

Mask Q & A for Restaurant Operators



Q: Many areas in Wisconsin require face coverings either by local or statewide order—including while working in a restaurant. What do I do if an employee does not want to wear a face covering while at work?

A: Since April, 2020, the CDC has been recommending the use of face coverings to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others. Simply put, individuals are required to wear face coverings, including restaurant workers. Your employees have no choice.

However, if an employee requests an accommodation under the Americans with Disabilities Act (ADA), it should be addressed on a case by case basis. An employer can request medical documentation from an employee about both the underlying health condition and the necessity of an accommodation to prove wearing a mask is unsafe or unhealthy due to the employee's disability. Keep in mind, an employer cannot ask this information from a customer.

When an employee proves the need for a waiver from a mask-wearing requirement, the employer needs to explore potential reasonable accommodations. However, a restaurant need not provide an accommodation that would impede the business's ability to safely provide its goods and services or result in undue hardship on the restaurant. In other words, if the nature of the employee's work is such that he or she could work from home or in a secluded and socially distanced area, the accommodation should be granted. A server, however, could not get a similar accommodation since, under current CDC guidance, allowing unmasked employees to serve the public in a restaurant creates a health and safety risk and could lead to civil or criminal liability.

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Q: How do I handle a customer who refuses to wear a face covering on constitutional grounds while in my restaurant?

A: Guests and employees have no constitutional free speech rights in a private business or workplace. The First Amendment to the US Constitution protects an individual's right to free speech from infringement by the US Government—not a private business. Similarly, state constitutions do not create such rights. Therefore, a restaurant can legally deny service to individuals who refuse to wear a mask for alleged constitutional reasons.

Here's some advice on what to do if a guest refuses to comply because of a disability. Title III of the Americans with Disabilities Act (ADA) requires restaurants to provide equal enjoyment of goods and services to individuals with disabilities. If a guest has a medical or disability-related condition that may require an accommodation, then the restaurant must consider the reasonable accommodation it can offer the guest. A guest must advise the business he/she needs an accommodation if the need for one is not obvious. A restaurant CANNOT request medical documentation when a guest requests a public accommodation.

However, a restaurant need not accommodate a guest if doing so would impede the business's ability to safely provide its goods and services. Under current Centers for Disease Control and Prevention (CDC) guidance, allowing unmasked members of the public into business establishments creates a health and safety risk. Moreover, COVID-19 is spread by persons who may be asymptomatic, and who possibly have no idea whether they carry the virus. As a result, guests are required to wear masks or other suitable face coverings under state and local ordinances mandating masks.

Under these circumstances, businesses have a good faith basis to NOT accommodate an unmasked member of the public. Although, no-contact shopping alternatives should be considered and communicated to the guest where a disability is involved, such as allowing for a curbside order.

Reports abound of restaurant workers confronted with increasing resistance and sometimes violence when asking customers to wear a mask or face covering. Under the Occupational Health and Safety Act, employers have a duty to provide a safe workplace for employees. Businesses should consider the impact threatening guest encounters on their premises could have on the safety of their employees and guests, as well as business operations.

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Some practical steps businesses can take include the following:

- **Make signage abundant and clear**
The CDC recommends using verbal announcements, signs and visual cues to promote social distancing and safety initiatives even before guests enter the building. Many businesses use humor to communicate the necessary message (you can find many examples online). Another approach is to focus on employee safety and the mandate on the company to provide a safe work environment (i.e., “We want our associates to remain healthy and available to provide you the guest service you deserve, so please wear your mask”).
- **Provide no-contact service delivery where possible**
Restaurants should consider providing no-contact service alternatives and including the phone number for curbside pickup or delivery options on mask signage for guests not wishing to comply with the public health requirements.
- **When possible, give masks away for free**
When a guest attempts to enter a business without a mask on, the business can offer one. This may defuse the situation if the person simply forgot their mask and feels frustrated that he/she needs to return home or their car to retrieve a mask before entering.
- **Train employees on mask policies and procedures**
Employees should not argue with guests who refuse to wear a mask and potentially escalate the situation. Employees should not attempt to apprehend resistant guests, block guests from entering or exiting the store, or physically force guests to leave. Employees should remain calm, discreetly call security or local law enforcement and allow the police to handle it.
- **Assign the right person(s) to communicate the message**
Staff have different skill sets; some are charming and disarming, while others are whizzes with numbers but have a gruff demeanor. The more pleasant the approach with non-compliant guests, the more likely of gaining compliance. Instead of being demanding with a guest who refuses to wear a mask, try a softer approach (e.g., “Wow, you must be having a tough day today. This whole COVID-19 situation has been hard on all of us. How can I convince you we all just want to get through the day healthy and ready for tomorrow?”). It may not always work, but this is about minimizing the issues when possible.

We thank the National Restaurant Association Law Center and its business associates, Margaret (“Peggy”) Strange and Felice Ekelman with the firm of Jackson Lewis P.C. for the information provided in this Q & A. This information is provided with a national focus so there may be slight variations due to local requirements.