

FHMS COVID-19 Resource Center:

MASK POLICIES AND LEGAL CONSIDERATIONS FOR BUSINESSES

As we discussed [here](#), COVID-19 exposure claims from customers will likely involve allegations that the company failed to comply with government recommendations. An overview of the exposure cases that have been filed can be found in our [FHMS COVID-19 Resource Center](#). There has been a new wave of lawsuits alleging violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, related to mask-wearing policies. Below is a discussion on these cases and the legal considerations for mask-wearing policies.

Overview of Mask Requirements:

The requirement to wear a mask varies at the federal, state, and local levels of government. Currently, there is no federal requirement to wear a mask; however, the Centers for Disease Control and Prevention (CDC) issued [guidance](#) recommending the use of a mask to help slow the spread of the virus on July 14, 2020. Eleven (11) states have issued recommendations on wearing a mask in stores but do not require same. Forty (40) states have some form of mask requirement. IL, MA, NY, NJ, and PA require most customers of essential businesses over the age of two (2) to wear masks. AK, OH, and TX have a similar requirement, but for customers over the age of nine (9). All states provide an exemption for individuals with respiratory or other health conditions that could endanger their health or safety. A few states, including MA, NY, and PA, permit businesses to exclude or remove individuals who fail to comply with the state mask orders but prohibit requiring documentation of a medical condition.

In PA, the Secretary of the Department of Health issued an [Order](#) on April 15, 2020 requiring all customers to wear masks while inside a business permitted to open, subject to limited exceptions. The order allowed businesses to deny entry to individuals over the age of two who were not wearing a mask. However, individuals with a medical condition that prevented them from wearing a mask were permitted to enter and were not required to provide documentation of such medical condition. Businesses providing medication, medical supplies, or food were required to provide alternative methods of pick-up or delivery of such goods.

On July 1, 2020, the Secretary of the PA Department of Health issued an [Order](#) extending the mask-wearing requirement to all persons in PA subject to certain exceptions. "Individuals who cannot wear a mask due to a medical condition, including those with respiratory issues that impede breathing, mental health condition, or disability" remain exempt from the mask-wearing requirement. Individuals are not required to show documentation that they qualify for an exception. Also, the mask or "face covering" was defined as "a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is wrapped around the lower face." A "plastic face shield that covers the nose and mouth" is considered a "face covering" under the order.

Thus, PA's orders require customers to wear masks and require supermarkets and other essential businesses to provide alternative methods of pick-up or delivery for customers who claim they cannot wear a mask due to a medical condition.

ADA Lawsuits Against Giant Eagle:

Lawsuits alleging violations of the ADA have been filed against retailers, specifically supermarkets, attempting to comply with a state's mask requirements. On or about May 26, 2020, nine (9) plaintiffs filed separate lawsuits against Giant Eagle, a company that operates supermarkets in Western Pennsylvania, alleging that its COVID-19 policies regarding masks and other face coverings violate the ADA. Two plaintiffs filed motions for preliminary injunctions in their cases. Thereafter, an additional 25 cases were filed by plaintiffs asserting the same allegations against Giant Eagle; all cases were consolidated on June 17, 2020. The same attorney represents all plaintiffs.

The plaintiffs filed an amended consolidated complaint on June 22, 2020 in the lead case, *Pletcher, et al. v. Giant Eagle, Inc.*, CA No. 2:20-cv-00754, Doc. 14 (W.D. Pa. June 22, 2020). They collectively claim that Giant Eagle's corporate policy requiring all PA customers to wear masks while inside the stores violates Title III of the ADA and the PA Human Relations Act (PHRA), 43 P.S. § 951, *et seq.*, because it makes no exception for customers who cannot wear a mask for medical reasons. The plaintiffs further alleged that the policy directly contradicted the order of the Secretary of PA's Department of Health, as well as related guidelines from the state and the CDC, and denied them full and equal access to Giant Eagle stores in violation of Title III of the ADA. The amended consolidated complaint contains detailed allegations of each plaintiff's specific experience at the Giant Eagle stores when they were not permitted to enter due to the mask policy.

One plaintiff, Josiah Kostek, filed an amended motion for preliminary injunction on July 1, 2020. That motion seeks a preliminary injunction prohibiting Giant Eagle from excluding customers with disabilities that prevent them from wearing masks to shop at its stores in the same manner as non-disabled customers. Additionally, the motion seeks an order requiring Giant Eagle to comply with the guidelines published by the PA Department of Health and enjoin a specific Giant Eagle store from banning Kostek in retaliation for asserting his rights under the ADA.

In opposing the motion, Giant Eagle referenced Kostek's social media posts suggesting that his grievance arose from his belief that mask requirements violate his constitutional rights, not a disability under the ADA as claimed. Giant Eagle further argued that there was no irreparable harm or violation because its curbside pick-up and home delivery services did not require use of a mask. Noting the spike in cases in Allegheny County, Giant Eagle argued that the immediate health risks to Giant Eagle's other customers, employees, and the general public outweighed any alleged inconvenience to Kostek. Finally, Giant Eagle identified the substantial steps that it took to safely operate its stores in the pandemic, which included tripling its curbside service, hiring thousands of new employees to support curbside service and in-store operations, investing \$3 million in protective health and safety equipment, and expanding store hours to accommodate older and immunocompromised customers. This motion is still pending and has not yet been decided by the court.

Legal Considerations:

Excluding customers with disabilities who refuse to wear a mask without providing a reasonable accommodation may constitute a violation of the ADA or applicable state law in places of public accommodation. To succeed on a claim under Title III of the ADA, a plaintiff must prove "(1) discrimination on the basis of a disability; (2) in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation; (3) by the public accommodation's owner, lessor, or operator." *Anderson v. Kohl's Corp.*, CA No. 2:12-cv-00822, 2013 U.S. Dist. LEXIS, *22 (W.D. Pa. May 3, 2013).

Section 301 of Title III of the ADA, 42 U.S.C. § 12181, lists the types of private entities considered to be places of accommodation (*i.e.*, places to which Title III applies). Those entities include, but are not limited to, a hotel, restaurant, theater, grocery store, clothing store, shopping center, laundromat, pharmacy, hospital, nursery, school, and places of exercise or recreation, if the operations of those entities affect commerce. Notably, the ADA does not require a public accommodation to allow a direct threat to the health or safety of others (42 U.S.C. § 12182(b)(3)), modify a legitimate safety requirement (28 C.F.R. § 36.301(b)), or make modifications that would create an undue burden (42 U.S.C. § 12182(b)(2)(A)(iii)).

The ADA defines “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.” 42 U.S.C. § 12182(b)(3). The [ADA Title III Regulations](#) require a public accommodation to make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk” in determining whether an individual poses a direct threat to the health or safety of others. 28 C.F.R. § 36.208(b). Such an assessment does not require a physician and can be based on “guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.” 26 C.F.R. PART 36, APP. C.

Recognizing the community spread of COVID-19 and the risk of contagion, **the U.S. Equal Employment Opportunity Commission [stated](#) on March 21, 2020 that the COVID-19 pandemic meets the “direct threat” standard.** On June 30, 2020, the U.S. Department of Justice [stated](#) that “[t]he ADA does not provide a blanket exemption to people with disabilities from complying with the legitimate safety requirements necessary for safe operations.”

Also, a public accommodation is permitted to establish eligibility criteria necessary for the safe operation of the place of public accommodation. 28 C.F.R. § 36.208. “Implicit in that right is the right to ask if an individual meets the criteria.” 26 C.F.R. PART 36, APP. C. However, eligibility criteria must be based on actual risk, not on speculation or stereotypes; applied to all customers; and inquiries must be limited to matters necessary to the application of the criteria. *Id.*

As the COVID-19 pandemic has been deemed a “direct threat”, the ADA regulations may provide a basis for denying entry to all customers of public accommodations who do not have a face-covering so long as reasonable accommodations that do not require a mask are provided. Also, the ADA regulations would permit a public accommodation to establish certain eligibility criteria and provides the right to ask if any individual meets the criteria. However, those regulations appear to conflict with the orders issued by the Secretary of PA’s Department of Health that permit individuals who state they are exempt from wearing a mask to enter a business without a mask without having to show documentation that they qualify for an exception.

Thus, a public accommodation may encounter conflicts in creating a mask-wearing policy that complies with both the ADA regulations and state orders on masks, especially in states with orders that expressly state a customer does not need to prove that they qualify for an exception. Finally, permitting individuals to enter a store without a mask may subject the store to other liability; businesses already face lawsuits from employees and customers alleging COVID-19 exposure from a lack of safety precautions as we discussed [here](#).

Recommendations:

Given the varying scope and frequently changing orders between states and within states, a public accommodation should make sure that its policy on masks not only complies with state and local requirements where the store is located, but also federal regulations that preclude discrimination based on race, gender, national origin, sex, age, and disability. The latter protected class is at issue when a customer does not wear a mask due to a medical condition. In those situations, the customer should be provided with a reasonable accommodation that does not require a mask.

The policy should address requests for reasonable accommodations without also subjecting the store to exposure cases, state or federal fines, closures, and employee claims. Reasonable accommodations may include online services, curbside pick-up, and no-contact delivery. Many supermarkets and retailers have already adopted these services during the pandemic. Stores can also consider mask alternatives in its policy, such as a scarf or face shield.

A store manager or other senior employee should be designated to review requests for accommodations and document *all* situations in which a customer was denied entry for refusing to wear a mask - not just when it involves a medical condition. Signs identifying the policy for wearing a mask and requesting an accommodation should comply with the state and/or local mask requirements and be posted to reduce or eliminate ADA violations.

We previously reported on efforts to obtain limited immunity from COVID-19 exposure claims for businesses in compliance with guidelines [here](#). There is still a strong effort being made to obtain this immunity and a few states have issued legislation providing such immunity. However, such immunity would not cover claims involving ADA violations. Similarly, a waiver would not avoid such liability; we previously discussed the enforceability of COVID-19 waivers in PA [here](#).

FHMS is closely monitoring the claims related to COVID-19 filed against business and are prepared to defend them. Information about those cases, efforts to obtain immunity from such claims, and more, can be found in our [FHMS COVID-19 Resource Center – Premises Liability](#). For questions about the ADA claims or assistance with drafting mask-related policies and procedures, please do not hesitate to contact us.

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