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“I CAN’T WEAR A MASK DUE TO A MEDICAL CONDITION...”

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We have received many questions from employers about the situation where an employee says that he or she cannot wear a mask as required by an employer. There are several approaches within an employer’s rights to deal with this mask issue. First, there is a great deal of misinformation about masks. OSHA has released a helpful Q&A regarding the safety of medical and surgical masks specifically: <https://www.osha.gov/SLTC/covid-19/covid-19-faq.html>. Depending on your workforce, you may want to affirmatively make this a positive talking point in a pre-shift or other regular meeting, or simply to have it readily available on an as-needed basis.

Next, if employees do articulate a specific medical inability to wear a mask, an employer has the right to require that the employee provide medical substantiation of the employee’s limitation from wearing masks or other face coverings. This includes the right to require that the medical substantiation identify whether the issue is any covering, the density of the covering, or the fabric used for the covering. Furthermore, the employer should ask for the employee’s healthcare provider to state what accommodation, if any, can be made for the employee in lieu of the face covering.

Let’s assume that the employee simply cannot wear a face covering. At this point, the employer evaluates whether there is some form of accommodation available where the employer’s infection control prerogatives remain in place. These can include

regular mask breaks where an employee is permitted to go outside or some other designated area and lower his/her mask; temporary transfer to an open position where a mask is not required; or telework. Any sort of physical reassignment of the place where work is done or job transfer does not have to be permanent; and, in the case of a job transfer, the job the employee is transferred to may pay less.

If the employer ultimately concludes that no accommodation is possible, the employer is not required to permit the employee to work without a face covering where it would negatively affect the health and safety of co-workers and/or consumers. In this situation, the employer has the right to tell the employee that until either the employer's face covering policy changes or the employee's limitations end need for accommodation change, the employee will be placed on a leave of absence, which may be without pay. During that time, the employer will move forward with filling the employee's position. If the employee at some point is able to return to work with a different or no accommodation, the employee should notify the employer and the employer at that time will evaluate its staffing needs. The employer may issue the employee a COBRA notice and either leave the employee alone indefinitely or provide the employee with a follow up date months into the future, if by which the employer does not hear from the employee, the employer will consider the employee separated from the organization.

Our attorneys are happy to assist with requests for medical substantiation, as well as other mask issues.