

Q & A ON EMPLOYER MASK AND FACE COVERING POLICIES FOR EMPLOYEES

June 22, 2020

As the state continues to reopen amid the COVID-19 pandemic, county governments are determining how to safely return staff to the workplace and to resume operations. One measure being explored by many counties is the implementation of mask or face covering policies for employees. However, counties need to evaluate such policies in light of the guidelines, recommendations, and requirements implemented by the Centers for Disease Control (“CDC”) and the Occupational Safety and Health Administration (“OSHA”).

The Wisconsin Counties Association and its general counsel, von Briesen & Roper, s.c., have received many questions surrounding issues, regulations, and safety requirements regarding mask and face covering policies. Our general counsel has prepared the Q & A below to provide information related to mask and face covering policies based upon the questions received.

This information should be reviewed carefully with corporation counsel to ensure county compliance with other applicable laws and regulations, including its own policies and procedures.

EMPLOYMENT OF WRS ANNUITANTS

Q: Are counties required to provide employees with a mask or face covering in the workplace?

A: No. None of the State of Wisconsin, OSHA, or the CDC currently require employers to provide employees with PPE or face coverings specifically related to COVID-19 (all employers must continue to follow existing standards requiring PPE or respirators for certain employees, e.g., medical professionals, certain construction workers, etc.). Counties should regularly check OSHA and CDC guidance in order to stay current with evolving standards and guidance.

Q: May employers implement and enforce mask or face covering policies for employees?

A: Yes. Employers, including counties, may implement either voluntary or required mask and/or face covering policies for their employees. However, such a policy should include religious and disability accommodations and should also account for jobs that do not allow for wearing a mask or face covering. Additionally, certain OSHA requirements may apply to employers based on whether the policy is voluntary or mandatory, and the type of mask or face covering required.

Q: What requirements apply if a county implements a mandatory mask or face covering policy for employees?

A: A county may be required to comply with certain OSHA standards if it implements a mandatory policy and also depending on the type of masks or face coverings that it requires its employees to wear. The following three categories of masks and/or face coverings are relevant under the OSHA standards:

- 1. **Respirators.** A respirator is a device that protects employees from inhaling particles or other dangerous substances (e.g., an N95 mask). Usually, they are fitted closely to the user's face and do not allow air to flow between the sides of the mask and the user's face. Employers requiring employees to wear respirators are subject to the OSHA Respiratory Protection Standard (29 CFR 1910.134). The OSHA Respiratory Protection Standard requires employers to establish and manage a respiratory protection program ("RPP"). RPP's must be worksite specific and include, as applicable: procedures for selecting the respirators chosen; medical evaluations for employees required to use respirators; fit testing for tight-fitting respirators; procedures and schedules for respirator maintenance; employee training; and procedures for regularly evaluating the program. Before selecting a respirator, employers must identify and evaluate the hazards in the workplace and select the one that protects the employees from exposure to the particular, identified hazard.*
- 2. **Personal Protective Equipment ("PPE").** PPE includes things like surgical masks, gloves, goggles, face shields, and many other protective items. Employers that require employees to wear PPE are subject to the OSHA PPE Standards (29 CFR 1910.132). The OSHA PPE Standards require an employer to: perform a hazard assessment; consider other alternative options to protect employees, such as installing a barrier between workers or workers and customers; identify and provide appropriate PPE for employees; train employees in the use and care of PPE; clean and replace PPE as needed; and create a plan that is periodically reviewed.*
- 3. **Improvised/Cloth Face Coverings.** Improvised and cloth face coverings are not respirators, and, therefore, are not subject to the OSHA Respiratory Protection Standard. While OSHA has not affirmatively stated that improvised and cloth face coverings are not PPE, it has issued guidance indicating that it does not consider these face coverings to be PPE.¹ Given this, a policy requiring employees to wear cloth face coverings would likely not be subject to the OSHA PPE Standards. However, because OSHA has not issued a formal position on this matter, it is highly encouraged that counties follow [OSHA's Guidance on Preparing Workplaces for COVID-19](#), the [CDC's Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 \(COVID-19\), May 2020](#), and [CDC guidance](#) on cloth face coverings as a good faith effort in the event OSHA takes a formal position to the contrary in the future.*

¹ See [Interim Enforcement Response Plan for Coronavirus Disease 2019 \(COVID-19\)](#); and [Guidance for Construction Work](#).

Q: Is a county required to comply with OSHA's standards if it implements a voluntary mask or face covering policy?

A: *Generally, no for a voluntary PPE policy. The OSHA PPE Standards only apply when an employer requires employees to wear PPE. However, even an employer's voluntary permission for employees to wear a respirator triggers the employer's required compliance with OSHA's Respiratory Protection Standard. When an employer permits employees to wear a respirator, the employer's obligations are slightly less stringent than when the employer requires employees to wear respirators. When an employer merely permits employees to wear respirators, the employer should take the following steps: (1) determine whether there is a hazardous condition that requires wearing a mask; (2) determine that the employee is not creating a new or different hazard by wearing a mask in the workplace (3) make sure that any masks that are used are clean and in good repair; and (4) provide written information to employees about wearing masks that has been drafted as required by [Appendix D to 1910.134](#).*

Q: Is a county required to provide employees with a mask or face covering if it implements a mandatory policy?

A: *Yes, an employer must provide employees with masks or face coverings consistent with the employer's policies requiring their use. Counties requiring employees to wear PPE (e.g., surgical masks), should follow OSHA and CDC guidance as to how masks should be cleaned and how often new masks should be provided. Counties providing cloth face coverings should also follow the latest [CDC guidance](#) providing instructions for making, cleaning, and wearing cloth face coverings.*

Q: May a county provide employees with a mask or face covering if it implements a voluntary policy?

A: *Yes, an employer may provide employees with masks or face coverings if it implements a voluntary policy. However, employees may still choose whether to actually wear the mask or face covering. Counties providing PPE (e.g., surgical masks), should follow OSHA and CDC guidance as to how masks should be cleaned and how often new masks should be provided. Counties providing cloth face coverings should also follow the latest [CDC guidance](#) providing instructions for making, cleaning, and wearing cloth face coverings.*