

Handling Retail Customers Who Refuse to Wear a Mask

By Richard D. Landau, Joshua R. Adams &

August 10, 2020

Meet the Authors



Richard D. Landau

Principal
914-872-6886
Richard.Landau@jacksonlewis.com



Joshua R. Adams

(He/Him)
Principal
980-465-7239
Joshua.Adams@jacksonlewis.com

Related Services

ADA Title III
COVID-19
Disability, Leave and Health Management
Hospitality
Restaurants
Retail
Workplace Safety and Health

Many jurisdictions require individuals to wear face coverings in public spaces, including in retail businesses, because of the COVID-19 pandemic. But some customers have been refusing to comply. How should a retail business respond to a customer refusing to wear a mask, and what should it do to minimize the chances of hostile incidents occurring?

The Founding Fathers Did Not Include Protections for Customers

Customers and employees have no constitutional free speech rights in a private business or workplace. The First Amendment to the U.S. Constitution protects an individual's right to free speech from infringement by the *U.S. Government* — not a private business. Similarly, most state constitutions do not create such rights.

“Public Accommodations” under Title III of Americans with Disabilities Act (ADA)

Title III of the ADA governs the accommodation requirements for guests with disabilities at facilities deemed places of “public accommodation.” Generally, a public accommodation is an entity that provides services to the public, such as lodging, dining, shopping, or medical services. Usually, this takes the form of allowing functional access to the public accommodation (*i.e.*, ramps, elevators, sufficiently wide aisles, and so on).

Title III mandates that public accommodations cannot deny equal enjoyment of goods and services to individuals with disabilities. If a customer has a medical or disability-related condition that may require an accommodation, then the entity must consider the reasonable accommodation it can offer the customer. A customer must advise the business they need an accommodation if it is not obvious. While an employer can and should request appropriate medical documentation when an *employee* requests a workplace accommodation, that same right may be more restricted, and not best practice, with respect to accommodation requests from a customer under Title III.

Accommodations can take many forms — but there are limits. A business need not accommodate someone 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, in light of the CDC guidance, customers can be required to wear masks or other suitable face coverings (*e.g.*, bandana, face shield, and the like) subject to applicable state and local ordinances mandating masks. For example, some state and local laws specifically exclude masks for persons unable to wear them due to a medical condition.

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 customer where a disability is involved. However, businesses should always be careful to align themselves with applicable state and local

government requirements as they can change from state to state, and city to city.

Preventing Workplace Violence

Unfortunately, masking has become more than a health and safety concern. Across the country, reports abound of [security guards](#) and other retail employees confronted with increasing violence while trying to enforce mask requirements. Similarly, [restaurant workers](#) repeatedly have been met with violence when asking patrons to wear a mask.

Under the Occupational Health and Safety Act, employers have a duty to provide a safe workplace for employees. Businesses should consider the impact threatening customer encounters on their premises could have on the safety of their employees and customers, as well as business operations. Some practical steps businesses can take include the following:

1. *Make signage abundant and clear and provide no-contact service delivery where possible.* The [CDC recommends](#) using verbal announcements, signs, and visual cues to promote social distancing and safety initiatives even before customers enter the building. Restaurants and retail businesses should consider including their phone number for curbside pickup or delivery options on mask signage for customers not wishing to comply with the public health requirements. Businesses also can provide remote shopping alternatives. Many businesses use humor to communicate the necessary message (the internet provides many examples). 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 customer service you deserve, so please wear your mask.”).
2. *When possible, give masks away for free.* When a customer 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 feel frustrated they need to return home or their car to retrieve a mask before entering.
3. *Train employees on mask policies and procedures.* For their own safety, employees should not argue with customers who refuse to wear a mask and potentially escalate the situation. Employees should *not* attempt to apprehend resistant customers, block customers from entering or exiting the store, or physically force customers to leave. Employees should remain calm, discreetly call security (if possible) or local law enforcement, and allow the police to handle it.
4. *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 customers, the more likely of gaining compliance. Instead of being demanding with a customer 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.

Takeaway

The U.S. Marine Corps has a slogan: “Improvise, Adapt, and Overcome.” If there was a slogan for business in 2020, it is hard to think of one better suited. Businesses can plan and prepare their responses to customers who refuse to follow mask requirements, as well as any confrontations that may cause.

Jackson Lewis attorneys have developed blog posts, webinars, legal updates, and online resources to address many of the specific employment law issues related to the COVID-19 pandemic. Jackson Lewis attorneys are closely monitoring updates and changes to legal requirements and guidance and are available to help employers weed through the complexities involved.

If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you regularly work, or any member of our [COVID-19 team](#).

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.