

## **No Mask, No Service? ADA Considerations for Business Owners Requiring Face Masks in Retail Stores**

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As numerous jurisdictions now mandate citizens wear face masks in public, many retailers have begun requiring customers to cover their faces as a safety measure to mitigate against the spread of COVID-19 among employees and fellow customers. Retailers intending to enforce a policy whereby it will turn away customers who refuse to wear face masks should be mindful of abiding by Title III of the Americans with Disabilities Act (“ADA”), which governs retail stores as a place of public accommodation.

### **May a Business Have a Policy Turning Away Customers Who Refuse to Wear Face Masks?**

Likely yes, for the time being. The ADA generally prohibits eligibility/screening criteria that tend to exclude individuals based on a disability, unless the criteria are necessary for the business to operate safely in providing its goods and services. Those requirements must be based on actual risks and may not be based on speculation, stereotypes, or generalizations about people with disabilities. At this time, businesses concerned about the safety of their staff and customers should be justified in relying upon [guidance](#) from the Centers for Disease Control and Prevention (CDC), as well as state and local governments’ orders, to justify policies forbidding customers without face masks from entering their stores. However, as guidance and state/local rules change regularly, retailers should regularly track developments so as not to rely on something that is no longer current and applicable. Moreover, as a best practice, and to avoid unwelcomed situations at the store, a business choosing to enforce such a policy should clearly communicate it to its customers (including in advance, e.g., via its website).

### **May a Business Turn Away Customers Who Refuse to Wear a Face Mask, Even Without a General Policy Requiring Face Masks Be Worn in Stores?**

It depends. The ADA permits a retailer to deny goods or services to an individual with a disability if their presence would result in a “direct threat” to the health and safety of others, but only when this threat cannot be eliminated by modifying existing policies, practices or procedures or permitting another type of accommodation. Whether a customer poses direct threat is an individualized, fact-sensitive inquiry. If a business does not have a clear policy of turning away customers who refuse to

wear face masks, and turns away an individual for that reason, the business must be prepared to identify how/why that individual's specific, observable, condition/behaviors made them a "direct threat". For example, if the person exhibited generally recognized symptoms of COVID-19 (such as aggressive coughing compounded with profuse sweating or visible difficulty breathing), refusal of service without a mask on an individualized basis may be justifiable. Conversely, a business could be hard-pressed to successfully argue that a customer without a face mask posed a "direct threat" if he or she was asymptomatic or if there was some form of accommodation that would have allowed the person to be served (e.g., allowing someone to wear a scarf instead of a mask). Upon refusing service on "direct threat" grounds, the store should contemporaneously document its actions and justifications in the event their decision is later challenged.

### **What If a Potential Customer's Disability Is Uniquely Impacted Due to the Face Mask Requirement?**

In limited circumstances, there could be a situation in which a customer cannot wear a face mask due to a legitimate health reason (e.g., a person with a respiratory condition who cannot have their breathing restricted). In this case, pursuant to the considerations detailed above, a business may not need to alter their face-mask required policy, but in any event should attempt to accommodate that customer in an alternative manner that would continue to protect the store's employees and other customers while also providing service to the customer (e.g., providing curbside pick-up; no contact delivery; or assistance via online store services).

Face masks may also present communication barriers to individuals who rely on lip reading to communicate. The ADA requires retailers to provide effective communication to individuals with disabilities through the provision of auxiliary aids and services that are appropriate for the nature, length, complexity, and context of the communication and the customer's normal methods of communication. Tools such as communication via text messaging, a disposable pen/pad, or a sanitized dry erase board could strike the right balance between achieving effective communication and helping to curb the spread of COVID-19.

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