

KEY TAKEAWAYS FROM OSHA'S NEW FAQs ABOUT FACE COVERINGS IN THE WORKPLACE

Insights
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The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has just published a series of [frequently asked questions and answers](#) regarding the use of cloth face coverings, surgical masks, and respirators in the workplace. While much of the document summarizes concepts and principles that [most employers should know by now](#), there are at least three important clarifying points that deserve your attention. What do employers need to know about this latest guidance?

CLOTH FACE COVERINGS ARE NOT CONSIDERED PPE

First, in setting out the differences between cloth face coverings, surgical masks, and respirators, OSHA guidance now states that cloth face coverings are not personal protective equipment (PPE) and that you are not required to provide them to your employees because it will not protect the wearer against contracting COVID-19 due to their loose fit and lack of seal and inadequate filtration. Similarly, if being used for source control (to contain the wearer's potentially infectious respiratory droplets) outside of healthcare and first-responder workplaces, surgical masks are not PPE according to OSHA. In other words, these surgical masks cannot be used in place of N95s or other respirators because they do not provide adequate protection against exposure to airborne contaminants for which respirators would ordinarily be needed.

However, it is important to remember that these FAQs are merely guidance. OSHA could still attempt to cite you for

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failing to provide these masks, conduct a PPE assessment, train your employees on how to use and [care for these masks](#), or pay for the masks in certain workplace settings. And, as noted below, your failure to require cloth face coverings in the workplace could help OSHA prove a General Duty Clause citation against you. Remember, however, when requiring cloth face coverings or PPE, [if an employee with a disability requests a reasonable accommodation under the ADA, you must still provide one.](#)

Moreover, as of this date, many [state and local orders](#) require cloth face coverings in the workplace, and many state and local orders also require many employers to pay for those cloth face coverings or masks. Therefore, even though OSHA's [PPE standard](#) does not apply to cloth face coverings, before you require cloth face coverings to comply with a state or local order or your obligations under the General Duty Clause, you should:

- perform a hazard assessment;
- consider other alternative options to protect employees;
- identify and provide cloth face coverings for employees as appropriate;
- train employees in the use and care of cloth face coverings;
- train employees how to clean and [maintain cloth face coverings](#), including replacing worn or damaged cloth face coverings; and
- revisit your hazard assessment periodically to ensure you are adequately protecting your workers through the proper selection of masks or, where appropriate, PPE.

THERE ARE OPTIONS BEYOND CLOTH FACE COVERINGS

Second, OSHA indicates that where cloth face coverings are not appropriate in the work environment or during certain job tasks (e.g., because they could become contaminated or [exacerbate heat illness](#)), employers can instead provide PPE such as face shields and/or surgical masks. OSHA's FAQs also make clear that the agency considers social distancing to be a key safe work practice, and cloth face coverings are not a substitute for requiring social distancing in the workplace.

OSHA'S GENERAL DUTY CLAUSE STILL APPLIES

Finally, OSHA reminds employers that the agency's General Duty Clause still applies in the COVID-19 context. The OSHA FAQs conspicuously mention the OSH Act's [General Duty Clause](#), Section 5(a)(1), which requires you to provide your employees with a workplace free from recognized hazards likely to cause death or serious physical harm. Despite guidance in the FAQs that cloth face coverings are not required in every workplace, OSHA's FAQs indicate that employers may choose to ensure that cloth face coverings are worn as a feasible means of abatement in a control plan designed to address hazards from SARS-CoV-2, the virus that causes COVID-19.

To prove a violation of the General Duty Clause, OSHA must establish the following: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. OSHA's note in the FAQs that cloth face coverings may be worn as a feasible means of abatement – coupled with its recommendation that employers encourage workers to wear them – is a signal to how the agency would approach any COVID-19-related citation under the General Duty Clause. OSHA will likely use the lack of workplace cloth face coverings during the pandemic to help prove its case against you if you are cited under the General Duty Clause.

WHAT SHOULD EMPLOYERS DO?

In addition to reviewing the new OSHA FAQs, as you begin the process of reopening, you should familiarize yourself with our alert: [5 Steps To Reopen Your Workplace, According To CDC's Latest Guidance](#). You should also keep handy our [4-Step Plan For Handling Confirmed COVID-19 Cases When Your Business Reopens](#) in the event you learn of a positive case at your workplace. For a more thorough analysis of the many issues you may encounter from a labor and employment perspective, we recommend you review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

CONCLUSION

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of [our Post-Pandemic Strategy Group Roster](#).

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