

WASHINGTON STATE HUMAN RIGHTS COMMISSION

Questions and Answers About Face Coverings and the Washington Law Against Discrimination During the COVID-19 Pandemic



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The Washington State Human Rights Commission enforces the Washington Law Against Discrimination (WLAD). The WLAD prohibits discrimination in the areas of employment, public accommodation, housing, credit and insurance on the basis of race, color, creed, national origin, citizenship or immigration status, age (in employment), sex (including pregnancy), disability, use of a trained dog guide or service animal, sexual orientation, gender identity, honorably discharged veteran and military status (in employment, credit, housing, and public accommodation), marital status (in employment, credit, insurance, housing), family status (in housing), or status as a breastfeeding mother (in public accommodation), or in retaliation for opposing discrimination.

This guidance reflects the information available as of the second week in August 2020. This information is likely to change. This information is not legal advice. As this is a new situation, there is little by way of tested practices or court cases that can tell us exactly what we need to do in specific situations related to face coverings and COVID-19. Following this guidance is not a guarantee that a business will not face a lawsuit or a discrimination claim, but it is the best guidance we can provide at the current time. For specific situations, you are urged to contact an attorney.

The terms “mask” and “face covering” are both used in this document, and are meant to be synonymous.

Background:

First recognized in Washington in February 2020, the novel coronavirus (SARS-CoV-2, or COVID-19) has fundamentally altered the way we live and work. Current research indicates that the virus can be spread through respiratory droplets that are produced when a person sneezes, coughs or talks. The virus can be spread by people who do not know they have the virus, and do not have any symptoms.

In order to protect yourself and others, the Centers for Disease Control (CDC) has recommended frequent handwashing with soap and water for at least 20 seconds, the use of hand sanitizer, frequent disinfecting of high-touch surfaces, staying at least 6 feet away from people who do not live in your same household, and wearing a face covering while in public.

More is being learned about the virus and how it is spread each week. Scientific, peer reviewed studies are ongoing. This is why guidance on staying safe has changed from February to now (August 2020). It is likely to change in the future. In order to stay current with the latest health recommendations, visit www.cdc.gov/coronavirus or www.coronavirus.wa.gov.

General Questions:

Q: Why do people have to wear masks?

A: Currently, approximately 30 states in the United States, including Washington, have face covering mandates, and that number is likely to increase as the virus continues to spread. See the Statewide Order at https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/Secretary_of_Health_Order_20-03_Statewide_Face_Coverings.pdf

There are three face cover orders in place:

- For employers and workers: Washington employers must ensure workers wear face coverings at work in almost all situations. Employers must provide face coverings if workers do not have them. Employers must comply with this order, which is enforced by the Department of Labor & Industries.
- For the public: An order from the secretary of health requires Washingtonians to wear face coverings in public spaces and shared spaces, both indoors and outdoors. Examples include hotel or apartment hallways, outdoors where many people are gathered such as parks, playgrounds or popular walking paths, and in a restaurant when not seated and not eating. People are individually responsible to comply with this order.
- For businesses: A proclamation from Gov. Inslee prohibits businesses from allowing customers to enter without face coverings. In this proclamation, businesses are encouraged to provide alternative methods of service for customers who cannot wear masks. (However, as you read through this document, you will learn that the Americans with Disabilities Act, or ADA, and the Washington Law Against Discrimination, **require** reasonable accommodation, in most of these situations.)

Q: Are there people who do not have to wear a face covering?

A: There are exceptions. Children under five do not have to wear a mask. People who have a medical condition, mental health condition, developmental or cognitive condition, or a disability that prevents them from wearing a face covering do not have to wear one.

Q: If a person cannot wear a mask because of a disability, does this mean that they are able to go where they want without wearing a mask?

A: No. These individuals are still prohibited from going places and doing things where a mask is required. (See specifics for businesses and employment below).

Q: Does a person have to produce medical documentation or certification when they are unable to wear a mask?

A: Not when they are a customer or patron at a business, or out in public. However, in an employment situation, medical documentation may be required. (See more below.)

Q: Are face shields an acceptable substitute for a mask?

A: No, because while they protect the wearer, they do not protect others. If the face shield has a cloth extension on the sides and bottom, then it is acceptable.

For Businesses and Customers

Q: Can businesses require all customers to wear a face covering inside their business?

A: Yes. See the Governor's order at <https://www.governor.wa.gov/sites/default/files/proclamations/20-25.6%20-%20COVID-19%20Safe%20Start-Stay%20Healthy%20%28tmp%29.pdf>

Q: Can a business stop a person from entering if they do not have a mask?

A: Yes. The Governor's Order states that no business may operate, allow a customer to enter a business, or conduct business with a customer inside any building that is open to the public or outdoors in a public place unless the customer is wearing a face covering.

The best practice is for the business to let the person know about the mask requirement and ask the person if they have a mask. If the person does not have a mask, it is a great idea for the business to have masks on hand to give to the person. There are signs that the business can print out and post at:

<https://www.coronavirus.wa.gov/sites/default/files/2020-06/FacemaskOnlyGuidanceGeneral.pdf>

Q: What if the person responds that they cannot wear a mask because of a disability; does the business have to let the person in then?

A: No.

If the person says that they cannot wear a mask because of a disability, then the business can explain that in that situation, they will try to provide an alternative service (a reasonable accommodation) to the person, but that the person will not be able to enter. The business will then need to work out a solution for the person to receive services, whenever possible (the interactive process).

Q: But, doesn't the ADA (Americans with Disabilities Act) require a business to allow anyone with a disability into the place of business?

A: No.

Nothing in the ADA, or the Washington Law Against Discrimination (WLAD), says that the person with a disability must be allowed into the business, even when they can't wear a mask. Rather, public health mandates work together with the laws protecting persons with disabilities. Public health mandates require masks to keep employees and the public safe, while alternate services (reasonable accommodations) are provided so that the person with the disabilities still receives services.

Q: Can the business ask the person to provide proof of a disability?

A: No. Nor can the business ask the kind of disability.

All the business can do is inquire if the person has a mask, and let them know that they need to wear one in order to enter the business. If the person says that they cannot wear a mask, the business should be prepared to discuss alternate services, without asking for proof. The business will then need to work out a solution for the person to receive services, whenever possible (the interactive process).

Q: What if the person has an official looking card that says that they do not have to wear a mask due to a disability and that a business could be fined if they don't let the person in?

A: These cards are phony. There is no government agency producing and distributing these cards. Unscrupulous people are selling or making them, even though they have no legal authority. No government agency is going to fine a business for not allowing a person in if they do not wear a mask. However, if the person claims a disability, card or not, the business does have to provide an alternate service when possible. See <https://www.justice.gov/opa/pr/departments-justice-warns-inaccurate-flyers-and-postings-regarding-use-face-masks-and>

Q: Does a business have to provide an alternate service to a person who has a disability and cannot wear a mask?

A: In most situations, yes. This is required by Title III of the ADA, as well as by the WLAD.

The business will need to work out a solution (a reasonable accommodation) for the person, with the person, so that they can receive services. This is referred to as the interactive process, and in most situations, will not be too complicated. The alternate services provided do not need to be identical to the services a person without a disability would receive, but need to provide similar services to the greatest extent possible.

Q: What types of alternate services does a business need to offer?

A: It depends on the type and nature of the business. The business needs to offer a reasonable modification (also called a reasonable accommodation) to the person so that the person can receive services. Often a business can offer phone or video appointments or consultations, on-line or phone ordering, a reserved time to receive services (with distancing), or curbside pickup. Other ideas include offering delivery (even if the business does not usually deliver) or having an employee use a video chat app to do shopping for the person.

Q: What if there is no alternate service available?

A: The person and the customer should do their best to think of something, and can be creative. A business may need to do something that it has not done before (for example, start delivery when it never has before).

However, there may be situations where a reasonable accommodation is not reasonable. Using the example above, a small hardware store with a small number of employees and no delivery truck may not be able to provide delivery, and buying a delivery truck for this purpose would not be reasonable.

Often, businesses that offer personal services will not be able to do any accommodations that would allow the person to receive services. Examples include a nail salon or barber. These businesses do not have to set up outside stations and then create an implement that could be used to provide services at a 6 foot distance.

The types of reasonable accommodations that will be required depend on the business, the type of services offered, the size and resources of the business, and the number of employees available to provide an alternate services. What may be reasonable for a large, chain box store may not be reasonable for a small, independent, family owned store.

One accommodation that is not reasonable would be to allow someone into the business without a mask, as this would constitute a safety risk to employees and customers.

If a business is unable to make a reasonable accommodation provide alternate services, the business should document the situation and their attempts and reasons. If the person refuses the alternate services, the business should document that as well.

Q: Is there ever a situation inside a business when someone can remove a mask?

A: Yes, a very narrow exception is when a store employee is communicating with someone who is deaf or hard of hearing who lip-reads or relies on facial expressions. In that situation, the store employee can take off their mask, while maintaining a six-foot distance, to communicate with the customer. Another exception is when a person is eating or drinking. Again, the person must maintain a six-foot distance from people not in their household.

Employment

Q: Do employees need to wear masks?

A: Yes, most employees need to wear masks while at work. If a person is working alone, they are not required to wear a mask. See more information from the Washington State Department of Labor and Industries here:

<https://www.lni.wa.gov/agency/outreach/coronavirus-covid-19-worker-face-covering-and-mask-requirements-questions>

Q: If an employee is not able to wear a mask because of a disability, should they be able to work without a mask?

A: No. If an employee does not work alone, the employee should not be allowed onto the worksite without a mask. However, an employer does need to reasonably accommodate the employee in this situation.

Q: But the ADA requires an employee to receive reasonable accommodation. Wouldn't that include excepting the employee from the mask rule?

A: No. The ADA and the WLAD do not interfere with or prevent employers from following public health guidelines or requirements. Non-discrimination laws (EEO laws) and public health guidelines need to work together. Public health mandates currently require the use of a mask to protect co-workers and the public. Non-discrimination laws require that the employer find some other way of allowing the employee to work, or at least to stay employed. This process of finding ways of allowing the employee to work is called the interactive process, and involves the employee and employer discussing options for a reasonable accommodation and coming to a solution.

Q: What is a reasonable accommodation?

A: A reasonable accommodation is a change to a workplace policy or practice so that a person with a disability can do the essential functions of their job, or enjoy the benefits and privileges of employment.

Q: Can an employer request medical documentation?

A: Yes, if an employee states that they cannot wear a mask due to a medical condition, then the employer can ask for medical documentation verifying this information and to obtain reasonable accommodation information. The doctor will not provide the information directly to the employer without a release, so generally this information is obtained through the employee. Any information pertaining to a medical condition or the reasonable accommodation process should be kept in a separate medical file, and not the personnel file. It should be kept as confidential as possible.

Q: What would be a reasonable accommodation in the situation where an employee can't wear a mask?

A: Reasonable accommodations can include having the employee wear a scarf, or a face shield with cloth extensions on the sides and bottom. The employee can be assigned to a closed wall office to work alone, or can be assigned to an area where they are working by themselves (and wear the mask when they leave the office or assigned isolated area). A Plexiglas barrier that extends completely around the employee and high enough to block any breath exhalations can be created between the employee and any co-workers or customers. The employee can be assigned to telework. The employee's schedule can be modified so that they are working alone. The person can be reassigned to a different position where they are working alone. As a last resort, the employee can be put on medical leave until they can either wear a mask, or until the health situation has improved and no masks are required.

An employer does not need to create a job, or to take away the essential functions of the job (although an employer can do this if it wants to).

Normally, medical leave as an accommodation would not be reasonable if it goes on for a long time or if there is no end date in sight for the leave. However, due to the uncertain nature of this pandemic, and lack of information about a cure or a vaccine, employers should be prepared to be more lenient about the length of a medical leave.

Q: Is not wearing a mask a reasonable accommodation?

A: No. Employees who work around other employees or customers are required to wear masks. If they do not wear a mask, then this would create a safety risk to other employees and customers, which would not be reasonable for the employer. However, the employer must provide another reasonable accommodation. (See the question directly above.)

Q: What else should an employer do during the interactive process?

A: Employers should keep in communication with the employee. Be creative about reasonable accommodation. If an employer wants ideas about reasonable accommodations, it should reach out to www.askjan.org. Keep good records about the interactive process, offers of reasonable accommodations, and any rejections of those offers. It is a good idea for the employer to put the reasonable accommodation in writing and give the document to the employee so it is on record and the employee knows what is expected. An employer does not need to offer the reasonable accommodation that the employee wants, but does need to do something that is effective.

Q: What if other employees complain that the employee seems to be getting special privileges?

A: The employer should simply reply that sometimes the law requires an exception to the normal workplace practices. They should not reveal that the person has a disability.

Q: If the reasonable accommodation is telecommuting, then who pays for any reasonable accommodation equipment for the home office?

A: The Equal Employment Opportunity Commission has determined that the employer pays for any reasonable accommodation necessary for the home office. For example, if the employee uses a sit/stand desk in the office, and needs one to work at home, the employer would pay for that equipment.

Additional Resources:

FAQ on masks from the Department of Health:

<https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/ResourcesandRecommendations/ClothFaceCoveringsandMasks/ClothFaceCoveringsandMasksFAQ>

DOH guidance on cloth face coverings:

<https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/ClothFacemasks.pdf>

Businesses can submit questions here: [COVID-19 Business and Worker Inquiries](#)

Employers can request COVID-19 prevention advice and help from DOSH:

www.Lni.wa.gov/DOSHConsultation . Employee workplace safety and health complaints may be submitted to the DOSH Call Center: 1-800-423-7233 or via email to adag235@Lni.wa.gov.

Common questions regarding workers and face coverings:

[Coronavirus \(COVID-19\) Common Questions Regarding Worker Face Covering and Mask Requirements](#)

L and I COVID 19 resources: [Novel Coronavirus Outbreak \(COVID-19\) Resources](#)

To report a violation: <https://coronavirus.wa.gov/report-safe-start-violation>

If you need additional information regarding discrimination issues, please contact the WSHRC at 360-753-6770 or 800-233-3247 (TTY 800-300-7525). Additional information on discrimination and other civil rights issues can be found on our website at www.hum.wa.gov. **This document is intended as general guidance does not constitute legal advice; if you have a particular situation about which you need legal advice, you should contact your attorney.**