtowels, or bandanas – do offer some protection and may slow the spread of COVID-19 transmission. In research that turns out to be incredibly useful now, Researchers at Cambridge University in 2013 tested a wide range of household materials, measuring what percentage of microbes those materials could capture compared to the common surgical mask. Not surprisingly, the surgical mask performed best, but the homemade materials – including cotton, linen, dish towels, t-shirts, and more – all managed to capture 49 percent of virus particles or more.

In response to the CDC’s new guidance, major retailers such as Amazon, Wholefoods, Walmart, and Target announced that they would begin supplying and/or allowing their employees to wear protective face coverings while at work.

While the CDC’s recommendation is voluntary, several localities have gone further and issued orders *requiring* essential personnel who encounter

the public to wear protective face coverings. For example:

- Governor Cuomo issued an Executive Order on April 12 requiring employers in New York to provide essential workers with cloth masks or surgical masks free of charge when interacting with the public.
- In Riverside County, California, all persons are required to wear face coverings.
- In Hoboken, New Jersey, all essential workers are required to wear face coverings while performing job functions.
- In San Diego, California, employees at grocery stores, pharmacies, drug stores, convenience stores and gas stations are required to wear cloth face coverings at work if they come into contact with the public as part of their job.

Prior to March 31, 2020, the CDC's coronavirus [guidance](#) recommended surgical masks for people who had symptoms of coronavirus when they had to leave home, as well as for their caregivers, since wearing a mask can help prevent spreading the virus by protecting others nearby when you cough or sneeze. However, due to the need to preserve medical-grade face masks for health care workers, the CDC now recommends only cloth masks for those who are sick and their caretakers. Notably, other current CDC [mask guidance](#) still says during periods of increased acute respiratory infections in the community, coughing patients and anyone suspected of having influenza should wear a mask at all times until they are isolated in a private room.

In light of the fact that cloth masks are now required in some jurisdictions and recommended in all others, employers should take steps to comply.

Employers Operating in Jurisdictions that Require Employees to Wear Face Coverings at Work:

Employers in these locations should:

1. Enact a policy that mandates employees wear face coverings while at work;
2. Establish a procedure to ensure policy compliance;
3. Evaluate whether the company can/should/must (i) provide face coverings to employees (and the risks associated with same), or (ii) reimburse employees for purchasing protective face coverings;
4. Evaluate in which circumstances protective face coverings can be reused;
5. Determine whether the use of face coverings interfere with job functions and create hazards that need to be eliminated or mitigated;
6. Train employees in the safe use of protective face coverings, including posting or circulating the CDC instructions; and
7. Evaluate how the company will handle developing a supply of face coverings.

Employers Operating in Jurisdictions That Do Not Require Employees to Wear Face Coverings:

Given the new CDC guidance, employers should generally allow – and even encourage – employees to wear face coverings, except where there is a safety issue. Employers should be particularly mindful of their obligations under the Americans with Disabilities Act to accommodate persons particularly at risk (those over 65 or with chronic health conditions). Employers also must be mindful of their obligations under the Occupational Safety and Health Administration’s (OSHA) general duty clause to maintain a workplace free from recognized hazards likely to cause death or serious harm. Recently, an employee in Illinois filed a lawsuit against his employer after he was terminated for refusing to come to work unless he was permitted to wear protective face gear. Similar lawsuits are likely to become commonplace.

In addition, employers must balance the CDC's recent recommendation against OSHA's published standards governing personal protective equipment (PPE) and respiratory protection that may be implicated even when an employee *voluntarily* wears a face covering, depending on the type of face covering used (i.e., a cloth face covering versus a dust mask like an N95). Employers who permit the *voluntary* use of non-respirator, cloth face coverings in the workplace need to be mindful that:

- Employers are obligated to determine whether there is a hazardous condition in the workplace such that the employer actually must require a cloth face covering as a type of PPE. In that event, the employer must comply with OSHA's PPE standard.
- Even assuming the employer determines a cloth face covering is not a required piece of PPE, employers need to make sure that employees are not creating a separate hazard in the workplace by wearing a face covering. For example, the face covering could get snagged on a piece of equipment or block the employee's field of vision.
- Employers should ensure that employees are using clean face coverings and understand best practices for removing and sanitizing cloth face coverings.

Generally, "do-it-yourself" cloth face masks are not considered respirators, and thus are not governed by OSHA's more onerous respiratory protection standard.

The FDA's Relaxation of Regulations Should Make Face Coverings More Available for Employees:

On April 2, 2020, the Food and Drug Administration (FDA) updated its Enforcement Policy for Face Masks and Respirators, superseding its earlier March 25, 2020, policy. The updated guidance concerns the manufacture and distribution of face

masks, shields, and respirators during the COVID-19 public health emergency. Among other things, it: (i) relaxes regulations associated with the manufacturing of non-medical face masks, face shields, and surgical masks for a medical purpose so long as the face mask does not create an undue risk; (ii) expresses the FDA's interest in engaging manufacturers on the decontamination of otherwise disposable face masks and filtering facepiece respirators for reuse; and (iii) relaxes regulations to increase the import and supply of face masks, N95 respirators, and similar devices.

With non-medical face masks becoming more readily available due to these relaxed regulations, employers who provide face coverings to their employees should take appropriate steps to mitigate against associated risk (e.g., utilizing appropriate product disclaimers and warnings) and follow all FDA guidelines for reuse. Those steps should include training employees in the safe use of protective face coverings, including posting or circulating the CDC [instructions](#).

For further guidance on face covering and face mask issues, contact your Akerman attorney.

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