
To: FCA International Members
From: FCA International Legal Counsel
Subject: **Employees Who Can't Wear Face Masks**
Date: Aug. 19, 2020

What If My Employees Say They Can't Wear a Face Mask?

In light of recent state and local orders requiring face masks in most indoor work settings, many employers are wondering how to deal with employees who say they cannot wear a mask due to a medical condition or religious belief. Before responding, employers need to be sure they understand their responsibilities under the various discrimination and employee leave laws.

Family and Medical Leave Act (FMLA)

The FMLA applies to employers with 50 or more employees. If an employee says that their medical condition makes it difficult to wear a face covering, the first issue to be addressed is whether the employee's inability to work with a mask constitutes a Family and Medical Leave Act (FMLA) qualifying condition.

FMLA permits eligible employees to take up to 12 weeks of job-protected leave in a 12-month period if they are incapacitated by a serious health condition. FMLA leave is unpaid, but the employee can utilize previously-accrued vacation or sick time.

The typical respiratory or cardiac ailments that interfere with mask-wearing may meet the FMLA's "serious health condition" standard. Therefore, if the employee is otherwise eligible for FMLA (being employed for at least one year and working at least 1,250 hours in the last year):

- The employer should first require the FMLA certification to be completed by the employee's health care provider.
- If the certification indicates the existence of a serious health condition, then the employee should be provided with FMLA leave for up to 12 weeks (less any FMLA time previously taken in the year).

Americans with Disabilities Act (ADA)

The ADA applies to all employers with 15 or more employees. **If the employee claiming inability to work with a mask is not eligible for FMLA (or has used up their eligibility), they may still be entitled to reasonable accommodation under the Americans with Disabilities Act (ADA) and its state law.** The employer should therefore initiate an interactive process designed to determine whether an accommodation is actually needed, and if so, whether any such accommodation is both possible and reasonable.

The first step is to request documentation from the employee's health care provider to verify both that the medical condition exists and that it impairs the employee's ability to wear a face covering in accordance with the state or local order.

While awaiting this documentation, the employee should not be allowed continue coming to the work site. Instead, consider placing the individual on a leave, allowing telework if possible or providing some other temporary accommodation until the matter is resolved.

Naturally, if no such documentation is provided, no accommodation is needed and the employee should be directed to return to their regular assignment. If proper documentation is submitted, the employer should consider the range of possible accommodations, such as providing a different sort of face covering (e.g. face shield), temporarily reassigning the employee to a vacant position that does not require wearing a face covering (e.g. one that works outside), allowing the employee to telework, or providing other responsive job modifications.

If no accommodation is possible, or if the possible accommodations just are not reasonable under the particular circumstances, the employee should be placed on an unpaid leave until the face mask order is rescinded or the employee's medical condition improves to permit a mask to be worn. For employees who have been on a FMLA leave for this same issue as described above, they will simply remain on leave but they are no longer subject to FMLA protections.

Title VII

Although most state and local face mask orders do not mention an exemption due to an employee's religious beliefs, some employees have identified religious objections to wearing masks. Both Title VII and many antidiscrimination statutes provide that religious beliefs must be accorded reasonable accommodation. **Therefore, if an employee refuses to wear a mask due to religious issues, the employer must engage in an interactive process to assess the viability of the requested accommodation.**

It is critical to note, however, that an employer's duty to accommodate religious beliefs is not nearly as extensive as the similar requirement under the ADA. Courts have made it clear that requests for religious accommodation may be refused if they present anything other than a minimal hardship for the employer.

Therefore, an employer need not consider substantial changes to the employee's job or other changes requiring more than a negligible expense. Instead, a job swap with another employee working in an area that does not require masks could be considered, or perhaps an unpaid leave of absence for the duration of the mask requirement provided that replacing the employee does not present any real hardship.

Bottom Line

Employees who are unable to wear face coverings because of a disability or their religious beliefs may be entitled to job modifications or other accommodations under the FMLA, ADA and Title VII. Be sure to follow a reasonable interactive process to find out more about the underlying basis for the request and the possible accommodation options that are presented.