

GUIDANCE: INFECTION CONTROL PROTOCOLS FOR NON-COMPLIANT PATIENTS IN OREGON

Updated Guidance Effective: June 7, 2022

1. Updated Guidance.

The statewide indoor masking requirement was lifted at 11:50 pm on March 11, 2022. However, pursuant to OAR 333-019-1011, face coverings are required in health care settings. Face coverings are defined as a cloth, paper, or disposable face covering that covers the nose and mouth, and includes a medical-grade face mask. OHA has indicated it has no current plans to lift mask requirements in health care settings under OAR 333-019-1011. <https://govstatus.egov.com/or-oha-face-coverings#:~:text=Masks%20are%20required%20in%20healthcare%20settings%20following%20OAR%20333%2D019,p.m.%20on%20March%2011%2C%202022.>¹

The OAR includes a provision that a responsible party² must develop and follow a policy that requires patients, residents, clients, and visitors to wear a face covering, and to develop and follow a policy that if a patient, resident, or client cannot tolerate any form of face covering due to a medical condition, strict physical distancing of at least six feet be observed from other non-health care personnel to the greatest extent possible. Face coverings are not required when the individual: (1) is under age 5; (2) is sleeping; (3) is actively eating or drinking; (4) is engaged in an activity or receiving health care that makes wearing a face covering not feasible; (5) is alone in a closed room; and (6) is a patient or resident in their designated room with their door closed.

OHA issued an FAQ regarding OAR 333-019-1011, which is linked here: <https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le3898n.pdf>.

2. Updated Guidance (Effective September 23, 2021).

The CDC has issued guidance with respect to infection control recommendations, which includes patient source control measures. The current guidance, last updated February 10, 2021, is linked here: https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Finfection-control%2Fcontrol-recommendations.html. These recommendations include that patients and visitors wear their own well-fitting form of source control³ upon arrival to and throughout their stay at the facility.

¹ Per OAR 333-019-1011(2), the healthcare masking requirements will remain in effect unless the State Public Health Director or State Public Health Officer issues an order stating that the requirements in this rule are no longer necessary to control COVID-19. Further, if such an order is issued, OHA must provide notice to interested parties and otherwise take reasonable steps to ensure notice of the order is provided to those affected by this rule, in accordance with OAR 183.335(1).

² Included in this definition are persons who have control or responsibility for the activities of health care personnel in a health care setting, or for the activities within a health care setting.

³ Source control is defined as well fitting cloth masks, facemasks, or respirators.

The Oregon Health Authority (OHA) has required masking in healthcare settings. The masking requirement applies to visitors and staff. OHA issued updated guidance on June 30, 2021 – which is linked here: <https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2351m.pdf>.

The OHA requirements addresses masking of patients and visitors, as well as healthcare personnel. With respect to patients and visitors above the age of 5, they are required to wear a face covering, face mask, or face shield⁴ when visiting a health care office except for the following:

- a. Face coverings, face masks, or face shields are not required while eating or drinking, but strict physical distancing (6 feet or more) should be maintained if face coverings are not used.
- b. Face coverings, face masks, or face shields are not required during a physical examination or procedure where access to the part of the face that would be covered by a face covering is necessary. The face covering should be put back on after this examination or procedure is completed.
- c. Face coverings, face masks, or face shields can be briefly removed where identity needs to be confirmed by visual comparison.

OHA further recommends that if an individual has a medical condition that makes it hard to breathe or a disability that prevents them from wearing a face mask, face covering, or face shield, they should notify their health care provider or health care office in advance so that appropriate accommodation can be made to ensure the safety of other patients, visitors, and health care providers.

In addition to the above, Oregon has also required the use of face coverings or masks when in public indoor and outdoor spaces with people from other households. This has been implemented as part of the Oregon Administrative Rules, OAR 333-019-1025, and is linked here: <https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=280702>.

3. Draft Date: Effective July 23, 2020

Effective July 24, 2020, children ages 5 and up will be required to wear a face covering in indoor public spaces, as well as in outdoor public spaces where physical distancing is not possible. It is strongly encouraged for children between the ages of 2 and 5, who are able to remove their own face covering, to wear a face covering in indoor public spaces and outdoor public spaces where physical distancing is not possible.

The Oregon Health Authority (OHA) has issued a detailed FAQ regarding face coverings and the public, including examples of types of accommodations that businesses can offer to customers who assert they are unable to wear a mask due to a disability. This FAQ clarifies that a reasonable accommodation for individuals with a disability does not include allowing them into a public place without any sort of face covering. This FAQ also clarifies that if an individual in an indoor public place refuses to wear a face covering and does not have a disability, they should be refused service.

This FAQ is linked here: <https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2390e.pdf>.

It is presumed that this FAQ will be updated to reflect the additional requirements regarding children between the ages of 5 and 12.

⁴ OHA does not recommend the use of face shields alone. Per OHA, their individual use should be limited to situations when a person has a medical condition that prevents them from wearing a mask or face covering, or when people need to see mouth and tongue motions in order to communicate.

4. Draft Date: Effective July 7, 2020

The Governor has recently announced that Oregon Occupational Safety and Health (OSHA) will take the lead, along with other state and local agencies, in enforcing face covering requirements for all covered Oregon businesses.

OSHA has issued a guidance document which contains practical advice regarding interacting with customers who are not wearing a face covering.⁵ This memo also includes best practices, including having free face coverings or face shields available for customer use. It also recommends that if the customer refuses to wear a face covering, the employer may politely ask the customer if they have a medical condition or disability that prevents them from wearing a mask. If the customer says no, or refuses to answer, they should be politely told that the employer cannot serve them and that they need to leave the premises.

As mentioned below, the Oregon face covering requirement applies to businesses and indoor spaces open to the public. Facilities that are not generally open to the public, including most behavioral health facilities, should devise their own policies regarding face covering requirements for residents, patients, and visitors, consistent with the needs of the facility.

5. Draft Date Effective: July 1, 2020

As of July 1, 2020,⁶ customers and visitors of businesses⁷ and indoor spaces open to the public⁸ are required to:

- wear a mask, face shield, or face covering unless the individual is under 12 years of age, except as follows:
 - Masks, face shields or face coverings are not required while eating or drinking.
 - Masks, face shields or face coverings are not required when at a business or in an indoor space open to the public and engaged in an activity that makes wearing a mask, face shield or face covering not feasible, such as strenuous physical exercise, or performers singing or playing an instrument if at least six (6) feet of distance is maintained from others.

Individuals who have a medical condition that makes it hard to breathe or a disability that prevents the individual from wearing a mask, face shield or face covering can request an accommodation to enable full and equal access to services, transportation, and facilities open to the public.

⁵ <https://osha.oregon.gov/Documents/COVID19-Face-Covering-Advisory-Memo.pdf>

⁶ The OHA statewide mask, face shield, and face covering guidance is linked here:

<https://sharedsystems.dhsosha.state.or.us/DHSForms/Served/le2288K.pdf>.

⁷ The definition of “business” does not include health care providers, with the exception of pharmacies.

⁸ “Indoor spaces open to the public” is defined as “indoor spaces, whether publically owned or privately owned, where the public has access by right or invitation, express or implied, whether by payment of money or not. In addition to the public areas of the businesses defined above, such spaces may include, but are not limited to, building lobbies or common spaces, elevators, bathrooms, and buildings or meeting rooms outside of private homes where people gather for social, civil, cultural or religious purposes.” It appears that this broad definition would include health care providers.

Despite the above age restriction, it is strongly recommended that children between the ages of 2 and 12 wear a mask, face shield, or face covering at all times in all indoor spaces open to the public, particularly in places where it is likely where physical distancing cannot be maintained, and where vulnerable people may go.⁹

The guidance also notes that it is “strongly recommended that everyone wear a mask, face shield, or face covering in any setting where at least six (6) feet of physical distance from others outside of an individual’s household, cannot be maintained.”

Per this new requirement, businesses and persons responsible for indoor spaces open to the public are required to:

- Require employees, contractors, volunteers, customers and visitors to wear a mask, face shield, or face covering, except as follows:
 - Employees, contractors and volunteers: Masks, face coverings or face shields are not required when at or in a location where the employee, contractor or volunteer is not interacting with the public and six (6) or more feet of distance can be maintained between other people.
 - Masks, face shields or face coverings are not required while eating or drinking.
 - Customers and visitors: Masks, face shields or face coverings are not required when at a business or in an indoor space open to the public and engaged in an activity that makes wearing a mask, face shield or face covering not feasible, such as strenuous physical exercise, or performers singing or playing an instrument if at least six (6) feet of distance is maintained from others.
- Provide masks, face shields, or face coverings for employees.
- Provide for accommodations for employees, contractors, customers and visitors if such accommodations are required by:
 - State and federal disabilities laws if applicable, including the Americans with Disabilities Act (ADA) which protects people with disabilities from discrimination in employment and requires employers to engage in the interactive process for accommodations.
 - State or federal labor laws.
 - State and federal public accommodations laws that provide all persons with full and equal access to services, transportation, and facilities open to the public.
 - OHA public health guidance if applicable.
- Post clear [signs](#) about the mask, face shield, or face covering requirements.

However, please see the exception related to EMTALA, below.

6. Draft Date Effective: June 23, 2020

⁹ There is an additional recommendation that children ages 2 to 12 who are wearing a face covering do so with the assistance and close supervision of an adult.

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 or face coverings, they are screening patients prior to or on 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 or face coverings 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/face coverings 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, 2020.

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 . . ."¹⁰ 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."

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."

¹⁰<https://www.jointcommission.org/-/media/tjc/documents/covid19/universal-masking-statement-04232020.pdf>

B. Opening Up America Again - CMS Recommendations for Re-opening Facilities to Provide Non-Emergent Non-COVID-19 Healthcare: Phase I.

As part of their recommendations regarding restarting non-emergent non-COVID-19 related medical treatment, CMS recommends that healthcare providers and staff wear surgical facemasks at all times.¹¹ With respect to patients, CMS further recommends that they wear a “cloth face covering that can be bought or made at home if they do not already possess surgical masks.”

C. American Medical Association: COVID-19 - A Physician Practice Guide to Reopening.

The AMA issued guidance in June 2020 with respect to reopening of physician practices.¹² These recommendations include that physicians implement various safety measures with respect to their patients, including that “[c]onsistent with U.S. Centers for Disease Control and prevention (CDC) guidance, practices should require all individuals who visit the office to wear a cloth face covering. This expectation should be clearly explained to patients and other visitors before they arrive at the practice.” The AMA guidance also includes directing patients to resources regarding how to make a cloth face covering or makes from items at home, and provides that visitors and patients who arrive at the practice without a cloth face covering or mask should be provided with one by the practice if there are available supplies.

II. Screening for COVID-19.

In connection with reopening, the Oregon Health Authority (OHA) has provided detailed guidance regarding resumption of non-emergent and elective procedures in clinics, hospitals, and ambulatory surgery centers.¹³ These guidance documents do not specifically discuss or require the use of face coverings with patients. However, they do recommend that medical care providers perform enhanced risk screening of patients prior to delivering care, including use of telemedicine, screening patients for COVID-19 risk factors and symptoms, and consider screening patients by laboratory testing prior to performing non-emergent or elective procedures.

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.

¹¹ <https://www.cms.gov/files/document/covid-flexibility-reopen-essential-non-covid-services.pdf>

¹² <https://www.ama-assn.org/system/files/2020-06/physican-guide-reopening-practices-covid-19.pdf>

¹³ OHA’s general guidance document for medical and dental offices is linked here:

<https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2322s.pdf>. The OHA guidance for hospitals is:

<https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2322u.pdf>. The OHA guidance for ambulatory surgical centers is:

<https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2322t.pdf>.

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).

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.¹⁴

1. Reasonable modifications in policies, practices and procedures.

Those covered under Title III of the ADA¹⁵ 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."¹⁶

a) Reasonable modifications will depend on the overall circumstances

b) Definition of "disability":¹⁷

(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

¹⁴ See 28 CFR 36.102 definition of "health care provider," (6); ADA Technical Assistance Manual (TAM) III-1.2000 Public accommodations.

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

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

¹⁷ 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.¹⁸

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.¹⁹

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.²⁰ 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.

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. Whether and when such evaluation should take place depends on the overall

¹⁸ 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.

¹⁹ 42 U.S.C. 12182(b)(3).

²⁰ <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.”)

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-19.²¹ 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. Oregon Law.

A. Oregon General Guidance.

Oregon generally refers people to the CDC guidance, which recommends individuals to cover their mouth and nose with a cloth face cover when around others to prevent the spread of COVID-19, even for those who do not feel sick.

1. The referenced CDC guidance further provides the following information regarding people not wearing masks.²²

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;

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.

B. Oregon Health Authority (“OHA”).

OHA has not required that patients wear face coverings as part of their guidance regarding reopening facilities. They have, however, recommended the use of masks for visitor of patients at

²¹ <https://www.osha.gov/Publications/OSHA3990.pdf> (OSHA: Guidance on Preparing Workplaces for Covid-19).

²² <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (REVISED COVID-19 Guidance for Entry into Acute Health Care Facilities: April 23, 2020)

hospitals, ASCs, and outpatient renal dialysis facilities. Relevant portions of this guidance are excerpted below:²³

In addition, all acute health care facilities must:

- Provide education to essential individuals regarding:
 - Hand hygiene: before entering a patient room and after leaving a patient room, essential individual shall wash hands with soap and water for 20 seconds, or clean hands with alcohol-based hand sanitizer.
 - Avoidance of face touching.
 - Use of good respirator etiquette: covering coughs and sneezes with the elbow and proper use of disposal of tissue.
 - Appropriate personal protective equipment use.
- Require appropriate signage regarding visitation and screening protocols and provide this information to individuals seeking entry to the facility, including a link to the hospital's grievance procedures if an individual believes they are inappropriately being restricted from the facility.
- Provide temperature checks upon request.

C. Policies in Oregon Healthcare Facilities.

Numerous facilities in Oregon are requiring that patients wear masks.

1. Legacy's Mask requirements.

Note that visitors, not patients, are required to leave if they refuse to wear a mask:

- **All patients and visitors must wear a mask at all times.** This includes public spaces. Consideration will be given to young children under age 2.
- Patients may remove their mask when in their room unless directed otherwise by their care provider. Visitors must continue wearing their mask while they are in the patient's hospital or exam room except when they are eating, drinking or sleeping overnight. Visitors must also wear any other personal protective equipment (PPE) given to them by their patient's care team.
- Visitors who **refuse to wear a mask** will be **asked to leave the building.**
- For your comfort and safety, visitors and symptom-free patients should bring and wear their own masks.
- Patients and visitors without a mask will be provided one if you have a latex allergy. Please note that some of the masks we provide contain latex in the ear loops. We cannot guarantee that our masks are latex-free because of supply shortages caused by COVID-19.
- Patients and visitors should follow these mask safety tips.

2. OHSU.

²³ OHA – COVID-19 Guidance on Screening and Visitation at Acute Health Care Facilities (REVISED June 8, 2020) - <https://sharedsystems.dhsosha.state.or.us/DHSForms/Served/le2282.pdf>.

OHSU is requiring masks for everyone age 2 and older at all OHSU and Tuality locations. They are asking people to bring masks from home but stating a mask will be provided if the person arrives without one.

3. [Adventist Health Portland.](#)

Adventist Health Portland is requiring all staff and visitors to wear a mask when in the hospital or clinics.

4. [The Portland Clinic.](#)

The Portland Clinic is also requiring use of a facemask to cover the nose and mouth, per CDC guidelines.

5. [The Oregon Clinic.](#)

The Oregon Clinic is also requiring that patients and guests bring a mask and wear it while in the clinic.

D. [Oregon Face Covering Guidance for Business, Transit, and the Public.](#)

In addition, Oregon has recently issued mask and face covering guidance for “business, transit, and the public.” The guidance appears to be intended for businesses reopening as part of Oregon’s overall reopening process. Health care providers, clinics, hospitals, etc. are not included in the definition of business in this guidance. As such, it is not applicable to those entities, strictly speaking. However, it does provide some useful information on the intersection of disability and mask wearing with respect to customers:²⁴

- If customers or visitors will be required to wear a face covering, develop a policy and post clear signs about any such requirements. A policy that requires customers and visitors to wear face coverings must:
 - Provide exceptions to the policy to accommodate people with certain health conditions, or children under two years of age.
 - Take into account that places of public accommodation must make reasonable modifications to their policy to allow people with disabilities to access their services.
 - Take into account that requiring people to wear face coverings affects people differently including people of color who may have heightened concerns about racial profiling and harassment due to wearing face coverings in public.
 - Consider whether to provide face coverings for customers or visitors who do not have one.

OHA has also issued an FAQ sheet regarding the above face covering requirements.²⁵ This document contains recommendations regarding how to deal with individuals who refuse to wear

²⁴ Signage regarding strong recommendation of use of face coverings is linked at:

<https://sharesystems.dhsoha.state.or.us/DHSForms/Served/le2729.pdf>

²⁵ <https://sharesystems.dhsoha.state.or.us/DHSForms/Served/le2390e.pdf>

a face covering. It is unclear, however, what impact, if any, the county specific face covering requirement will have on the below recommendations:

Q5: What do I say if a potential customer or visitor shows up without a face covering to my business?

If your business (with the exception of public transit) is requiring face coverings and has posted clear signs as required under the [Mask and Face Covering Guidance](#), you can ask the individual politely if they cannot wear a face covering because of a medical condition or disability. If they answer yes, then you should not require them to wear a face covering. It is not appropriate or allowed to ask an individual what their medical condition is or to make them to provide proof of their medical condition or disability. If they answer no, then consider politely offering them a face covering, provide them with other options (e.g., online shopping) to find what they need, or ask them to come back with a face covering.

Q7: Is it illegal to refuse service to someone not wearing a face covering?

It may be illegal to refuse service to someone because they are not wearing a face covering. The Americans with Disabilities Act (ADA) says that places of public accommodation, such as grocery stores and doctor's offices, must make reasonable modifications to their policies to allow people with disabilities to access

their services. Requiring a face covering might violate the ADA if both of the following are true:

- Requiring a person to wear a face covering makes services inaccessible to people with disabilities, and
- No other options are provided.

If a business chooses to require customers or visitors to wear a face covering, they must:

- Develop a policy and post clear signs about this requirement. A policy that requires customers and visitors to wear face coverings must:
 - Provide exceptions to the policy to accommodate people with certain health conditions, or children under two years of age.
 - Make reasonable modifications to their policy to allow people with disabilities to access their services.
 - Understand that requiring people to wear face coverings affects people differently including people of color who may have heightened concerns about racial profiling and harassment due to wearing face coverings in public.
 - Consider whether to provide face coverings for customers or visitors who do not have one.

To file a civil rights complaint, visit the Bureau of Labor and Industries (BOLI) website or call 971-673-0764.

E. County Specific Face Covering Requirements.

Effective June 24, 2020, individuals²⁶ in Clackamas, Hood River, Lincoln, Marion, Multnomah, Polk, and Washington Counties²⁷ are required to wear a mask, face covering, or face shield at businesses in these counties.²⁸ The definition of “business” does not include health care facilities or hospitals, but does include pharmacies.²⁹ Delineated exceptions to this face covering requirement are:

- If the individual is under age 12³⁰
- If the individual has a medical condition that makes it hard to breathe when wearing a mask, face covering, or face shield
- If the individual has a disability that prevents them from wearing a mask, face shield, or face covering

Businesses in these counties are required to post clear signs regarding the face covering requirement.³¹ It is recommended, but not required, that they provide free face coverings to customers who do not have one. They are also required to provide for accommodations and exceptions from the face covering requirement if such accommodations and exceptions are required by:

- State and federal disabilities law if applicable, including the ADA
- State or federal labor laws
- State and federal public accommodations laws that provide all persons with full and equal access to services, transportation, and facilities open to the public
- OHA public health guidance if applicable

Although it has been announced that businesses will be able to ask patrons to leave if they do not comply with the face covering requirement, this provision is not included in the OHA guidance.³²

It is also possible that there may be municipalities or counties in Oregon that have or will have their own requirements regarding face coverings, or may opt to be included in the county specific requirements referenced above.³³ So, this is something to consider and look into locally.

²⁶ The face covering requirement applies to customers, employees, contractors, volunteers, and visitors.

²⁷ The OHA guidance notes that counties other than the currently identified ones wish to have this guidance applied in their county, they can request that the Governor add them to the list.

²⁸ OHA’s newly issued guidance is linked at: <https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2351j.pdf>.

²⁹ The OHA guidance notes that there may be other face covering requirements and recommendations that apply to other businesses not identified in the guidance. It refers other businesses types and other counties to other applicable sector guidance – linked here: <https://govstatus.egov.com/OR-OHA-COVID-19#collapseOHAGuidance>. There is no specific guidance within these materials regarding health care providers.

³⁰ Despite this exception, the OHA guidance notes that it is strongly recommended that children between ages 2 and 12 wear a face covering in settings like grocery stores and pharmacies where physical distancing cannot be maintained, and that they be worn with the assistance and close supervision of an adult.

³¹ A sample sign from OHA is linked here: <https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2728.pdf>.

³² Governor Brown has stated that she will institute this face covering requirement via Executive Order, and has also stated in remarks that this requirement will be enforceable. To our understanding, the Executive Order has not yet been issued.

³³ Prior to Governor Brown’s announcement regarding the face covering requirement, Lincoln County was in the process of implementing its own requirement. Per [The Oregonian](#), the Lincoln County ordinance was broader in scope than the OHA guidance.

F. Oregon Public Accommodation law.

In addition to the protections under federal law, under Oregon law, it is illegal to discriminate in places of public accommodation on the basis of race, sex (including pregnancy), sexual orientation, national origin, religion, marital status, physical or mental disability, or age (18 year of age and older) (emphasis added).³⁴

The basic definition of a disability pertaining to places of public accommodation³⁵ tracks the ADA.³⁶ There are differences, but they are not pertinent to the broad advice provided here.

Per Oregon law, a place of public accommodation includes, but is not limited to, any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.³⁷ This definition would include hospitals and health care facilities, with the exception of state hospitals, such as Oregon State Hospital.

OHA has also issued guidance that it is illegal for health care providers to ration care based on a person's disability status, and that it is unlawful in Oregon to discriminate against an individual on the basis of disability with regard to access to public accommodations, like a hospital.³⁸

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

There are several alternatives to consider to wearing a mask/face covering 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 patient who cannot wear a mask; and (4) face shields.

IX. Summary.

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

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

³⁴ See ORS 659A.403.

³⁵ See OAR 839-006-0305, which incorporates by reference the definition from the employment context, OAR 839-006-0205.

³⁶ In general, disability means a physical or mental impairment that substantially limits one or more major life activities of the individual, or a record of having a physical or mental impairment that substantially limits one or more major life activities of the individual. See OAR 893-006-0205(1).

³⁷ See 659A.400(1); A place of public accommodation in Oregon does not include: Department of Corrections institutions and state hospitals (i.e., Oregon State Hospital), youth correctional facilities or institutions, bona fide clubs or places of accommodation that is in its nature distinctly private. See ORS 659A.400(2).

³⁸ <https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2288R.pdf>

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 Association³⁹, the American Academy of Allergy, Asthma & Immunology⁴⁰, and the Cystic Fibrosis Foundation⁴¹.

This information should be modified based on individual circumstances, professional judgment, and local resources. This document is provided for educational purposes and is not intended to establish guidelines or standards of care. Any recommendations contained within the document is not intended to be followed in all cases and does not provide any medical or legal advice.

Our risk management services and expertise helps members reduce their risk of exposure through customized and collaborative consultation, education, and targeted risk management offerings.

³⁹ <https://www.lung.org/lung-health-diseases/lung-disease-lookup/covid-19/faq>

⁴⁰ https://education.aaaai.org/resources-for-a-i-clinicians/prepare-your-practice_covid-19

⁴¹ <https://www.cff.org/Life-With-CF/Daily-Life/Germs-and-Staying-Healthy/CF-and-Coronavirus/COVID-19-Community-Questions-and-Answers/>