



Employers Need to Adjust as Boston Reissues Indoor Mask Mandate

Insights

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Acting Boston Mayor Kim Janey just announced a resumption of an indoor mask mandate for all indoor areas open to the public within the City of Boston effective at 8:00 AM on Friday, August 27. The renewed mask mandate is one aspect of the City's "Five-Point Plan for the Delta Variant," coming as Boston battles the virus resurgence and prepares for the return of more than 50,000 out-of-town students to the City's colleges and universities. Here is what employers need to know about the latest developments.

Who is Covered?

All indoor premises open to the public in Boston must comply with the new order. This includes any business, club, or place of assembly, which is broad enough to cover retail establishments, restaurants, bars, gyms, performance venues, museums, social clubs, event spaces, and municipal buildings. Patrons are only permitted to remove their masks while actively eating or drinking.

Any Exceptions?

One key exception is for offices or businesses that are not open to the public. These work settings are not required to comply with Boston's renewed mask mandate, though they are encouraged to continue social distancing and other COVID-19 mitigation efforts.

Importantly for restaurants and other performance venues, musical and other live performances are still permitted, and performers may remove their masks while performing as long as they maintain at least six feet of distance from the nearest customer or attendee. Similarly, and increasingly important as restaurants continue to offer outdoor dining options, the mask mandate does not apply inside a tent or temporary structure where at least one side of the structure is completely open.

How Should We Handle Customers Who Claim they are Exempt from the Mandate?

There is a tremendous amount of misinformation about whether and to what extent you must grant an accommodation or exception to a mask mandate to a customer. To start, only accommodation requests based on disability/medical conditions or sincerely held religious beliefs require an you to potentially modify the mask mandate. Requests for accommodations based on political or personal beliefs, conspiracy theories, or what a customer reads on Facebook are insufficient.

Legitimate requests should be handled just as you would handle similar requests for accommodation. You should engage in a limited interactive process with the customer to determine whether or not there is a reasonable accommodation that will permit the customer to patronize your business without jeopardizing the safety of your employee or others.

Generally speaking, the ADA requires businesses open to the public to provide individuals with disabilities equal access to business's goods and services. What this means is that businesses that are open to the public must make reasonable modifications to their policies, practice, and procedures to ensure equal access for individuals with disabilities. As a result, business must: (1) include reasonable accommodations as integral components of their policies and procedures; and (2) ensure that all customers have equal access, including those who cannot wear a mask. However, if an individual's refusal to wear a mask is based on mere social objection, employers may refuse entry.

For retailers and grocery stores, reasonable accommodations might include online or phone ordering and curbside/contact-free pickup, specified shopping hours, or by notifying them they can enter at another time if they are wearing a full clear face shield. Businesses can tailor their accommodations based on their functions while still providing enhanced levels of safety and should be advised that there is no one-size fits all approach.

Signage can also further support a business's goal of enhanced protections. You can post notices at all entrances stating that customers must wear masks, and that the business reserves the right to refuse entry if the requirement is not followed. These notices should also contain a statement about requests for accommodation to avoid ADA-related violations. Your Fisher Phillips attorney can help you tailor these notices and answer any other questions you may have on a decision to require masks.

Finally, businesses should avoid requiring guests to provide doctor's notes if they claim a medical condition makes it difficult to wear a mask. Individuals will likely not be carrying a doctor's note with them, and some state and local public health orders prohibit requiring medical documentation. Further, while the ADA does not specifically address face masks, the Department of Justice previously provided some guidance on this issue in the context of requiring medical documentation for individuals with service animals entering places of public accommodation. It concluded that requiring "persons with disabilities to obtain medical documentation and carry it with them any time they seek to engage in ordinary activities of daily life in their communities" would be an "unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA." It is likely the Department of Justice would interpret the ADA similarly in the context of requiring medical documentation in the context of face masks.

How Should We Handle Employee Accommodation Requests?

Employers have wider latitude when it comes to assessing accommodation requests from their employees as compared to customers. Legitimate requests should be handled just as you would

employees as compared to customers. Legitimate requests should be handled just as you would handle similar requests for any other type of disability or religious accommodation. You must engage in the interactive process with the employee to determine whether or not there is a reasonable accommodation that will not cause your business undue hardship. To further this process, you should adopt (if you have not already) a reasonable accommodation policy, along with accommodation request forms. Sample forms drafted by Fisher Phillips are available [here](#). These forms will provide you with the information necessary to make an informed decision about the request.

In some cases, allowing an unmasked employee to continue working while wearing a face shield and maintaining appropriate social distancing may be a reasonable accommodation. In some instances, however, it may not. Such a decision must be made (and thoroughly recorded) on an individualized basis. You should take into account factors such as community spread, current CDC or Massachusetts Department of Public Health guidance, and the type of work environment you provide for your workers. This can include considerations such as whether the employee works alone or with others; whether the work takes place inside or outside; the available ventilation; the frequency and duration of direct interaction the employee has with other employees or customers; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If, however, you reach a conclusion that you cannot accommodate the unmasked employee in the workplace, you should consider alternative accommodations, such as telework or an unpaid leave of absence. You are strongly encouraged to seek the advice of counsel as you navigate the accommodation process.

Anything Else?

While the renewed mask mandate is sure to get top billing, the Acting Mayor has also ordered that all City employees, contractors, and volunteers will be required to verify their vaccination status through a secure centralized digital portal by the end of August. Employees, contractors, and others who are unvaccinated will be required to submit proof of a negative COVID-19 test every seven days. If you or your company does business with the City, you should be prepared to comply with the City's vaccine mandate as well.

What's Next?

Guidance on these subjects continues to change on a daily basis as all levels of government assess the current state of the Delta variant and its spread. While Massachusetts has not reverted to a statewide mask mandate or imposed a vaccine mandate applicable to private businesses, several other communities are likely to follow in Boston's footsteps. In fact, as of August 23, the following communities have imposed similar mandates: Arlington, Belmont, Billerica, Brookline, Lexington, Martha's Vineyard, Nantucket, Provincetown, Salem, Somerville, Truro, Wellfleet, and Winchester. Boston area employers are encouraged to keep up to date with the rapidly evolving guidance.

Boston-area employers are encouraged to keep up-to-date with the rapidly evolving guidance. We'll monitor the situation and provide updates as developments occur, so make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your policies comply with Boston's mask mandate or other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the [author](#) of this Insight, or any attorney in our [Boston office](#).

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