

July 13, 2020
UPDATE ON FACE COVERINGS:
California Issues State Wide Guidance For Mandatory Cloth Face Coverings

On June 18, 2020, the California Department of Public Health issued a statewide “Guidance for the Use of Face Coverings.” The Guidance was made effective immediately. Although the Guidance is not an Executive Order and does not refer to any authorizing legal authority, Governor Newsom tweeted “NEW: Californians are REQUIRED to wear face coverings in public spaces.” The State’s COVID-19 webpage (<https://covid19.ca.gov/>) also states that Californians “must wear face coverings in common and indoor spaces and outdoors when distancing is not possible.” exceptions.

While this Guidance does not modify the advice provided in the May 18, 2020 whitepaper reprinted below, it does represent the first, statewide action on face coverings, permitting grocers to adopt uniform policies and practices for face coverings no matter where they are located.

Definition of Cloth Face Covering

The Guidance defines cloth face covering as a material that covers the nose and mouth. A cloth face covering can be made from a variety of materials, including cotton, silk, or linen, and can be factory-made, sewn by hand, or improvised from household items such as T-shirts or towels.

When Californians Must Wear Face Coverings

The Guidance mandates that Californians wear face coverings when they are “inside of, or in line to enter, any public space.”

In addition, employees must wear face coverings when they are interacting in-person with any member of the public and when working in any space visited by the public, even if no one from the public is present. Employees also must wear face coverings in any enclosed areas when other persons are present if physical distancing is not possible. They must wear face coverings when working in or walking through common areas, such as hallways or elevators. Employees also must wear cloth face coverings when they are in any space in which food is prepared or packaged for sale or distribution to others.

Californians also must wear face coverings when they are obtaining services from the healthcare sector, driving, waiting for or riding on public transportation, and while driving or a passenger in a taxi, car service, or ride-sharing vehicle.

Exemptions

The Guidance provides for only limited exceptions, including:

- 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; and
- 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.

Practical Guidance -- Customers

The new Guidance largely reinforces the advice provided in our earlier article. Below are a few tips on how to best strike a balance when complying with the face covering guidance and taking into account the rights of customers.

First, the new state Guidance will likely override any county or municipal order that is less restrictive. Where county or municipal orders are more restrictive, businesses may need to evaluate the state Guidance alongside these orders and determine the best path to comply with both.

Second, businesses will be in the safest position under the ADA where they follow the new state Guidance, meaning, among other things, that they enforce the face covering requirement while acknowledging that exceptions may need to be made for customers with certain conditions that prevent them from wearing face coverings.

Third, businesses that choose to require face coverings without exemptions for medical conditions or disabilities may want to consider taking steps to establish the “direct threat” defense under the ADA, which requires a reasonable judgment based on objective medical evidence or the best evidence available. Most courts addressing the “direct threat” defense have required businesses to rely on outside medical or expert evidence.

Fourth, the Guidance maintains the silence of all or nearly all of the orders to date on whether businesses can require customers claiming a disability to carry proof that they cannot wear a face covering. Because there is no clear answer in the Guidance and the law about requiring documentation to receive accommodations under Title III of the ADA is still in its infancy, businesses may risk provoking customers with disabilities, or even a lawsuit, by requiring them to carry proof of their need for accommodations.

Finally, the Guidance explicitly addresses the issue of hearing-impaired customers or employees who rely on lip-reading to communicate. In another exception to the requirement, the Guidance requires the person(s) with whom they communicate to remove their face coverings or wear transparent coverings during the period of communication.

Practical Guidance – Employees

Because the Guidance takes effect immediately, on June 18, 2020, employers promptly should implement procedures in accordance with the Guidance.

First, the Guidance requires that customers wear a face covering when standing in line for and inside a business. In order to follow the Guidance, employers should prepare written procedures

for and train employees on what they should do if customers do not wear a cloth face covering. If the business elects to require proof for the need for an exemption, the procedures should include under what circumstances and how employees should ask customers for confirmation that they have a medical condition that prohibits them from wearing a cloth face covering.

Second, grocers should modify operations (*e.g.*, closing every other cash register, changing restocking schedules) if necessary to allow employees to work at least six feet away from each other. If operations cannot be modified in such a manner, employees will have to wear face coverings during the workday.

Third, grocers should prepare written standard operating procedures as to when employees must wear cloth face coverings and distribute the procedures to all employees.

Fourth, grocers should consider posting on all entrances to the store a notice to all customers, visitors, and vendors that they must wear face coverings. Many counties already require businesses to post their COVID-19 protection plan.

Finally, although the Guidance is not set forth in an Executive Order, employers should recognize that their failure to follow the Guidance may affect their legal position adversely in certain situations. For example, an employer's failure to follow the Guidance may make it extremely difficult to overcome the presumption that an employee became infected by COVID-19 at the workplace for workers' compensation claims. Similarly, an employer that does not follow the Guidance may find it more difficult to reject an employee's reasonable accommodation request to work from home because the employee is concerned about contracting the virus, particularly if the employee has an underlying medical condition that makes them more vulnerable to the virus.

INCLUDED: May 18, 2020 Whitepaper- Guidance for Grocers on Responding to Employees' or Disabled Customers' Requests to Go Without Face Coverings.