

MASKS, COVID-19 AND THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR BUSINESSES

Due to the ongoing COVID-19 pandemic, the CDC and other reputable, scientific sources strongly recommend that in places where people will come into contact with individuals from outside their own household and social distancing cannot be consistently maintained, individuals should wear masks to prevent the spread of the coronavirus.

Additionally, because confirmed positive cases are on the rise in Indiana, on July 24, 2020, Governor Eric J. Holcomb issued Executive Order 20-37, mandating masks that cover the nose and mouth be worn inside businesses and other indoor spaces in Indiana that are open to the public.

Executive Order 20-37 does provide, in Section 4, subsection c of Executive Order 20-37, that “any person with a medical condition, mental health condition or disability which prevents wearing a face covering” is exempt from the state’s mask mandate. However, it is not always readily apparent that a person has a disability, and stores—particularly national chains and smaller businesses in areas where surges are occurring—may have mask policies in place that are more stringent than those detailed in Executive Order 20-37.

The following guide has been created with the goal of clearing up confusion for businesses as they navigate compliance with the mask mandate, protecting themselves, their businesses, their customers and their employees, and applying CDC and Indiana State Department of Health (ISDH) best practices guidelines, all while not running afoul of Title III of the Americans with Disabilities Act.

If you have any questions regarding how to balance the rules set forth by Executive Order 20-37, store policies that require masks be worn, and the ADA, please feel free to call Katherine Tardiff, ADA/Title VI Coordinator for the City of Monticello, at 574-583-4568, or send your questions to adacoordinator@monticelloin.gov.

We are all in this together, and by protecting disability rights *and* public health, we can, and will, get back to better!

I HAVE CUSTOMERS WHO SAY THEY CAN'T WEAR A MASK BECAUSE OF A DISABILITY, BUT MY STORE'S POLICY IS "NO MASK, NO ENTRY, NO EXCEPTIONS". WHAT CAN I DO?

To answer this question, it's important to touch upon a few key points:

- 1.) the ADA guarantees people with disabilities *access* to businesses—i.e., the right to enjoy the products and services they offer. Businesses must make reasonable modifications to policies and procedures to make that possible.
- 2.) Access to a business, however, is not the same thing as *entrance* to a business' physical location, nor is it a guarantee that customers with disabilities will achieve identical results or have identical experiences as customers without disabilities.
- 3.) Public health mandates and the ADA—which is still in effect, even during a pandemic—do not cancel each other out, nor does one override the other. Rather, they must be considered in a balanced fashion in order to preserve the civil rights guaranteed by the ADA, while also protecting the health of all persons—disabled and non-disabled alike.
- 4.) Businesses cannot deny entry to an individual solely on the basis of a disability—to do so would be discrimination, which is illegal. At the same time, businesses have no obligation to allow anyone—with or without a disability—into their facilities who poses a "direct threat" to the health and safety of others. Furthermore, businesses have the legal right, and responsibility, to develop requirements needed for safe operation and delivery of goods and services.

In short, using current information and recommendations about the coronavirus from reliable, expert sources (such as the CDC, ISDH, WHO, etc.) businesses *can* reasonably determine that an individual not wearing a mask—for *any* reason—poses a direct threat to the health and safety of others, and can therefore be denied entry. However, if the person cannot wear a mask *because of a disability*, the business **MUST** offer reasonable accommodations so that the individual with a disability is not being denied access to the products and services the business offers. These accommodations might include:

- a. Giving the option to wear a clear plastic face shield instead of a mask
- b. Phone and online ordering
- c. Curbside pickup
- d. Delivery, even if it's not a service typically provided, and as long as offering it would not cause a fundamental alteration to, or an undue hardship on the business
- e. Video or audio call to an employee who will shop for them and bring their purchases to their car
- f. Reserved shopping time, if it will not cause an undue hardship for the business.

A CUSTOMER TOLD ME THEY HAVE A DISABILITY, BUT THEY DON'T LOOK DISABLED. CAN I ASK THEM WHAT THEIR DISABILITY IS?

The short answer is “no”. You may not ask a person what their disability is. You also may not ask a customer to provide documentation or other proof of disability in order to provide reasonable accommodations to them, such as those suggested above. To do so would be to condition receipt of goods and services upon the ability to prove a disability, which is considered an undue hardship on the individual.

You may, however, politely ask if they are *able* to wear a mask. If they are, offer them a face covering, ask them to return with a face covering, or suggest they consider shopping online from their home. If they answer that they are *not* able to wear a mask, you may follow up by asking if they are covered by one of the mask mandate’s exemptions, or if they meet any exceptions indicated by the CDC (this is strictly a “yes or no” question—they do *not* need to disclose which exemption or exception they meet). If they are exempted or meet one of the CDC’s exceptions, you can then begin what the ADA calls the “interactive process”—i.e., a discussion to determine how you can best accommodate that customer, while still abiding by the requirements of the state mask mandate and your store’s own policies.

OKAY, BUT A CUSTOMER SHOWED ME A REALLY OFFICIAL-LOOKING CARD FROM THE FTBA THAT SAID IF I DON'T LET THEM INTO MY BUSINESS WITHOUT A MASK, I COULD GET A \$75,000 FINE FROM THE DEPARTMENT OF JUSTICE. I CAN'T AFFORD A \$75,000 FINE!

These cards have been a hot topic in the last several weeks. They’re bold, they’re freely available on the internet...and they’re also fraudulent, for several reasons:

- There is no “FTBA”, or “Freedom to Breathe Agency”. It’s not a real government agency.
- There is no constitutionally-protected right to enter a place of business without a mask.
- ADA complaints are handled by a variety of government agencies—not just the DOJ.
- ADA complaints, even if they go to court and the plaintiff wins, do not typically result in large fines. Instead, the result is usually something called “injunctive relief”—in other words, a judge will order the defendant to do certain things to bring them into compliance with the ADA going forward.
- Furthermore, if the defendant does pay anything, it will most likely be the plaintiff’s legal fees, or monetary damages to the *plaintiff*—not a fine paid to the government.
- If a person has a disability, they do not need to carry documentation to prove or assert it—that is considered an undue hardship on the individual with the disability. Since such documentation is unnecessary, a real government agency would not issue it.
- Remember: the ADA protects people **with disabilities**. As long as businesses are offering reasonable accommodations—even if those accommodations aren’t what the customer wants or prefers, or the customer refuses those accommodations—those businesses are not in violation of the ADA.