

How Should Multistate Employers Approach Workplace Mask Policies?

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Businesses in multiple jurisdictions must carefully plan their workplace safety strategies as some states continue to reopen in phases and others pull back due to spikes in coronavirus cases. Developing policies and best practices for wearing masks in the workplace can be particularly daunting as employers grapple with different regional rules and evolving federal guidelines.

"Requirements across the country vary widely," observed Dee Anna Hays, an attorney with Ogletree Deakins in Tampa, Fla. Some state and local jurisdictions require that masks or cloth face-coverings be worn in the workplace, some require employers to provide them, and some limit the information employers can request when an employee declines to wear a mask due to a medical condition.

"Because this patchwork of laws is ever-changing, many employers have taken a location-by-location approach to compliance," Hays said. However, she noted, making frequent updates to a policy when local requirements change can be cumbersome.

So employers will have to decide if forming one global policy works better for their organization. They may choose the most stringent applicable requirements to form the basis of the policy, Hays said.

Of course, using a global approach may force employers to go well beyond the standard requirements in some jurisdictions. "This burden, along with having to update the policy to keep pace with local changes, may outweigh the desire for organizationwide consistency," she noted.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Consider the Specific Worksite

Employers that have different workspaces in multiple jurisdictions may find implementing a single "masks-in-the-workplace" policy difficult, said Terese Connolly, an attorney with Barnes & Thornburg in Chicago. Employers will have to consider many factors when developing policies, including their industry and nature of the jobs, state and local requirements, and the physical workspace. Requirements and best practices may be different for office space, warehouses, restaurants and retail stores.

The Occupational Safety and Health Administration (OSHA) has offered some guidance (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/face-masks.aspx). The agency generally recommends that employers "encourage workers to wear face coverings at work," but it added that employers "have the discretion to determine whether to allow employees to wear cloth face-coverings in the workplace based on the specific circumstances present at the worksite."

Hays noted that some employers may determine that wearing cloth face-coverings presents or exacerbates a workplace hazard, and therefore they should not be worn.

Alka Ramchandani-Raj, an attorney with Littler in Walnut Creek, Calif., said jobs at some locations may require more-stringent policies and personal protective equipment (PPE) such as respirators, whereas jobs at other facilities may need only cloth face-coverings.

Cloth face-coverings are meant to stop the wearer from spreading respiratory droplets and remind people not to touch their faces. Unlike N95 respirators and surgical masks (<https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/n95-respirators-and-surgical-masks-face-masks>), cloth face-coverings are worn not so much to protect the wearer from exposure to the coronavirus as to protect others from respiratory droplets. Therefore, cloth face-coverings are not considered PPE, which would prompt the employer to follow additional OSHA safety rules.

"The employer should conduct a job-hazard assessment to determine what each job position needs to be safe, and then it can determine whether to have uniform guidelines or take a location-by-location approach based on a business decision of what is feasible," Ramchandani-Raj said.

Review Applicable Laws

Depending on the state or city, employees may be required to wear masks if they are public-facing, work in close proximity to other people, work in certain specified industries or can't take other precautions for physical distancing. Employers should note that they may be required to supply masks in some locations. The U.S. Centers for Disease Control and Prevention generally recommends (<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>) that most people wear cloth face-coverings in public and when they are around people who don't live in their household, particularly when other social distancing (<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>) measures are hard to maintain.

"The relevant orders and guidance have been and will continue to change," Connolly said. "It will be important to stay in touch with labor and employment counsel and assign someone internally to monitor the orders and guidance for all relevant jurisdictions."

Employees can refuse to wear a mask if doing so would interfere with their ability to perform the job or cause a safety hazard. "Sometimes the masks themselves create safety hazards by getting stuck in machinery or catching on fire," Connolly noted.

Additionally, an employee may have a disability that prohibits him or her from wearing a mask. In that case, employers would have to comply with the Americans with Disabilities Act and similar state laws to determine if a reasonable accommodation can be made.

Look at the Bigger Picture

Are there other safety measures that could be used in combination with wearing a mask or when wearing a mask isn't feasible? Developing a mask policy shouldn't be done in isolation, attorneys said.

Additional safety measures may include a combination of engineering and administrative controls, safe work practices such as physical distancing, and using PPE, Hays noted.

Depending on the workspace, perhaps employers could mandate that masks be worn in common areas but ease the requirement in closed offices or other isolated workspaces, Connolly said. Consider whether physical barriers can be installed or if the number of employees in the office at one time can be reduced by using a rotating schedule of office days and work-from-home days, she suggested.

"The most difficult issue with implementing the policy is actually ensuring employees are wearing their masks," Ramchandani-Raj observed. Employees may initially find the mask difficult to wear while performing regular job duties—such as taking phone calls—or they may forget to put it on as they walk through common areas or participate in small group meetings. When developing policies, she said employers should consider:

- What type of mask or face covering they will provide.
- How they will implement the policy.
- What corrective actions they will take for violations.

- How they will ensure the policy is effective.
- Who will be in charge of updating and enforcing the policy.

Hays noted that documentation is crucial in proving that an employer complied with safety regulations, local orders and regulatory guidance. Accordingly, many employers have drafted written policies and notices to employees to document newly implemented face-covering and other safety requirements related to COVID-19. Communicating these safety measures to employees may provide some comfort when they return to the workplace, she said.

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