

Podcast Episode: COVID-19, Face Mask Requirements, and the ADA

CALEB BERKEMEIER: Welcome to ADA Today, a podcast of the Mid-Atlantic ADA Center. My name is Caleb Berkemeier, training specialist for the Center, and I'm joined by Nancy Horton, our information specialist. Hello, Nancy.

NANCY HORTON: Good morning.

CALEB BERKEMEIER: Today we're going to be talking about a hot-button topic that's generated lots of questions, confusion, and contention as the COVID-19 pandemic continues to raise new challenges for our society. Many states or local governments have issued orders for people to wear face masks or face coverings when they're in public, and many agencies or businesses have established similar policies of their own.

Now, as many of you know, state and local governments are covered by Title II of the ADA, and many types of private businesses that are open to the public are covered by Title III. Entities covered under these parts of the ADA must make reasonable modifications to their policies, practices, and procedures in order to accommodate people with disabilities, and some people with disabilities have difficulty wearing face coverings.

So, for example, people with conditions that affect breathing may have problems with face masks, or people with other types of disabilities, including autism, intellectual disabilities, or mental health issues may have trouble managing face coverings.

So, Nancy, with this context in mind, people may be wondering, "Am I exempt from mask requirements because I have a disability?"

NANCY HORTON: Well, not necessarily. As you mentioned, state and local government agencies and many private businesses must make reasonable modifications to their policies, practices, and procedures in order to accommodate people with disabilities, but that does not mean that every request of a person with a disability must be granted.

CALEB BERKEMEIER: So, a person with a disability does not automatically get the modification he or she requests or prefers?

NANCY HORTON: No, a covered entity may consider legitimate factors, such as the cost or difficulty of making adjustments, valid safety rules, or the risk of direct threat to the health of others.

CALEB BERKEMEIER: What is the difference between a direct threat and a safety rules?

NANCY HORTON: In terms of Title II and Title III of the ADA, a direct threat means a particular individual with a disability poses a "significant risk to the health or safety of others" that cannot be reasonably eliminated. Determining direct threat is based on an individualized assessment of a specific person, within a specific situation.

Safety rules, on the other hand, are merely general rules that are based on general concerns, and they're legitimate if they are really necessary for safe operations, and not based on speculation, assumptions, stereotypes, or generalizations. An example of a safety rule is "no glass containers in the swimming pool." That's a simple rule most of us are familiar with, and most of us understand that it's based on real risks for the potential of broken glass winding up in or around the swimming pool, where it's wet and slippery and everyone is barefoot.

So, the real difference between direct threat and a safety rule is that defending a safety rule is really about the *rule*, and making sure the rule is legitimate, but determining direct threat is really about a *person*, and looking at that person in the context of a situation, and finding that that individual person really poses a significant risk to the health or safety of other people, and that just cannot be accommodated.

CALEB BERKEMEIER: We've seen a lot in the news about social media postings, so-called "ADA cards," and other materials that people are presenting to businesses, saying that because of the ADA they are exempt from face mask requirements, and that they can't be questioned about that. The Department of Justice has issued a couple of press releases calling these materials "fraudulent," but does that mean that people with disabilities never have the right to request a modification of these face mask policies?

NANCY HORTON: No, not necessarily. I think the problem with some of these cards and other materials is that they address the issue as if it's a one-size-fits-all kind of situation. The application of the ADA doesn't usually work that way. It often requires consideration of various factors in different situations to balance access and the rights of people with disabilities with things like legitimate safety rules, costs or difficulties in making adjustments, and so forth.

People with disabilities can certainly request modifications, and agencies and businesses can consider the various factors that may come into play in the context of their programs and their businesses.

Covered entities – that is, agencies and businesses – can and should make decisions in a case-by-case way. Sometimes a person might be able to enter a facility without a mask, other times an alternative might be provided – such as the popular curbside pick-up option – but there may also be some services that can only be provided in a close, face-to-face sort of way – like getting a haircut, for example – and providing that service without face coverings or similar precautions may not be possible.

One statement from the Department of Justice, that they make in one of their press releases on this subject is [quote] "the ADA does not provide a blanket exemption to people with disabilities from complying with legitimate safety requirements necessary for safe operations." [unquote] I think that really speaks to the problem of a "blanket" sort of approach instead of an approach that takes individual factors into consideration.

CALEB BERKEMEIER: Right. Now, if a person says they cannot wear a face mask, can business operators ask for medical documentation?

NANCY HORTON: This is something that's really not clear at this point in time under Titles II and III of the ADA. The Department of Justice's regulations generally prohibit covered entities from even asking about disability unless it's *really* necessary, but there are times it *is* necessary, and therefore allowed.

There are a few specific situations where the regulations speak to the question of getting medical documentation, and there's some variety in when, where, why, and how much can be asked for. Many of these situations are discussed in the context of making reasonable policy modifications.

On one end of the spectrum, for example, we've got situations like people using service animals. A person bringing a clean, well-behaved dog into a restaurant, for example, can be asked if the dog is a service animal needed because of a disability, and what task or work the dog has been trained to do for the person, but nothing further. The restaurant operator can't ask what the person's specific disability is or anything else.

On the other end of the spectrum, if a person tells a college that she has a learning disability and asks for extra time on tests, the college can require medical documentation to verify that the person has a learning disability that would necessitate extra time on tests. Then the college would determine if granting extra time would be appropriate in the context of specific tests and what they are designed to measure. Requiring documentation is allowed in a situation like that because otherwise an accommodation might be granted that would give the test-taker an unfair advantage and render the test results meaningless.

The situation we have now with COVID-19 and face covering requirements is really new and it's unique. It certainly seems clear that there are real risks of spreading this highly contagious and potentially deadly disease if we don't take some pretty strict precautions. But in many situations, I think it will not be necessary to get medical documentation in order for covered entities to determine whether an individual can be accommodated without a face covering.

CALEB BERKEMEIER: When might it be legitimate to ask for medical documentation?

NANCY HORTON: Well, that's a really good question, and we've been racking our brains trying to come up with scenarios where it might make sense for a covered entity to ask for medical documentation. I think maybe in some of those situations where the relationship between the covered entity and the individual is a close or ongoing one, and accommodating an individual would require really extensive or challenging measures, there may be times when getting documentation would not be inappropriate. And many of those situations would be the types of situations where covered entities might generally be allowed to get documentation, such as the example we mentioned about providing testing or academic accommodations in college.

College is a situation where an individual is in classes or dormitories or other shared spaces for extended periods of time on a regular basis. Accommodating an individual who cannot wear a face covering might require some pretty extensive measures. Perhaps the individual would need to be placed in a dormitory room by herself, when students are typically required to share a room with a roommate. And when a student normally requests that sort of modification, the college would be allowed to get documentation of the disability and the need, if those things are not obvious.

CALEB BERKEMEIER: Should people have to prove what their specific disability is, or can it be generic proof of disability?

NANCY HORTON: I think that in the rare instances where it might make sense to require proof at all, it *would* need to be specific to the particular disability and the disability-related need. Otherwise, some people might not get the modifications they really need, and others might be granted unnecessary modifications, which could reduce or interfere with the ability of the covered entity to provide adjustments for those who really need them.

For example, if a store operator provides free home delivery or curbside pick-up, which they normally charge a fee for, as an alternative to requiring a face covering for those with disabilities who cannot wear a face covering, then the operator of the store might argue that they should be able to verify the need for that. Otherwise, they may wind up engaging more of their workers in unnecessarily providing, for free, a service they normally charge for.

CALEB BERKEMEIER: So, what if so many people refuse to wear a mask it becomes an unacceptable disruption to operations?

NANCY HORTON: Well, first of all, people cannot simply “refuse” to abide by a legitimate safety rule. If people do not believe that a mask requirement is a legitimate safety rule, but rather a rule that is *unnecessarily* screening them out, excluding them, based on their disabilities, they can challenge that rule under the ADA by filing a complaint or a lawsuit. But if such a rule is considered to be, or found to be, legitimate, then people cannot simply refuse to comply with it, any more than they can refuse to abide by the “no glass in the swimming pool” rule.

But what they can do is request a modification that allows them to access goods or services. In some instances, simply being allowed to enter a facility without wearing a mask might be reasonable. For example, a person might be able to enter a store at a time it’s not very busy or crowded and get what they need while easily maintaining very generous social distancing. But at another time or in a different store, it might be a very different situation. And that brings us back to your original question. Is there a tipping point where allowing so many people to enter without face coverings that it becomes unreasonable simply by virtue of the numbers?

I think it could be a consideration. Many places are limiting occupancy already, limiting the number of people they allow into a store or a gym or an office, based on calculations of mask-wearing and social distancing. If everyone, or almost everyone, is wearing a mask, perhaps

more people can be accommodated in the space. But if only a few people are wearing masks, really effective social distancing may become too challenging, and at some point, it may affect operations so adversely that it can't be sustained.

CALEB BERKEMEIER: What are some examples of modifications other than not requiring a mask?

NANCY HORTON: I'm glad you asked that, because I think in many cases there will be alternatives that can balance the needs of people with disabilities who really cannot wear face coverings with the rights of agencies and businesses – of society, really – to implement measures to limit the spread of this dangerous disease.

Businesses and agencies are coming up with lots of creative ways to provide goods and services while limiting close contact. I applaud businesses and agencies for their efforts and urge them to continue to do those things – to try to find reasonable ways to accommodate people when possible.

We mentioned curbside pick-up and home delivery earlier, and those are common examples. Other examples include adjusting appointment times to reduce exposure in waiting rooms, and conducting appointments by telephone or online.

I think if agencies, businesses, and those they serve talk to each other, they will find solutions, at least in many cases. Communication and creativity are key.

I would also urge businesses and agencies to carefully consider their policies, and post signs and make information available on their websites and so forth, to communicate those policies, including any options they may have available (such as ordering online or by phone), and provide contact information so people who want to talk to someone about policies and options will have an avenue to do that.

Also, I would recommend that businesses and agencies train their employees in how to approach people who are not following policies and how to communicate about those policies and options.

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