

Wisconsin's Face Covering Order

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Practice Area: Labor and Employment

On July 30, 2020, Governor Tony Evers issued Emergency Order #1 (the "Order") requiring every individual in Wisconsin, aged 5 and older, to wear "Face Coverings" except in limited circumstances. This mandate, effective August 1, 2020, and continuing through September 30, 2020, requires Face Coverings be worn in Wisconsin when an individual is both:

1. **Indoors** or in an **Enclosed Space** (excluding private residences), **and**
2. **Another person or persons is present** (who are not members of individual's household or living unit) in the same room or Enclosed Space.

The Order applies to public and private places of employment. There are a number of exceptions under the Order describing situations when Face Coverings do not need to be worn and identifying classes of people who do not need to wear them including:

- Individuals with breathing trouble
- When engaging in work where wearing a Face Covering would create a risk to the individual, as determined by government safety guidelines
- While eating or drinking
- While making a presentation in a religious, political, media, educational, artistic, cultural, musical or theatrical presentation, provided the speaker remains at least 6 feet away from all other individuals.

For purposes of the Order, "Face Coverings" is defined as a piece of cloth or other material that is worn to cover the nose and mouth completely. A Face Covering includes a bandana, a cloth face mask, a disposable or paper mask, a neck gaiter, or a religious face covering. A Face Covering does not include face shields, mesh masks, masks with holes or openings, or masks with vents.

The Order defines an "Enclosed Space" as a confined space open to the public where people congregate. This definition includes but is not limited to outdoor bars, outdoor restaurants, taxis, public transit, ride share vehicles, and outdoor park structures. Missing from the Order is the definition of what a "room" is for purposes of the "Indoors" restrictions. While limited spaces such as a conference room or meeting area are anticipated to be within the scope of the restriction, it is not clear that a warehouse or open manufacturing facility would not be a "room" under the Order requiring an exception to the Face Covering requirement.

FAQs for Employers

In the application of the Order the State of Wisconsin has provided FAQs to help define more closely the obligations under the Order. Some of the more salient provisions are:

1) Are there any exceptions to the Face Coverings requirement for employers?

Yes. Section 3(a)(vii) of the Order describes a safety exception. It states that Face Coverings are not required, *"When engaging in work where wearing a face covering would create a risk to the individual, as determined by government safety guidelines."* To determine if this exception applies, employers are encouraged to closely review their OSHA safety standards and manufacturer safety recommendations to determine if wearing a Face Covering while performing certain tasks would create a risk to the employee. If the Face Covering would create a risk for the employee, a Face Covering would not be required.

2) If the employees can physically distance in the factory, do they have to wear a Face Covering?

Yes, if the work is performed Indoors (or in an Enclosed Space) and there is one or more persons present in the room or the Enclosed Space (who are not members of their household or living unit). However, if the Section 3(a)(vii) safety exception applies, the employee would not need to wear the Face Covering.

3) If an employee is in their own office, do they have to wear a Face Covering?

No, provided no other persons are present in the office. According to the FAQs, a Face Covering is not needed if the employee is the only person in the room.

4) Are there penalties for violating or not complying with the Order?

Yes. Violation of the Order can result in a penalty of not greater than \$200. There is currently disagreement on the enforcement mechanism as some law enforcement agencies are declining to enforce the mandate based on their discretionary authority in law enforcement.

Practice Points for Employers

While the interpretive process under the Order begins, employers should consider protective steps in the operations of the business including:

1. Supplement the work place safety policy of the employer to reflect exceptions, if any, to the use of Face Coverings in the manufacturing facility, specifically referencing OSHA obligations where appropriate.
2. Establish Standard Operating Procedures for office and common areas on the required use of Face Coverings
3. Evaluate Enclosed Spaces at the facility and provide for appropriate disclosures or notices of compliance obligations by employees.
4. Revise the COVID compliance policy and procedures to reflect the obligations on employees and the organization of the Order
5. Communicate with employees the expectations of the organization for compliance and the consequences of disregarding the Order and the policies.

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