

ADA AUDIO CONFERENCE SERIES

Face Coverings and the ADA: Implications for Title III

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Centers for Disease Control (CDC) June 28th, 2020

- CDC recommends that people wear cloth face coverings in public settings when around people outside of their household, especially when other social distancing measures are difficult to maintain
- Cloth face coverings may help prevent people who have COVID-19 from spreading the virus to others
- Wearing a cloth face covering will help protect people, including those at higher risk of severe illness
- A cloth face covering may not protect the wearer, but it may keep the wearer from spreading the virus to others

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State Mandates Requiring Face Coverings

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Alabama



Requirement:

- Each person over age 6 shall wear a face covering at all times when within six feet of a person from another household in any of the following places: an indoor space open to the general public, a vehicle operated by a transportation service, or an outdoor public space where ten or more people are gathered.
- Face coverings are expressly required for employees of restaurants, personal care services, entertainment venues, and gyms and fitness centers
- <https://governor.alabama.gov/newsroom/2020/07/governor-ivey-issues-amended-safer-at-home-order-4/>

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Alabama Exceptions



A. Exceptions for practical necessity. The facial-covering requirement does not apply to:

- (i) Any person six years of age or younger;
- (ii) Any person with a medical condition or disability that prevents him or her from wearing a facial covering;
- (iii) Any person while consuming food or drink, or seated at a restaurant to eat or drink;
- (iv) Any person who is obtaining a service (for example, a medical or dental procedure) that requires removal of the facial covering in order to perform the services; or
- (v) Any person who is required to remove the facial covering to confirm his or her identity, such as for security or screening purposes.

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California



Requirement:

Californians must wear face coverings when they are in the situations listed below:

- Inside of, or in line to enter, any indoor public space;
- Obtaining services from the healthcare sector in settings including, but not limited to, a hospital, pharmacy, medical clinic, laboratory, physician or dental office, veterinary clinic, or blood bank;
- Waiting for or riding on public transportation or paratransit or while in a taxi, private car service, or ride-sharing vehicle;
- Engaged in work, whether at the workplace or performing work off-site, when:
- Interacting in-person with any member of the public;
- Working in any space visited by members of the public, regardless of whether anyone from the public is present at the time;
- Working in any space where food is prepared or packaged for sale or distribution to others;
- Working in or walking through common areas, such as hallways, stairways, elevators, and parking facilities;
- Driving or operating any public transportation or paratransit vehicle, taxi, or private car service or ride-sharing vehicle when passengers are present
- While outdoors in public spaces when maintaining a physical distance of six feet from persons who are not members of the same household or residence is not feasible.

<https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-128.aspx>

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California Exceptions



- Children aged two and under;
- Persons with a medical, mental health, or developmental disability that prevents wearing a face covering;
- Persons who are hearing impaired, or communicating with a person who is hearing impaired, where the ability to see the mouth is essential for communication;
- Persons for whom wearing a face covering would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines;
- Persons who are obtaining a service involving the nose or face for which temporary removal of the face covering is necessary to perform the service;
- Persons who are seated at a restaurant or other establishment that offers food or beverage service, while they are eating or drinking, provided that they are able to maintain a distance of at least six feet away from persons who are not members of the same household or residence;
- Persons who are engaged in outdoor work or recreation such as swimming, walking, hiking, bicycling, or running, when alone or with household members, and when they are able to maintain a distance of at least six feet from others;
- Persons who are incarcerated. Prisons and jails, as part of their mitigation plans, will have specific guidance on the wearing of face coverings of masks for both inmates and staff.

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Michigan Requirement:



Any individual who leaves their home or place of residence must wear a face covering over their nose and mouth:

- When in any indoor public space;
- When outdoors and unable to consistently maintain a distance of six feet or more from individuals who are not members of their household; and
- When waiting for or riding on public transportation, while in a taxi or ridesharing vehicle, or when using a private car service as a means of hired transportation.

To protect workers, shoppers, and the community, no business that is open to the public may provide service to a customer or allow a customer to enter its premises, unless the customer is wearing a face covering as required by this order.

Businesses that are open to the public must post signs at entrance(s) instructing customers of their legal obligation to wear a face covering while inside. The Michigan Department of Labor and Economic Opportunity may, in its discretion, require such businesses to post signs developed and made available by the Department, or conforming to requirements established by the Department.

<https://www.michigan.gov/whitmer/0,9309,7-387-90487-533941--00.html>

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Michigan Exception



The requirement to wear a face covering does not apply to individuals who:

- Are younger than five years old, though children two years old and older are strongly encouraged to wear a face covering, pursuant to guidance from the Centers for Disease Control and Prevention ("CDC");
- Cannot medically tolerate a face covering;
- Are eating or drinking while seated at a food service establishment;
- Are exercising when wearing a face covering would interfere in the activity;
- Are receiving a service for which temporary removal of the face covering is necessary to perform the service;
- Are entering a business or are receiving a service and are asked to temporarily remove a face covering for identification purposes;
- Are communicating with someone who is hearing impaired or otherwise disabled and where the ability to see the mouth is essential to communication;
- Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel;
- Are officiating at a religious service; or
- Are giving a speech for broadcast or an audience.

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Texas

Requirement:



Every person in Texas shall wear a face covering over the nose and mouth when:

- Inside a commercial entity or other building or space open to the public,
- In an outdoor public space, wherever it is not feasible to maintain six feet of social distancing from another person not in the same household;

<https://gov.texas.gov/news/post/governor-abbott-establishes-statewide-face-covering-requirement-issues-proclamation-to-limit-gatherings>

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Texas Exception

Exceptions:



- any person younger than 10 years of age;
- any person with a medical condition or disability that prevents wearing a face covering;
- any person while the person is consuming food or drink, or is seated at a restaurant to eat or drink;
- any person while the person is (a) exercising outdoors or engaging in physical activity outdoors, and (b) maintaining a safe distance from other people not in the same household;
- any person while the person is driving alone or with passengers who are part of the same household as the driver;
- any person obtaining a service that requires temporary removal of the face covering for security surveillance, screening, or a need for specific access to the face, such as while visiting a bank or while obtaining a personal-care service involving the face, but only to the extent necessary for the temporary removal;
- any person while the person is in a swimming pool, lake, or similar body of water;
- any person who is voting, assisting a voter, serving as a poll watcher, or actively administering an election, but wearing a face covering is strongly encouraged;
- any person who is actively providing or obtaining access to religious worship, but wearing a face covering is strongly encouraged;
- any person while the person is giving a speech for a broadcast or to an audience; or 11. any person in a county (a) that meets the requisite criteria

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Washington

Requirement:



- Department of Health statewide order directing all individuals to wear a face covering in any indoor public setting or when outdoors and unable to maintain 6 feet of physical distance from others. (effective June 26).
- A governor's order directing businesses to require and enforce the use of face coverings by all customers or visitors
- Businesses must post signage reminding customers and clients to wear a mask.

<https://coronavirus.wa.gov/information-for-you-and-your-family/face-masks-or-cloth-face-covering>

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Washington Exception



Exception:

- people with certain disabilities or health conditions
- People who are deaf or hard of hearing
- Children under the age of 2

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Business Policies Requiring Face Coverings



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Walmart U.S./Sam's Club Policy



A Simple Step to Help Keep You Safe: Walmart and Sam's Club Require Shoppers to Wear Face Coverings

- All shoppers must wear a face covering starting Monday, July 20
- Posting Signage regarding new face covering requirement
- Created the role of Health Ambassador
- They will work with customers who show up at a store without a face covering to try and find a solution
- "We know it may not be possible for everyone to wear a face covering. Our associates will be trained on those exceptions to help reduce friction for the shopper and make the process as easy as possible for everyone."

<https://corporate.walmart.com/newsroom/2020/07/15/a-simple-step-to-help-keep-you-safe-walmart-and-sams-club-require-shoppers-to-wear-face-coverings>

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Starbucks Policy



"Safety Protocols: We respectfully require customers follow social distancing and safety protocols recommended by public health officials, including wearing a facial covering when visiting our stores. It is our responsibility to protect our partners and comply with local public health mandates. As such, our partners have the right and responsibility to refuse service to customers who are not wearing facial coverings."

Drive-thru: Since Mar. 16, many Starbucks locations have been serving their communities at the drive-thru. While some locations may continue to operate only at the drive-thru, others will expand their service to include grab-and-go or entryway pickup.

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Other Business Policies:

- Costco**
 - "We know some members may find this inconvenient or objectionable, but under the circumstances we believe the added safety is worth any inconvenience."
- Apple**
 - "Face coverings will be required for all of our teams and customers, and we will provide them to customers who don't bring their own."
- Dollar Tree**
 - "In accordance with guidelines from the CDC, we are requiring all associates, customers and vendors to wear cloth face coverings when inside our stores."
- AT&T**
 - "Masks are required to be worn by employees, customers and visitors in our stores (both in store and curbside) and will be provided to customers who need them."
- Best Buy**
 - "Customers and employees are required to wear a face covering. We will supply a face covering if you don't have one. Small children and those unable to wear one for health reasons may enter without one."

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Resources

- About Cloth Face Coverings | CDC
<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>
- DOJ Press Release: *The Department of Justice Warns of Inaccurate Flyers and Postings Regarding the Use of Face Masks and the Americans with Disabilities Act* <http://www.ada.gov>

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Questions



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ADA Title III & Public Health Mandates

Balancing Nondiscrimination with Public Health and Safety in Businesses



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Is it true I can't ask if someone has a disability, and can be fined by the DOJ if I don't let them in?

NO, BUSINESSES MAY IMPOSE LEGITIMATE SAFETY REQUIREMENTS THAT ARE NECESSARY FOR SAFE OPERATION.

- The ADA does not give individuals with disabilities an absolute right to enter a business without a face covering.
- Cards and flyers that say otherwise are fraudulent, and the statements in them are false.

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THERE IS NO CONSTITUTIONALLY PROTECTED RIGHT TO ENTER A BUSINESS WITHOUT A FACE COVERING

And the ADA does not provide protection for people without disabilities

§ 36.201 General | (c) Claims of no disability

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WE ALL KNOW AND ACCEPT THIS HEALTH & SAFETY REQUIREMENT

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THIS IS ANOTHER PUBLIC HEALTH & SAFETY REQUIREMENT

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THE CRUX OF THE ISSUE

State and local governments mandate face coverings in public

- Public health mandates don't replace the ADA

The ADA upholds rights of people with disabilities to access businesses

- The ADA doesn't override public health mandates

Some disabilities make wearing a face covering difficult or impossible



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PUBLIC HEALTH MANDATES AND THE ADA MUST BOTH BE CONSIDERED

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WHAT IS ADA TITLE III?

Prohibits discrimination in places of public accommodation (i.e. businesses) including:

- Restaurants
- Department stores
- Salons
- Fitness centers
- Movie theaters
- Doctors' offices



Subpart B – General Requirements | § 36.201 General
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NONDISCRIMINATION REQUIREMENTS & REASONABLE MODIFICATIONS

Businesses should make reasonable modifications to meet nondiscrimination requirements, full and equal enjoyment to the extent possible:

- Equal opportunity to participate
- Equal opportunity to benefit
- Receipt of benefits in the most integrated setting appropriate

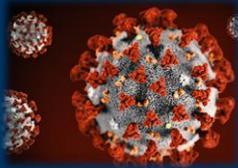
This does not mean that an individual with a disability must achieve an identical result as persons without a disability.

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EXCEPTIONS

- Eligibility criteria that include legitimate safety requirements
- Fundamental alteration
- Direct threat



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ELIGIBILITY CRITERIA AND SAFETY

Businesses shall not create eligibility criteria that screen out or tend to screen out people with a disabilities.

AND, businesses may create legitimate safety requirements for safe operation.

Subpart C – Specific Requirements | § 36.301 Eligibility criteria

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FUNDAMENTAL ALTERATION OF GOODS OR SERVICES

Planetarium example:

Someone who is Deaf asks lights be raised so that she can see her interpreter

- This would make a fundamental alteration to the goods/services for all patrons
- Offering another reasonable modification is appropriate:
 - Offer a seat on the far right or left, and position the interpreter with a dim light right in front of her
 - Provide patron with the narrator's script and a clip on light on clipboard

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DIRECT THREAT EXCEPTION

A public accommodation does not have to permit an individual to participate... when that individual poses a direct threat to the health or safety of others.

- AND the risk cannot be eliminated by:
 - A modification of policies, practices, or procedures, or
 - The provision of auxiliary aids or services
- Requires individual assessment

III-3.8000 | § 36.208 Direct threat

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INDIVIDUAL ASSESSMENT OF DIRECT THREAT

- Use it to determine:
 - Nature, duration, and severity of risk
 - Probability that potential injury will occur
 - Whether reasonable modifications will mitigate/eliminate the risk
- Gives appropriate weight to legitimate concerns (health, safety, etc.)
- Based on reasonable judgment to protect people from discrimination
 - Relies on current medical evidence/best available objective evidence

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RESOURCES FOR DETERMINING DIRECT THREAT

Sources for medical knowledge are public health authorities:

- The Centers for Disease Control (CDC)
- The National Institutes of Health (NIH)
- The U.S. Public Health Service
- Your state's Department of Health or COVID-19 information site



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What should I say or do if someone comes to my place of business without wearing a face covering?

Politely ask if they are able to wear one

- IF YES:
 - Offer them a face covering
 - Ask them to please come back with a face covering
 - Suggest they consider shopping online from their home
- IF NO:
 - Ask if they meet the mandate's exemption parameters
 - Ask if they meet any exceptions indicated by the CDC



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If someone can't wear a face covering because of disability, do I have to let them in without one?

No, instead you can:

- Offer a reasonable modification to provide them with options
- Engage in collaborative problem solving, an interactive process
- Identify the best way to accommodate this customer with a disability

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What are some ways a business can accommodate a person who can't wear a mask?



- Phone and online ordering
- Curbside pick-up or delivery
- A clear plastic face shield
- Reserved shopping time
- Video or audio call to employee who shops for them

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What if there's no way to accommodate without risking safety or completely changing my business?

Businesses don't have to give requested modification that would create:

- Direct threat to employees or customers
- Fundamental alteration to business practices

Example:

- At a hair salon, customers must wear face coverings;
- A customer can't wear one, and asks for a reasonable modification;
- How can the business accommodate this customer?



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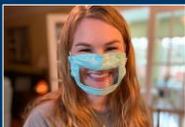
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What do I do when face coverings create a communication challenge for a customer?

Effective communication: Communication with customers who have disabilities must be as effective as it is for people without disabilities.

Businesses should prepare employees to communicate in different ways:



- Use gestures as much as possible
- Pull down face covering while maintaining 6' distance
- Face shields, or masks with clear plastic windows
- Small dry-erase board, or paper & pens
- Text message
- Remote video conferencing

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Questions



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Proof of Disability and Title III of the ADA – Public Accommodations

Talking About Medical Documentation

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A Popular Question

- May a business ask for proof of disability or medical documentation when an individual is unable to wear a face covering or protective mask due to a disability?
- Answer: Generally speaking, no, because the ADA generally prohibits conditioning goods and services on whether an individual can prove a disability.

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ADA Generally Prohibits Asking People to Prove their Disability

- General Rule: Asking for disability-related information pertaining to a requested accommodation is generally prohibited under Title III in the context of routine business transactions – such as shopping, going to a bank, or visiting a doctor;
- Reason: non-disabled individuals are not required to meet such prerequisites before they can go shopping, go to a bank, or visit a doctor; i.e., the spirit of the ADA is to foster equal access and inclusion in economic activities for people with disabilities.
- Requiring proof of a disability would amount to discrimination or exclusion from having equal access to routine goods and services.

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Limited Exceptions Apply Allowing Disability-Related Inquiries

- disability-related inquiries are permissible depending on the nature of the relationship between an individual with a disability and a public accommodation; e.g., a private college or day care center;
- Private College: may ask registered students with non-obvious disabilities for limited and relevant information from an appropriate licensed professional to justify semester-long classroom or testing modifications;
- Day care Center: may ask for limited and relevant medical information when a child requires specialized attention due to disability; e.g., insulin shots, administering medications, or special dietary needs – allergies, diabetes, hyperactivity, etc.

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Nature of Relationship Between Individual with Disability and Public Accommodation

- Customer with disability that prevents wearing a mask has a brief relationship when routine shopping or transacting business; e.g., making store purchases or withdrawing money in a bank.
- College student with disability has a long term relationship; staying for 4 years to obtain a degree, attend classes daily, and receive academic modifications to afford equal participation in programs and activities;
- Child with disability in Day Care goes to day care everyday necessitating accommodation or policy modification for medical necessity to participate in activities; e.g., getting insulin shots or preventing Hepatitis contamination.

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What does the Title III Statute and Federal Regulations say

- Both the Statute and Regulations are silent in regard to whether a public accommodation may ask an individual to prove a disability in the context of routine shopping or transactions;
- DOJ stands consistent with Congress in its policy that people with disabilities need not have medical documentation to carry with them any time they seek to engage in ordinary activities such as shopping for goods and services;
- Why? Because individuals without disabilities are able to shop or obtain services UNCONDITIONALLY; i.e., conditioning access to goods and services on proving a disability amounts to discrimination;
- DOJ has concluded that “a documentation requirement... would be unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA.” See, [28 C.F.R. Part 36 Appendix to the Rule \(Other Issues section\)](#).

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Permissible Service Animal Questions Help Determine Legitimacy of Needed Service Animal Not Disability

- Permissible Inquiries. A public accommodation SHALL NOT ask about the nature or extent of a disability but may make two inquiries to determine whether an animal qualifies as a service animal: (1) if the animal is required because of a disability and (2) what work or task the animal has been trained to perform;
- Public Accommodation SHALL NOT require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal;
- Public Accommodation MAY NOT make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., dog guiding blind individual, pulling a wheelchair, providing assistance with stability or balance for an observable mobility disability. See, 28 C.F.R. § 36.302(c)(6)

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Title III Medical Inquiries are Highly Specific to Nature of Covered Activity

- Service Animal questions do not ask about a person's disability;
- College or Day Care medical inquiries go to long term participation in programs or activities;
- DOJ routinely enforces ADA against graduate school and professional licensing examinations to prevent overly broad medical inquiries; e.g., Settlement Agreements with Title III and title II testing entities – LSAT, Police Academy admission, College SAT, etc. See e.g., 28 C.F.R. § 36.309(b)(1)(iv).

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Legitimate Safety Requirements Do Not Excuse Continuing ADA Obligations

- TRUE: a public accommodation may impose legitimate safety requirements that are necessary for safe operation; they must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities;
- FALSE: a protective mask requirement excuses a failure to accommodate or modify how goods and services are provided;
- REMEMBER: CDC and State/Local Required Mask Mandates generally provide exception for individuals unable to wear mask due to disability;
- Businesses are strongly advised to VERY SERIOUSLY consider disability-related disclosures and should avoid cynical doubts of a medical condition that prevents wearing a mask; e.g., respiratory, neurological, physical, or psychiatric medical reason.

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Direct Threat Defense Does Not waive ADA Obligation to Modify How Goods and Services are Provided

- TRUE: Public Accommodation may rely on “scientific evidence” from CDC, WHO, OSHA, and State/Local Mask Requirements to justify a “no exceptions” face covering requirement;
- FALSE: Direct Threat “ADA defense” exempts business from continuing obligation to modify how goods and services are offered;
- FYI - DOJ expects significant effort to make goods and services available without incurring undue burden or fundamentally altering how goods and services are provided; e.g., making a home delivery even if business never makes home deliveries (a policy modification).

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Reasonable Accommodation Must also be Made for Employees Unable to Wear a Mask

- Businesses must reasonably accommodate employees with a disability that prevents using a face covering;
- Here too the danger of spreading COVID-19 does not exempt an employer (a title III business or Title II public entity) from facilitating work-related reasonable accommodations or modifications to allow a worker to perform essential job functions; e.g., working from home, not wearing a mask where social distancing can be achieved, restructuring a job, etc;
- EXCLUSIVE TITLE I EXCEPTION: EEOC and OSHA have temporarily suspended ADA non-discrimination provisions that prohibit unnecessary medical inquiries to permit COVID-19 intrusive and invasive safety medical inquiries to prevent spread of the virus among employees; e.g., taking temperature, testing employees for COVID-19, asking questions about exposure to anyone believed to have COVID-19 symptoms.

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Do Healthcare Providers have Different ADA Obligations?

- The ADA reasonable modification of practices and procedures requirement remains applicable to healthcare providers;
- Healthcare providers are required to balance appropriate modifications with public health requirements relating to Federal and State health-related regulations and rules that legally and ethically obligate practitioners to provide medical services – even during a state of emergency that prioritizes airborne virus prevention measures;
- Healthcare organizations have an overarching obligation to modify any practice or procedure to reasonably accommodate any patient that requires medical services – regardless whether a Federal, State, or local mask requirement is in place;
- DOJ has on numerous occasions enforced ADA obligations when doctors refused to treat individuals with HIV, Hepatitis, and other high risk contagious diseases.

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Balancing Accessible Goods and Services with Legitimate Safety Requirements

- Since the COVID-19 virus is considered a direct threat by CDC, OSHA, and EEOC, a business has a legitimate “scientific” foundation to prevent the direct threat of spreading COVID-19 by requiring that ALL customers wear a protective mask or face covering when inside an enclosed business environment;
- BUT - a business does not have an absolute right to refuse service or exclude an individual unable to wear a mask due to a disability;
- instead of additional disability questions or demanding documentation, the business should engage the customer in an interactive process to identify alternative methods of service that allow the business to keep employees and other customers safe while still making goods and services accessible.

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What Should a Individual Unable to Wear a Mask Due to Disability do if a Business Requires a Mask without Exception?

- All consumers, regardless of disability status, are expected by government authorities and businesses to sensibly cooperate in a national concerted effort to prevent spread of a deadly airborne virus;
- Explain how disability prevents using a mask or face covering even though there is no obligation to carry medical documentation;
- Ask to access goods in an alternate way; e.g., home or curb-side delivery, online ordering, phone ordering, etc.
- Ask for home delivery even if business does not offer home delivery;
- Ask for appointment to obtain goods or services to avoid contact with other customers;
- Use one of the several smart phone or computer-based applications to order items; e.g., Uber Eats, grocery store online delivery services, DoorDash, Amazon Fresh, Wal-Mart App, etc.
- File charges of discrimination with US DOJ or private lawsuit;
- Identify another business offering same goods or services willing to reasonably accommodate or modify how goods or services are offered.

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Questions



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CONTACT THE ADA NATIONAL NETWORK

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