

Employers Providing Face Masks Should Review Their Health and Safety Obligations

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In its continuing efforts to slow the spread of COVID-19, on April 3, 2020, the Centers for Disease Control and Prevention (“CDC”) [recommended](#) that the general public wear, on a voluntary basis, “cloth face coverings in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies) especially in areas of significant community-based transmission” of coronavirus.

As a result, essential businesses (in non-healthcare settings) may decide to provide face masks to their employees. In such circumstances, these businesses should review if they have any health and safety obligations to their employees, including the following four threshold issues.

First, are employees expected to use masks or is the decision purely voluntary? While the CDC recommendation is for voluntary use, an employer could be compelled to require certain employees to wear masks. As discussed in our [article](#) on conducting hazard assessments for workers of essential businesses, if employees are considered “medium risk” for COVID-19 exposure because, for example, they have frequent contact with individuals within six feet, then using a mask could be required. Under OSHA’s guidance for conducting these hazard assessments, wearing a mask could be viewed as a form of administrative control and part of the employer’s obligation to provide a safe workplace. By contrast, if masks are not required based on the employer’s hazard assessment, the employers should clearly communicate that use is voluntary to avoid potential OSHA obligations discussed below.

Second, what types of masks are employees wearing? Initially, employers must carefully consider if the face masks are N-95 respirators, which look similar to paper surgical masks. As discussed in our separate [article](#) on COVID-19 OSHA issues, this distinction is important as N-95 respirators are subject to OSHA’s Respiratory Protection standard, which imposes numerous obligations on employers when employees are required to use them, and a separate obligation when use is voluntary. Under this recent CDC recommendation of cloth masks, the agency emphasized the need to conserve N-95 respirators stating that these are “critical supplies” that must “be reserved for healthcare workers and other medical first responders.” For employees who are required to wear N-95 respirators due to the nature of their jobs, employers should ensure compliance with OSHA’s Respiratory Protection standard in 29 CFR 1910.134(c)(1).

Third, has the employer considered the hierarchy of safety controls if masks are mandatory? An employer needs to carefully consider its OSHA obligations when it requires employees to wear masks. Bandannas and other cloth materials that are not designed to be face protection under OSHA’s Personal Protective Equipment (“PPE”) standard could still be considered a form of administrative control as a safe work practice (when used in conjunction with other controls like social distancing). Consequently, while it would not be proper to treat such cloth masks as PPE under the OSHA standard, an employer would still have obligations when using them as a form of administrative control to ensure employees use them safely. Moreover, if an employer was to mistakenly treat them as PPE, the OSHA standard imposes various requirements on employers

regarding maintaining, inspecting, and using PPE, in addition to training employees on a variety of PPE issues. For example, these PPE requirements would likely extend to surgical masks, which unlike bandannas and cloth masks, are designed for some limited face protection (as the CDC has recommended them for sick individuals to minimize the spread of COVID-19).

Fourth, if the employer requires employees to wear face masks, what other obligations might exist? As cloth masks could be a form of administrative control, an employer will likely need to provide general information on safe usage of any required mask. Because federal OSHA and several state OSHA plans rely on CDC guidance, employers should consider that the new CDC recommendation does not replace other CDC instructions, such as using social distancing and good hygiene for slowing the spread of the virus. The CDC advises that cloth face coverings “can be used as an additional, voluntary public health measure.” In that regard, employers should continue to actively encourage employees to wash hands frequently, avoid touching their face with unclean hands, and maintain social distancing. Further, employers would likely need to train employees on how to wear cloth face coverings in a way to minimize touching their face, consistent with the CDC’s guidance. Finally, for mandatory use, employers need to ensure that they are emphasizing the limitations on cloth and surgical masks, consistent with the CDC, such that it is clear to employees that - unlike N-95 respirators – these masks lack a filtration system that prevents particles from entering the lungs.

In addition to these initial considerations, employers should review their local jurisdictions as many state OSHA plans have additional obligations to generally train and educate employees when a new process is introduced that could be safety-related.

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