

Blog Post

Facing Exposure: Dealing with Mask Refusers in the Workplace

March 23, 2021

As various states (Florida, Texas, South Carolina, and many more) have done away with mask mandates and as vaccinations become more widely disseminated amongst the general population, many individuals may be emboldened to throw their face coverings in the trash and never look back. However, employers may be hesitant to lift mask requirements and other COVID-19 protocol in their workplaces for a variety of (valid) reasons. But can employees refuse to don masks as they return to work in offices and other physical workspaces? What can employers do when employees try to make masks things of the past?

Generally, employers have wide discretion when it comes to enforcing safety and health requirements. Under various federal, state, and local laws, employers actually have an affirmative obligation to provide a reasonably safe working environment for their employees (as well as for any clients, customers, or other visitors). When the pandemic began, federal agencies like OSHA and the CDC put in place certain procedural requirements for employers to enact (temperate checks, social distancing, health screening, etc.) in order to protect employees and other third parties from the COVID-19 pandemic. Even as states begin to allow employees to return to normal life before face coverings, nothing from the CDC or OSHA suggests

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that the federal government is supporting an end to mask mandates.

In fact, OSHA's in February 2021 advisory guidance, titled "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace," suggests that employers provide workers with face coverings at no cost and require non-workers who visit the workplace to wear face coverings. The guidance pointedly does not encourage employers to forgo mask policies—instead, it states clearly that “[f]ace [c]overings... are simple barriers that help prevent respiratory droplets from your nose and mouth from reaching others. Face coverings protect those around you, in case you are infected but do not know it, and can also reduce your own exposure to infection in certain circumstances. Wearing a face covering is complementary to and not a replacement for physical distancing.” Any employer looking to continue face covering mandates in its workplace can look directly to OSHA for support. Of course, employers must discuss reasonable accommodations with any workers who cannot wear certain types of face coverings due to a disability. The February 2021 guidance also cautions employers to not implement measures that would single-out employees who are not vaccinated, for example only requiring unvaccinated employees to wear a mask. And, as always, employers should continue to take steps to ensure that workers are not retaliated against for raising any safety concerns. These protections against retaliation and discrimination are just as important now as before, especially given that workers may begin to no longer wear face coverings because he/she has been vaccinated.

This month, OSHA also announced a new National Emphasis Program (NEP) directive, designed to significantly reduce worker exposure to COVID-19 by targeting industries and worksites where employees may have a high frequency of close-contact exposures (think healthcare facilities, supermarkets,

manufacturing, etc.). Each OSHA Regional Office will conduct targeted COVID-19 inspections from a randomized list, and OSHA predicts that there will be about 1,600 inspections OSHA-wide. This NEP is effective through March 12, 2022, unless canceled or extended by a superseding directive.

Continuing to require face coverings may not only be compliant with OSHA standards; it may also reduce liability for employers as they begin to reopen their businesses to employees and the public. Employers are also facing multiple pandemic-related lawsuits relating to COVID-19 cases and health risks. These cases often involve employer liability and claims of wrongful death, negligence, violation of OSHA standards, and failure to enforce safety measures. In cases where employers intentionally violated federal, state, or local standards, employees may be able to sue in state or federal court instead of bringing worker's compensation claims.

As we previously reported, with some exceptions, employers can still mandate face coverings in the workplace as they see fit, especially because mask policies relate directly to safety protocols that ensure the health of employees. Thus, when faced with employees who are refusing to comply with mask/face-covering rules at work, employers can in fact require that face coverings are worn in the workplace or on the job in accordance with its own policies. In the event employees refuse or fail to comply with masks mandates, employers are able to discipline and/or terminate employees in the name of keeping other employees and the public safe from the spread of COVID-19. Employers should ensure that they have established face covering, mask, and other COVID-19 policies if it wishes to enforce such requirements amongst all employees.

For assistance with updating COVID-19 policies and procedures, including but not limited to face covering/mask policies, contact your Akerman attorney.

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