

## FACE COVERINGS AND BUSINESSES: BALANCING THE ADA WITH PUBLIC HEALTH DURING COVID-19

In response to the COVID-19 pandemic, many states and local governments have issued mandates for people to wear face coverings when entering businesses such as shops, restaurants, and other establishments. Face coverings are intended to slow the spread of the virus between people, and are considered essential to public health and safety during this pandemic.

Title III of the Americans with Disabilities Act (ADA) upholds the right of people with disabilities to enjoy the goods and services of shops, restaurants, and other establishments, which include non-profit organizations and are also called places of public accommodation or Title III entities. For the purposes of this Q&A fact sheet, these establishments are referred to as businesses.

Certain disabilities make wearing a face covering difficult or impossible. A person with a respiratory condition, for example, may be unable to breathe effectively with a face covering. This raises questions about how to balance current government health and safety mandates with the rights that the ADA affords people with disabilities. Even during a pandemic, public health mandates do not replace the ADA; both must be considered.

### **What should I say or do if someone comes to my place of business without wearing a face covering?**

If your business is requiring face coverings, you may ask the individual politely if they are able to wear one.

- If they answer yes, consider offering them a face covering, provide them with other options such as online shopping, or ask them to come back with a face covering.
- If they answer no, you may ask them if they meet the parameters that your state or local government has defined as exceptions for face covering use, or if they meet any of the exceptions for face covering use indicated by the Centers for Disease Control and Prevention (CDC).

Do not ask a person to share personal medical or disability information, such as what their specific condition is, or ask them to provide documentation or other proof. With very limited exceptions, Title III of the ADA prohibits businesses from making unnecessary inquiries into the existence of a disability.<sup>1</sup> (See section titled “Can I ever ask for proof of disability?”)

### **If someone says they cannot wear a face covering because of a disability, do I have to allow them into my business without one?**

Not necessarily, but it is not appropriate to deny them service.

Rather than asking further questions regarding the disability, or demanding documentation, if a person says that they cannot wear a face covering due to disability or medical condition, offer them another way to access your business’ goods and services – a reasonable modification or accommodation. Engage the customer in an interactive process – collaborative problem solving – to determine possibilities that would provide goods and services to the customer, while keeping employees and others safe. These could include curbside pickup, online ordering, or even communicating remotely with a store employee, while the employee shops on their behalf.

Further, if your state does not have a strict face covering mandate, but your store has a policy that everyone must wear one, your business may choose to offer a person with a disability entry without a face covering; making an exception to your own policy would be an acceptable reasonable accommodation, as well. (See next question.)

## Can a business have a face covering policy that is stricter than its state or local government's?

For now, probably yes. While the ADA generally prohibits using screening criteria that would likely exclude individuals based on a disability, an entity can create such requirements if they are necessary for the business to safely provide its goods and services. However, if a business requires face coverings, this does not override the ADA. The business must still consider requests for accommodations for people with disabilities. In order to avoid health risks to their employees and other patrons, businesses may offer access to their services in a different way, such as online ordering or curbside pickup.

Businesses are relying on guidance from state and local governments, and the CDC as a foundation for policies that only allow customers with face coverings to enter their stores. As guidance and mandates change, businesses should update their policies based on the most current information. Requirements that businesses adopt must be based on actual risk, not on speculation, stereotypes, or generalizations about people with disabilities. As a best practice, a requirement should be clearly communicated at the business location, and whenever possible, in advance, such as on its website.

## What if there is no way to offer an accommodation without putting people at risk or fundamentally changing the way I do business?

After exploring ideas for reasonable modifications, there may be rare instances when it is not possible to accommodate an individual. It does not have to provide a requested modification if doing so would create:

- a) A direct threat<sup>ii</sup> to its employees or customers, and/or,
- b) A fundamental alteration<sup>iii</sup> to its business practices.

For Example:

A hair salon has a policy that all customers must wear a face covering. The owner considers how to accommodate a customer who cannot wear one. They creatively, thoughtfully, and thoroughly assesses the business' constraints and resources, and decide to allow phone orders with curb-side delivery of salon products for this customer.

However, for styling services like haircuts and coloring, the owner finds that it is not feasible to deliver these services – whether inside or outside of the salon – because it would endanger the employee who must touch the customer. The thought process:

1. If the salon chose to rearrange the salon to create six feet or more between each of the clients' chairs, the clients would be socially distanced, but it would not reduce the risk to the salon workers, who still must work near the customer's head. Result: DIRECT THREAT.
2. If the salon chose to cut the customer's hair outdoors, it would require purchasing and setting up a new chair, attaining a new water source and sink, and obtaining a special permit to operate business on a sidewalk. This significantly changes the salon's way of doing business, and it still does not reduce the risk to employees. Result: FUNDAMENTAL ALTERATION and DIRECT THREAT.

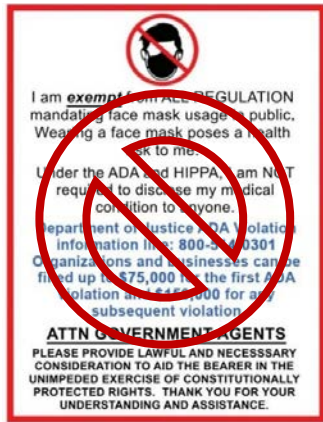
So in this case, the salon can accommodate the customer's request when it comes to providing products through a modification of policy, practice, or procedure, but there is not a reasonable way to safely accommodate the customer's direct service request.

## Is it true that I can't ask someone if they have a disability, and if I don't let them into my business without a mask I'll be fined by the Department of Justice? Some people have an I.D. card that says this.

No. The ADA does not give individuals with disabilities an absolute right to enter a business without a face covering. The individual rights afforded by the ADA must always be balanced with the health and safety of employees, other customers, and the public at large. Cards and flyers that say otherwise are fraudulent, and the statements in them are false.

As noted in previous sections, you can offer them another way to access your business' goods and services – a reasonable modification or accommodation to provide goods and services to the customer, while keeping

employees and others safe. It might not be possible for a business to offer a reasonable modification that would allow an individual with a disability to access services if that individual's participation would result in a direct threat to the health or safety of others. Examples of fraudulent disability cards and fliers, below:



### Can I ever ask for proof of disability?

Considering the ADA's prohibition on unnecessary inquiries, usually not.

However, courts have determined that there are rare instances when documentation may be necessary, depending on the scope of the accommodation. For example, in the case of a child joining a sports team, which would be a long-term relationship, the team may ask for documentation to determine the best accommodations to offer. In such cases courts have determined that the scope of the inquiry should be very narrow.

Considering the ADA's prohibition on unnecessary inquiries, it is likely not reasonable to expect a person to carry documentation of their disability in order to request and receive accommodation at a store or restaurant. Turning someone away from a business because they do not have immediate proof of their disability, or making them wait days while their request is considered would effectively deny them access to that business' goods and services.

### How do face coverings make communication more challenging for certain customers, and what does the ADA require in such situations?

The ADA states that communication with customers who have disabilities must be as effective as it is for people without disabilities. Face coverings present unique challenges to some people with hearing, processing, and communication disabilities. Face coverings hinder people's ability to use lip-reading and facial expressions to understand what others are expressing, so businesses are advised to prepare to communicate in different ways.

- Encourage employees to use gestures as much as possible. This will be helpful not only to those with disabilities, but to all customers adjusting to life with face coverings.
- Allow both the customer and an employee to pull down face coverings while communicating, when able to maintain a six foot distance.
- Provide employees with clear face shields or cloth masks with clear plastic windows.
- For brief communications, consider having a small dry-erase board to exchange messages on, or keep small pads of paper and pencils for customers and employees to use.
- Communicate in-person by text message or app, or via remote video conferencing.

### What are some ways a business can accommodate a person with a disability who cannot wear a mask?

Businesses must make reasonable modification evaluations and decisions on a case-by-case basis, so there is no comprehensive list. However here are some examples for business owners:

- Phone and online ordering with curbside pick-up, or delivery of products
- The customer may be allowed to wear a clear plastic face shield instead of a cloth face covering
- Reserved shopping time for limited numbers of people to shop inside your business while maintaining safe distance, and not wearing face coverings
- The customer may communicate by video or audio call to an employee who shops for them

#### **What else can I do to welcome and accommodate customers with disabilities?**

- Make sure your employees understand that people with disabilities are entitled to a reasonable modification of your business' policies and procedures to access goods and services. Consider making a list of some accommodations that they can offer to a customer who cannot wear a mask due to disability.
- Educate your employees to follow disability etiquette, such as:
  - Communicating with the person directly, not to someone who is with them
  - Using plain language when explaining things, whether communicating with speech, or in writing
  - Allowing extra time, and not rushing or interrupting the person
  - For people who are blind or have low vision, always asking permission before touching the person, and verbally communicate when handing them something

#### **AN OVERVIEW OF NORTHWEST STATES' FACE COVERING MANDATES**

##### **WASHINGTON:** [Washington State Coronavirus Response \(COVID-19\)](#)

["Department of Health statewide order"](#) directing all individuals to wear a face covering in any indoor public setting or when outdoors and unable to maintain 6 feet of physical distance from others."<sup>iv</sup>

["\[G\]overnor's order"](#) directing businesses to require and enforce the use of face coverings by all customers or visitors."

"There are some exemptions to the DOH order, including people with certain disabilities or health conditions, people who are deaf or hard of hearing, and children under the age of 2. (Officials encourage use of a face covering by children ages 3-5 if possible. Children 5 and older must wear a face covering.)"

##### **OREGON:** [Oregon Health Authority | COVID-19 Updates](#)

"Face coverings are currently required statewide for indoor public spaces... As of July 15, face coverings are also required in outdoor public spaces when physical distancing is not possible. For children over the age of 2 and under the age of 5, it is recommended, but not required... People with a disability or medical condition may request accommodation from the business if they cannot wear a mask, face shield or face covering."<sup>v</sup>

##### **ALASKA:** [AK Dept. of Health and Social Services Coronavirus Response](#)

"The state does not require the use of masks by the public, however health and science experts recommended that you wear a mask in public where social distancing is challenging to reduce the likelihood that you unknowingly spread COVID-19."<sup>vi</sup>

##### **IDAHO:** [Idaho Official Resources for The Novel Coronavirus \(COVID-19\)](#)

"Idaho's response to COVID-19 is now primarily local or regional in nature... For questions about COVID-19 in your area, please contact your local public health district."<sup>vii</sup>

## RESOURCES

### [Washington State Coronavirus Response \(COVID-19\)](#)

[coronavirus.wa.gov](https://coronavirus.wa.gov)

### [Washington State Coronavirus Response \(COVID-19\) Business Guidance and Resources](#)

[coronavirus.wa.gov/information-for/business](https://coronavirus.wa.gov/information-for/business)

### [Oregon Health Authority Reopening Guidelines FAQs Statewide Mask, Face Shield, Face Covering Guidance \(Updated 7-9-2020\)](#)

[sharesystems.dhsoha.state.or.us/DHSForms/Served/1e2390e.pdf](https://sharesystems.dhsoha.state.or.us/DHSForms/Served/1e2390e.pdf)

### [Idaho Official Resources for The Novel Coronavirus \(COVID-19\)](#)

[coronavirus.idaho.gov/](https://coronavirus.idaho.gov/)

### [Alaska Department of Health and Social Services Coronavirus Response](#)

[coronavirus-response-alaska-dhss.hub.arcgis.com/](https://coronavirus-response-alaska-dhss.hub.arcgis.com/)

### [Centers for Disease Control and Prevention Coronavirus \(COVID-19\)](#)

[cdc.gov/coronavirus/2019-ncov/index.html](https://cdc.gov/coronavirus/2019-ncov/index.html)

### [U.S. Department of Justice Civil Rights Division Information and Technical Assistance on the Americans with Disabilities Act Emergency Preparedness and Response COVID-19 Resources](#)

[ada.gov/emerg\\_prep.html](https://ada.gov/emerg_prep.html)

### [U.S. Equal Employment Opportunity Commission Coronavirus and COVID-19](#)

[eeoc.gov/coronavirus](https://eeoc.gov/coronavirus)

### [Northwest ADA Center Respectful Interactions: Disability Language and Etiquette](#)

[nwadacenter.org/factsheet/respectful-interactions-disability-language-and-etiquette](https://nwadacenter.org/factsheet/respectful-interactions-disability-language-and-etiquette)

## FURTHER GUIDANCE

### [US Department of Justice Civil Rights Division](#)

[ada.gov](https://ada.gov), 800-514-0301, and Human rights commission or civil rights office for your state:

[Washington State Human Rights Commission](#), [hum.wa.gov](https://hum.wa.gov), 800-233-3247

[Oregon Bureau of Labor and Industries](#), [oregon.gov/boli](https://oregon.gov/boli), 971-673-0761

[Alaska Commission for Human Rights](#), [humanrights.alaska.gov](https://humanrights.alaska.gov), 800-478-4692

[Idaho Human Rights Commission](#), [humanrights.idaho.gov](https://humanrights.idaho.gov), 888-249-7025

## PLEASE NOTE

Public health mandates may change as the CDC, the World Health Organization, and others learn more about COVID-19. The guidance in this publication is current as of its most recent date of revision, and will be updated as new information becomes available.

This publication is not intended to constitute legal advice; information and content is for general informational purposes only. Readers should contact their attorney to obtain advice with respect to any particular legal matter.



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**Alternate formats available upon request.**

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## ENDNOTES

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<sup>i</sup> [ADA Title III Technical Assistance Manual](#): III-4.1300 Unnecessary inquiries. The ADA prohibits unnecessary inquiries into the existence of a disability.

<sup>ii</sup> [ADA Title III Technical Assistance Manual](#): III-3.8000 Direct threat. A public accommodation may exclude an individual with a disability from participation in an activity, if that individual's participation would result in a direct threat to the health or safety of others. The public accommodation must determine that there is a significant risk to others that cannot be eliminated or reduced to an acceptable level by reasonable modifications to the public accommodation's policies, practices, or procedures or by the provision of appropriate auxiliary aids or services. The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability; it must be based on an individual assessment that considers the particular activity and the actual abilities and disabilities of the individual.

<sup>iii</sup> [ADA Title III Technical Assistance Manual](#): III-4.2000 Reasonable modifications, III-4.2100 General. A public accommodation must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public accommodation can demonstrate, however, that a modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations it provides, it is not required to make the modification.

<sup>iv</sup> [Washington State Coronavirus Response \(COVID-19\) Information for Face Masks](#)

<sup>v</sup> [Oregon Health Authority | COVID-19 Updates](#)

<sup>vi</sup> [State of Alaska COVID-19 Information](#)

<sup>vii</sup> [Idaho Official Resources for the Novel Coronavirus](#)