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Guidance – Infection Control Protocols for Non-compliant Patients in Washington

Draft Date: July 7, 2020

1. Updated Guidance.

On July 2, 2020, Governor Inslee held a press briefing where he extended the face covering requirement formerly in place only for Yakima County to businesses statewide.¹ The order requires businesses and customers to wear a mask. Under the proclamation, businesses may not serve any customer, services or goods, if they do not comply with the state-wide face covering order.²

Also, DOH has recently clarified its guidance on mask-wearing, which FAQ includes important information for Washington State residents and businesses.³ As related to certain health care facilities, DOH has stated:

DOH’s public health order is focused on areas that are generally accessible to the public. Right now, most behavioral health and long-term care facilities are closed to visitors. Staff at these facilities are required to wear face coverings consistent with L&I’s Safety and Health requirements. For residents, patients, and visitors, face covering requirements will be determined by the medical director of medical facilities. We are working with providers to formalize a Safe Start Plan for visitors to long-term care facilities.

Accordingly, facilities that are not generally open to the public, including most behavioral health and long-term care facilities, should devise their own policies regarding mask requirements for residents, patients, and visitors, consistent with the needs of the facility.

However, please see the exception related to EMTALA below.

2. Original Guidance (Effective June 24, 2020).

Hospitals and clinics are starting to resume non-urgent care and as part of their resumption of services, they are requiring patients to wear masks, they are screening patients prior to or on

¹ <https://www.governor.wa.gov/news-media/inslee-extends-face-covering-requirement-businesses-statewide-and-halts-county> (Inslee extends face-covering requirement for businesses statewide and halts county advancements).

² Id. See also prior order <https://medium.com/wagovernor/inslee-announces-statewide-mask-mandate-812c9ba7a92>

³ <https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/ResourcesandRecommendations/ClothFaceCoveringsandMasks/ClothFaceCoveringsandMasksFAQ> (DOH: Cloth Face Coverings and Masks FAQ – See “What are the requirements for behavioral health and long-term care facilities?”)

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arrival, and they are routinizing COVID-19 testing pre-chemotherapy or pre-procedure (testing not screening).

This guidance document addresses the situation where a patient is not cooperative or declines to participate in the workflow or process that an organization has implemented to minimize the risk to both patients and staff. Entities have legal obligations to keep hospital staff, patients, and visitors safe. At the same time, health care entities have legal obligations to accommodate those who cannot wear masks, in very limited circumstances, based on an individual assessment.

The requirement that patients and visitors wear masks is entirely consistent with public health guidance across the board.

An important exception: all hospitals governed by EMTALA must comply with EMTALA obligations to screen and stabilize patients presenting to their emergency departments, regardless of patients' compliance with COVID-19 processes. Those obligations are covered in detail in the prior EMTALA guidance that was posted.

I. Use of masks in the healthcare setting.

There are helpful regulatory and professional society position statements and guidelines on the use of universal masking in the health care setting. The pertinent information from these papers is summarized below.

A. The Joint Commission: Statement on Universal Masking of Staff, Patients, and Visitors in Health Care Settings, April 23, 2020⁴.

Citing the CDC's revised infection prevention and control recommendations related to COVID-19, the Joint Commission (TJC) has issued a statement that healthcare facilities "...implement source control for everyone entering a healthcare facility (e.g., healthcare personnel, patients, visitors) regardless of symptoms . . . "The statement goes on to say that such measures will help to contain respiratory secretions and thus reduce the dispersion of droplets from an infected individual. This is a necessary and prudent measure, given the instances of asymptomatic transmission.

The statement further provides, "The Joint Commission believes that universal masking within healthcare settings is a critical tool to protect staff and patients from being infected by asymptomatic and presymptomatic individuals and should be implemented in any community where coronavirus is occurring."

⁴ <https://www.jointcommission.org/-/media/tjc/documents/covid19/universal-masking-statement-04232020.pdf>

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With respect to patients and visitors, the statement reads, “All patients and visitors should be instructed to wear a cloth mask when entering any healthcare building. If they arrive without a cloth mask, one should be provided.”

Consistent with CDC recommendations, the statement indicates, “facemasks and cloth face covering should not be placed on young children under age 2, anyone who has trouble breathing, or anyone who is unconscious, incapacitated or otherwise unable to remove the mask without assistance.”

B. Washington State Hospital Association (WSHA) Recommendation on Health Care System Policies for Universal Masking.

Consistent with TJC, WSHA recommends universal masking for all patients and visitors, which is broken down with further recommendations for patient type and status. For asymptomatic patients and visits, they must wear a face covering while in the facility, except as noted in the WSHA statement.

WSHA also recommends that facilities provide face coverings to patients or visitors who present without them, if possible. A visitor without a face covering should not be permitted to enter the facility if the facility is facing a shortage and cannot provide one. Patients and visitors may use their own face coverings, unless it has a valve, which does not provide the requisite protection to others. If a i at all times. Further, for hospital inpatients, they may remove their mask in their room only, or when they are sleeping.

Next, for patients with COVID-19 symptoms⁵, they should receive a medical facemask *before* they enter the facility. Different entities are handling this process differently, with drive thru triage prior to entry, or screening at the doors of the facility. Regardless, there should be some process in place for these patients.

The categorical **exceptions** to the universal masking policy are: (1) for children under the age of two, anyone who has labored breathing or is unconscious, or who cannot remove a mask (this is consistent with the CDC and TJC guidance); and (2) certain behavioral health patients, or anyone else the care team determines is not an appropriate mask candidate. For the second group, providers should evaluate patients who decline to wear masks to determine if the mask is clinically appropriate, and if in the professional discretion of the team it is not required, alternative control measures should be implemented and enforced. Finally, any other exceptions, in the interest of necessary patient care, should be evaluated and authorized by the CMO, CNO or other delegate.

⁵ Symptoms of COVID-19 include cough, shortness of breath or difficulty breathing, fever, chills, muscle pain, sore throat and new loss of taste or smell.

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Visitors with symptoms of COVID-19 should be turned away and advised to consult with their health care provider or to call Public Health for evaluation.

II. Screening for COVID-19.

Additionally, WSHA also recommends screening patients for symptoms of COVID-19 prior to entering a facility or engaging in treatment, either through pre-screening telephonically, or, at a minimum, in person prior to entering the facility.

Consistent with these recommendations, many facilities or clinics are conducting telephonic or secure portal pre-screening prior to treatment. Some facilities are electing to conduct this screening onsite, and prior to treatment. There are other ways to comply as well, and the screening should be tailored to the nature and resources of the facility.

III. Application of Processes for Universal Masking and Pre-Screening for COVID-19.

Whatever process the facility develops and implements, it should be applied consistently and documented where necessary, particularly where some kind of modification is made for a patient. The facility will want to have a record as to the legitimate health and safety reasons for any modification.

IV. Management of Patients Who Refuse to Comply with COVID-19 Related Safety Protocols.

First, to reduce these issues on the front end, advise patients at the time they make an appointment of the safety precautions in place at the facility, CAH, or hospital, including the requirement to wear a mask and that they will be screened for potential COVID-19 symptoms, including temperature checks, or other measures. Post the same information on the facility's website and in signage at the facility. In those postings, advise that those without a mask will not be permitted into the facility.

Next, have a process in place that is uniformly applied to discern if there is a genuine medical reason the individual cannot wear a mask. Uniformity is crucial, as that will protect the facility against any charges of disparate treatment or discrimination. This process would effectively serve as a type of screen for possible disability accommodation issues. (This is discussed in more detail below).

As an example of putting this into practice, the WSHA recommendations suggest having a CMO, CNO, or their delegate authorize exceptions to the requirements of the neutral safety policy. And again, such exceptions should be infrequent and as limited as possible.

V. General obligations under the ADA regarding public accommodations.

A. Prohibition of discrimination on the basis of disability in places of public accommodation.

Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation. Professional offices of health care providers and hospitals are specifically included as entities covered by this title.⁶

1. Reasonable modifications in policies, practices and procedures.

Those covered under Title III of the ADA⁷ must provide “*reasonable modifications*” in policies, practices and procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to *individuals with disabilities*, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.”⁸

- a) Reasonable modifications will depend on the overall circumstances⁹
- b) Definition of “disability”:¹⁰
 - (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - (ii) A record of such an impairment; or

⁶ See 28 CFR 36.102 definition of “health care provider,” (6); ADA Technical Assistance Manual (TAM) III-1.2000 Public accommodations.

⁷ 42 U.S.C. 12182(b)(2)(A)(ii) & (iii).

⁸ 42 U.S.C. 12182(b)(2)(A)(ii) (emphasis added).

⁹ See WSHA Recommendation on HealthCare System Policies for Universal Masking (“WSHA Recommendations”), which may be downloaded from the WSHA website. It may be found under the first bullet point under “PPE,” at the following link, as of June 17, 2020: <https://www.wsha.org/for-patients/coronavirus/coronavirus-resources-for-hospitals/>. These recommendations advise health care systems to involve the CMO, CNO or their delegate to authorize exceptions to the requirements of the policy to determine if wearing a mask is clinically inappropriate.

¹⁰ 28 CFR 36.105; https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=2ab2aab2d3d2fd0f544a5ce7aad8f04c&rgn=div5&view=text&node=28:1.0.1.1.37&idno=28#se28.1.36_1105

(iii) Being regarded as having such an impairment as described by law.

2. Modifications do not need to fundamentally alter the service being offered.

Entities may not fail to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services,” unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.¹¹

3. “Direct Threat” exception.

General Rule: generally applicable, neutral policies do not need to be modified where doing so would create a “direct threat” to the health or safety of others. The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.¹²

COVID-19 presents a direct threat: although not specifically applicable to Title III, in the employment context, the EEOC, has recognized that COVID-19 poses a “direct threat” under Title I of the ADA to health or safety.¹³ Accordingly, it is likely safe to assume that a business need not modify its neutral safety policies that protect workers unless reasonable measures could be taken to mitigate the threat. However, how this would apply where the patient does not have a confirmed case of COVID-19 is unclear.

¹¹ 42 U.S.C. 12182(b)(2)(A)(iii) (emphasis added); “undue burden” is a term of art; whether the requested modification is an undue burden is a fact-specific inquiry.

¹² 42 U.S.C. 12182(b)(3).

¹³ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and other EEO Laws, Technical Assistance Questions and Answers – Updated on June 11, 2020) (“The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.”)

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4. Interactive process.

Whether, and what kind of reasonable modification should be made is determined through an interactive process. The “interactive process” is an ADA Title I concept, clearly laid out in the employment section of the ADA. However, case law has, to a limited degree, extended it beyond that title. Further, the balancing required in Title III is, by its nature an interactive process.

For the patient evaluation, the patient’s individual circumstances must be considered, along with the generally applicable neutral safety policies of the health care center. The WSHA Recommendations referenced above advise that any patient who declines to wear a mask be evaluated by the care team to determine if wearing a mask is clinically inappropriate.¹⁴ Whether and when such evaluation should take place depends on the overall circumstances. If the care team determines that the patient should not be required to wear a mask, alternative infection control measures should be implemented and enforced.

VI. OSHA.

OSHA has issued Guidance on Preparing Workplaces for COVID-19.¹⁵ Like many resources, OSHA cites to CDC guidance. The highlights include developing policies and procedures for prompt identification and isolation of sick people, if appropriate, and taking steps to limit the spread of the respiratory secretions of a person who may have COVID-19. The guidance, consistent with the above, says to provide a facemask, if feasible and available, and ask the person to wear it, if tolerated.

OSHA also recommends for healthcare facilities to follow existing guidelines and facility standards of practice for identifying and isolating infected individuals and for protecting workers. The guidance further recommends posting signs “requesting patients and family members to immediately report symptoms of respiratory illness on arrival at the healthcare facility and use disposable face masks.”

VII. Washington Law.¹⁶

A. Governor’s Mandatory Mask Requirement.

¹⁴ See WSHA Recommendations, at 3 and 8 (*supra*, at footnote 6).

¹⁵ <https://www.osha.gov/Publications/OSHA3990.pdf> (OSHA: Guidance on Preparing Workplaces for Covid-19).

¹⁶ The content of sections B – E, except D.2, are the same as the previous draft of this guidance, but were formerly contained in sections A – D.

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Governor Inslee announced on Tuesday, June 23, that the state is imposing a mandatory requirement that people wear a face covering in indoor public spaces such as stores, offices and restaurants. The order also requires face coverings outdoors when you can't stay 6 feet apart from others.¹⁷ He described it as a "legal requirement," and said that not wearing a facial covering would amount to a misdemeanor crime. The requirement goes into effect on Friday, June 26 and "will likely remain in place until a vaccine is found or some other development significantly changes the equation."

The exemptions announced include:

- People with certain disabilities or health conditions
- People who are deaf or hard of hearing or need to have their mouth uncovered in order to communicate
- Children under the age of 5 (though it's encouraged to have children ages 3-5 wear a covering if possible)
- When it is onerous to do so, including customers who are eating out at a restaurant
- It is not necessary to wear a cloth face covering in your home when you are only with people in your household, or when you are alone in your car. Also, it is not necessary to wear a face covering when individuals are outdoors and people are far apart.

B. Washington State Department of Health General Guidance.¹⁸

The Washington State Department of Health references the CDC guidance by stating: Washington State DOH and the CDC now recommend that people wear cloth face coverings when they are in public settings where they cannot maintain 6 feet of distance from others. This is in addition to other hygiene measures like frequent hand washing. This is general guidance, not specific to the health care setting. The DOH guidance repeats the CDC guidance that:

- **Who should NOT use cloth face coverings:** children under age 2, or anyone who has trouble breathing, is unconscious, incapacitated or otherwise unable to remove the mask without assistance

¹⁷ <https://coronavirus.wa.gov/information-for/you-and-your-family/face-masks-or-cloth-face-covering> (Washington State Coronavirus Response (COVID-19) Face Masks or Cloth Face Covering)

¹⁸ <https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/ClothFacemasks.pdf> (Guidance on Cloth Face Coverings from the Washington State Department of Health).

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- **Cloth face coverings are NOT surgical masks or N-95 respirators.** Surgical masks and N-95 respirators must be reserved for healthcare workers and other medical first responders, as recommended in CDC guidance

C. Washington State Human Rights Commission: Guidance Related to Non-Discrimination in Medical Treatment for Novel Coronavirus 2019 (COVID-19).

In addition to the protections under federal law, the Washington Law Against Discrimination (Chapter 49.60 RCW) prohibits discrimination in places of public accommodation, including medical clinics and hospitals, based on a person’s race, creed, color, sex, sexual orientation, gender identity, national origin, disability, use of a dog guide or service animal, status as a breastfeeding mother, and honorably discharged veteran or military status.

Disability is defined broadly under Washington State law as the presence of a sensory, mental, or physical impairment that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist. No person may be denied equal access to testing or medical treatment for COVID-19, or any other medical issue, due to a disability or a perceived disability, in the event of limited hospital or other health care facility resources and/or capacity.¹⁹

D. County-Specific Guidance.

1. King County.

King County has issued a “Directive to wear face coverings.”²⁰ This directive is part of the reopening of business in general in King County and does not specifically include health care settings. It provides, “Wear a face covering when you are at any indoor or outdoor public space where you may be within 6 feet of someone who does not live with you.”

The guidance advises how to wear a mask properly and lists those who “do not need to follow this directive, including:

- Children ages 2 years and younger. Babies and toddlers under age two should never wear cloth face coverings.

¹⁹ https://www.hum.wa.gov/sites/default/files/public/publications/WA_State_Disability_COVID19-Treatment_NonDiscrimination_Joint_Bulletin_April2020.pdf

²⁰ <https://www.kingcounty.gov/depts/health/covid-19/care/masks.aspx> (King County Directive to wear face coverings, starting on May 18, 2020).

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- Children ages 2-12 years. Children in this age group should only wear a face covering if a parent or caregiver supervises to make sure it's worn safely.
- Anyone with a disability that makes it hard for them to wear or remove a face covering.
- Anyone who is deaf and moves their face and mouth to communicate.
- Anyone who has been advised by a medical professional to not wear a face covering because of personal health issues.
- Anyone who has trouble breathing, is unconscious, or unable to remove the face covering without help.”

2. Yakima County.

Governor Inslee announced during a press briefing on June 20, 2020 that it will be a requirement, not just a recommendation, that individuals wear masks in Yakima County to help limit the spread of the novel coronavirus. Formal written guidance has not been issued to date.

E. Exemplar Policies in Washington Healthcare Facilities.

Numerous facilities in Washington are requiring that patients follow their safety processes during COVID-19. Some example of this include:

1. Polyclinic:²¹ Mandatory masking for all patients, visitors, and staff, and screening at main clinic locations.
2. Overlake Hospital²²
 - Patients, visitors, and employees are screened for COVID-19 symptoms; temperature checks will be performed.
 - All employees, providers, and patients are required to wear a face mask. If you do not have one, our team members will provide one to you.
 - “Upon Your Arrival” All patients, visitors and employees are being screened for COVID-19 symptoms, including a temperature check, upon entrance to our hospital and clinics. Everyone will be required to wear a mask, regardless of whether they have COVID-19 symptoms, and we ask that you remove personal gloves and use

²¹ <https://polyclinic.com/coronavirus>

²² <https://oh-rebuild-oh.pantheonsite.io/safe-in-our-care/preparing-for-your-visit>

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the hand sanitizing stations throughout the facility. Cloth masks are acceptable, and we will provide a mask if you do not have your own.

3. Swedish Medical Center²³
 - SCREENING. We conduct routine coronavirus symptom screening on patients, visitors and employees.
 - MASKING. Our facilities have adopted policies that align with recommendations from the Centers for Disease Control and Prevention.
 - DISTANCING. We're taking steps to ensure appropriate distance between you and other patients, visitors and staff.
 - SANITIZING. Our staff are regularly cleaning waiting areas and exam rooms in between visits, and hand sanitizer stations are located throughout our facilities.
 - SEPARATING. COVID-19 patients, as well as those caring for them, are safely isolated from the rest of the population.
 - VISITORS. We are limiting people coming into our facilities to those deemed essential. This helps maintain appropriate physical distancing and reduces spread of germs.
 - VIRTUAL VISITS. For on-demand and routine medical care, we offer virtual visits – a reliable way to see your provider from the comfort your own home.

VIII. Alternatives to Wearing Masks or Screening for COVID-19 Symptoms.

There are several alternatives to consider to wearing a mask or patient screening onsite, which include: (1) telehealth appointments; (2) rescheduling to another time, or potentially the first appointment of the day; (3) more extensive testing or questionnaires for patients who cannot wear a mask; and (4) face shields.²⁴

IX. Summary.

A. Maintain Neutral Policies that protect health care workers, patients and visitors.

²³ <https://coronavirus.providence.org/swedish/safety-updates>

²⁴ See Washington Office of Superintendent of Public Instruction: Reopening Washington Schools 2020 <https://www.k12.wa.us/sites/default/files/public/workgroups/Reopening%20Washington%20Schools%202020%20Planning%20Guide.pdf> (Recommendation not for health care facility, but in the educational context. Still may be an option.)

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Facilities may have neutral policies designed to protect the public that are consistent with public health guidelines. Any exception to that, based on the health of the patient, should be handled by designated staff, in consultation with the Primary Care Provider team, as needed.

The interactive process will guide the decision about whether any reasonable modifications are warranted. For a patient with mild asthma, rescheduling as the first appointment in the morning before other patients come in may be appropriate. For someone with a post-surgical infection, figuring out how to get them in right away, maybe through a different access route, or allowing for curbside check-in would be advisable.

And finally, if the neutral policies are adjusted, document the reasons in each case as to why such modifications were made.

B. Make Reasonable Modifications Where Truly Warranted.

Those with breathing difficulties are at greater risk of developing serious illness from COVID-19, and thus should probably be wearing a mask for health care visits. This is consistent with the recommendations of many of the sub-specialty associations that involve conditions with breathing or airway compromise, including the American Lung Association²⁵, the American Academy of Allergy, Asthma & Immunology²⁶, and the Cystic Fibrosis Foundation²⁷.

²⁵ <https://www.lung.org/lung-health-diseases/lung-disease-lookup/covid-19/faq>

²⁶ https://education.aaaai.org/resources-for-a-i-clinicians/prepare-your-practice_covid-19

²⁷ <https://www.cff.org/Life-With-CF/Daily-Life/Germs-and-Staying-Healthy/CF-and-Coronavirus/COVID-19-Community-Questions-and-Answers/>