



May 18, 2020

To: CGA Retail Members

From: California Grocers Association

Re: CGA Whitepaper: *"Guidance for Grocers on Responding to Employees' or Disabled Customers' Requests to Go Without Face Covering"*

CGA Retail Member,

These are unprecedented times for both grocery retailers and their customers. The uncertainty of COVID-19 has confounded the science and medical community, along with government agencies and elected officials, creating an environment of confusion and misunderstanding.

This conundrum has given rise to serious questions regarding facial covering requirements. As more and more cities and counties adopt mandatory facial covering requirements for customers and employees, the question of enforcement has caused considerable consternation within the grocery community. Employers also need direction on what accommodations need to be made when an employee or customer refuses to wear a facial covering.

To provide CGA retail members direction, the Association requested the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. to create a whitepaper entitled ***"Guidance for Grocers on Responding to Employees' or Disabled Customers' Requests to Go Without Face Covering."***

This whitepaper offers a general understanding of the risks and liabilities under the law, and every operator should apply this advice to their circumstances.

Also, CGA has created a database of local facial covering ordinances to keep you current on city and county mandates. CGA updates this page regularly. To access the page, click [here](#).

## **Guidance for Grocers on Responding to Employees' or Disabled Customers' Requests to Go Without Face Covering**

An employee approaches management, with or without a doctor's note, saying that she cannot wear a face mask because of a disability such as asthma, COPD, a skin condition, or claustrophobia. Similarly, a customer approaches the store entrance, with or without a doctor's note, saying that he or she cannot wear a face mask because of a disability.

Do you honor those accommodation requests? Do you send the employee home? Do you deny the customer entry into the store?

The Centers for Disease Control and Prevention and California Department of Public Health recommend the use of simple cloth face coverings to prevent transmission of the COVID-19 virus and slow its spread. However, many California cities and counties have taken a stricter approach on the use of face coverings,<sup>1</sup> leaving grocers at a loss for how to respond to employee and customer requests to be excused from face covering requirements.

Below, we take you through some of the orders and then guidance how to handle requests for face covering accommodations from employees and customers with disabilities.

### **City and County Face Covering Orders**

The following is a list of the different types of orders that we have seen in California and that may (or may not) apply to your specific store:

- County Orders, City Orders, and Others. Keep in mind that your store may be subject to more than one order regarding face coverings. For instance, both your city and your county may have issued orders regarding face coverings. In some cases, stores located at university campuses are also subject to face covering orders issued by the university.
- Face Covering *Required* or Face Covering *Recommended*. While most face covering orders *require* face coverings for employees and customers, other orders simply *recommend* the use of face coverings. Some orders *require* face coverings for employees, but only *recommend* face coverings for customers.
- Enforcement. Some orders state that a store *must* remove or refuse service to a customer who does not comply with a face covering order. Other orders state that the store *may* remove them or refuse service, but is not required to do so. It is important to note that most city and county orders can be enforced by local police departments.
- Posting Face Covering Requirement. Some orders require the store to place a posting about the face covering requirement at the store entrance or somewhere that can be easily seen by customers.
- Supplying Face Coverings. Most orders will *require* the store to provide face coverings to its employees free of charge, but only *recommend* that the store have face coverings available for purchase by customers.

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<sup>1</sup> Many county and city orders use the term "face coverings" to refer to any fabric or other soft or permeable material, such as cloth face masks, scarves, and bandanas, that cover the nose and mouth.

- Exceptions for Disabilities or Health-Related Reasons. Some orders contain exceptions stating that face coverings are *not* required for persons who have a disability or “health-related reason” that prevents them from wearing a face covering. Most orders do not contain this exception.
- Exceptions for Children. Many orders will contain an exception that does not require children under the age of 6 to wear a face covering. However, the age range for the exception to apply may vary from 2 to 6 years old and some will not specify an age.

Given the wide variety of orders in different jurisdictions, it is very important to review the local orders that apply to your specific grocery store, which may include, for example, a city and county order.<sup>2</sup>

As noted above, many cities and counties have required grocery *employees* to use face coverings, but have only *recommended* grocery store customers use face coverings. In addition, while California’s Occupational Safety and Health Act (“Cal-OSHA”) guidelines recognize that “[c]loth face covers are not protective equipment and do not protect the person wearing a cloth face cover from COVID-19,” they instruct that “[e]mployers should train and encourage workers to wear the face covering of their choice voluntarily while at work to help prevent community transmission.” Cal-OSHA also instructs employers to post signs at store entrances instructing customers to “use cloth face covers in the facility when possible.”<sup>3</sup>

Many grocers have responded to employee, customer, and/or union pressure and have voluntarily elected to implement face covering policies for customers without any local orders, or that are stricter than local orders. If you go this route, you may want to ensure that your stricter policies are rooted in some objective and scientific evidence, like CDC guidance or a physician’s recommendation.

## **EMPLOYEE REQUESTS**

### **How Should You Respond to an Employee Request For An Exemption to Face a Covering Policy/Order?**

Questions about accommodating employee refusals to wear face coverings implicates not only the Americans with Disabilities Act (ADA) and Fair Employment and Housing Act (FEHA) accommodation processes, but also county and city orders that frequently change. Your treatment of these requests should be consistent with your interactive process<sup>4</sup> for all other requests for reasonable accommodations.

If an employee objects to the use of a face covering because of disability or for other medical reasons, you are required to discuss the request with the employee and either honor the request or

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<sup>2</sup> The CGA maintains an up-to-date catalogue of most of the face covering orders at <https://www.cagrocers.com/government-relations/local-ordinance-database/>.

<sup>3</sup> <https://www.dir.ca.gov/dosh/Coronavirus/COVID-19-Infection-Prevention-in-Grocery-Stores.pdf>

<sup>4</sup>It is important to memorialize this process in writing through the normal interactive dialogue process. The California Department of Fair Employment and Housing has created a sample Request for Reasonable Accommodation Package to assist employers and employees in engaging in the interactive process. See <https://www.dfeh.ca.gov/accommodation/>.

provide a reasonable alternative *unless* doing so would result in an undue hardship on the operation of the business. The term “undue hardship” includes any accommodation that is unduly costly, extensive or substantial, or would fundamentally alter the nature of the business.

#### *Requests for Exemption to Employer’s Face Covering Policy*

In evaluating an employee’s request to be exempt from your face covering policy, you must timely engage in the interactive process with the employee to assess both the job and specific limitations of the employee that are directly related to the need for the exemption. A discussion with the employee may reveal that the employee can work with a face covering, but with a simple modification. For example, the employee may be able to generally wear the face covering, but will need more frequent breaks to periodically remove the covering.

If the employee cannot work with *any* face covering even in a modified capacity, you should consider exploring other accommodations. This analysis includes evaluating whether the employee can work without a face covering, but under stricter physical distancing conditions. Some examples include allowing the employee to work in a different area of the building that does not bring the employee into close proximity with other employees or the public, allowing the employee to work different hours, changing the employee’s job duties, or reassigning the employee to a vacant position for which the employee is qualified.

If none of these accommodations will allow the employee to continue to work, you must consider whether a leave of absence is an effective accommodation. Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee’s disability.

Both the ADA and FEHA provide that employees are not qualified to perform their job duties if a disability poses a direct threat to the health and safety of themselves or others. Whether an employee working without a face covering would be a direct threat to themselves or others will hinge on many factors, including the current science and recommendations of health officials and the degree of the employee’s interactions with customers or co-workers.

Unless the disability and need for accommodation is obvious, you may generally require the employee to provide a health care provider’s note, or other medical documentation, to substantiate the request for the accommodation.

#### *Requests for Exemption to City or County Face Covering Order*

You must similarly engage in the interactive process in response to an employee’s request for an exemption from a city or county face covering order. However, there is a viable argument that forcing a business to violate the law (*e.g.*, not enforce a governmental face covering order) is an undue hardship on the operation of the business.

## **CUSTOMER REQUESTS**

### **What Laws Are Relevant to a Customer's Request to Enter Without a Face Covering?**

There is growing concern regarding how to handle a customer's refusal to wear a face covering. The most common reason that customers and employees refuse to wear a face covering is that they have a disability or other health-related reason that prevents them from doing so. Such a request requires consideration of certain state and federal laws that may apply.

At the federal level, Title III of the ADA prohibits places of public accommodations (that includes grocery stores) from discriminating against persons with disabilities in the provision of goods and services. Specifically, the ADA prohibits grocery stores and other businesses from imposing "eligibility criteria" (such as a face covering requirement) to enter a store to purchase goods and services if it will screen out persons with disabilities. The ADA also requires grocery stores to make "reasonable modifications" to policies and procedures (such as a face covering requirement) if necessary to afford goods and services to persons with disabilities. However, the ADA also provides that you may exclude an individual with a disability for compelling safety reasons where an individual with disability or her conduct poses a "direct threat to the health or safety of others." It remains unclear, however, how these exceptions will apply during these unprecedented times.

At the state level, Cal-OSHA and the Unruh Civil Rights Act ("Unruh Act") are relevant. The Unruh Act prohibits "business establishments" from discriminating against persons on the basis of disability. A violation of the ADA above leads to a violation of the Unruh Act, but an independent violation of the Unruh Act can be established where the discrimination is intentional. Cal-OSHA encourages workers' and customers' use of face coverings.

### **How Should You Respond to a Customer Request to Enter Without a Face Covering?**

The first step is to review and understand any applicable government order. Remember: there may be more than one.

Grocers should enforce face covering rules imposed by any governmental order, whether at the state, county, or municipal level. While all of these issues are unprecedented, we believe that following those orders provides protections from claims by customers and employees alike, as well as government enforcement actions.

The second step is to consider whether those orders provide for exceptions for disabled customers. Where they do, you should honor customer requests, but be prepared for the backlash that any customer moving through the store may experience. Where the government orders do not provide for disability exceptions, and many do not, you have a more difficult choice. While we think adhering to the government orders is defensible, the ADA is a "supreme" federal law, compared to the state or local orders, and a court may one day say your ADA obligations trump your state and local obligations.

This places you in a “no win” situation, so you have to assess your risk considering all of the following:

- Does the applicable order(s) require you or local law enforcement to enforce it/them? If the latter, please ask them in advance for guidance on how you should enforce the order and maintain a written record of that contact. Alternatively, let the customer enter without a face covering and call law enforcement to report the violation.
- Has the union or public demanded or requested that all customers wear face coverings? That won't change the ADA analysis, but it could tilt the scales in favor of your bearing the risk of an ADA lawsuit to prevent one from employees or from customer dissatisfaction.
- Have you been subject to any enforcement actions by governmental bodies, or the claims of employees or customers? Again, this won't change the ADA analysis, but could affect your risk analysis. More importantly, it will enhance your ability to argue that those with disabilities should challenge the order(s) under the ADA, and not a grocer's enforcement of the order(s).
- How well can you accommodate the customer with alternative service, such as pre-ordering and pick-up services or grocery delivery? If you have in place strong, prompt and effective options to provide grocery delivery or pick-up, it will be easier to defend your strict enforcement of government orders. If you do use telephone or internet for such alternative service, make sure they are accessible to the disabled, especially those who are blind or deaf. If people are being served effectively, they are much less likely to sue.

For jurisdictions where customers are not required to wear face coverings, but your company or particular location wants to impose such a requirement for the safety of your employees or customers, you are free to do so, although you will need to be sure that you can establish the “direct threat” defense or perhaps an established risk under Cal-OSHA. If you choose to take that route, it is strongly recommended that you (1) get guidance from a legal professional to ensure that you can deny entrance to disabled customers and use a “direct threat” or Cal-OSHA defense, and (2) ensure that you are providing alternative methods for providing your goods and services in a prompt, effective, and accessible manner.

### **Stay Up-to-Date on New Developments**

These are unprecedented times for both grocers and their customers. The medical knowledge relating to COVID-19 and the state and local rules regarding customer and employee safety will continue to change. Grocers should stay informed on those updates and be prepared to modify their approach in order to make the most educated assessment relating to requests for face covering accommodations. As cities and counties continue to issue, amend, and rescind public face covering orders, we are seeing incidents of attacks on retail store employees and altercations between customers arising out of a customer's refusal to comply with face covering orders. Such incidents, coupled with the growing number of customers refusing to wear face coverings because of a claimed disability, make it difficult to predict the viability and enforceability of face covering orders.

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