



Every day we hear from our insureds on the Risk Management Hotline, and we will be sharing some of those questions and answers with you.

Our Risk Management Team is here to help you minimize and mitigate Medical Professional Liability risk.



No Shoes, No Shirt, No Mask, No Service

Medical practices and clinics have a duty to provide a reasonably safe place for patients. Requiring masks and implementing other infection control precautions recommended by the Centers for Disease Control (“CDC”) may help practices minimize liability for claims asserted by patients alleging they were exposed to COVID-19 in the office or clinic (Adler, 2020; Buppert, 2020). Masks may be mandated by state, county, or local orders. However, if there is no order for mask use, a practice may nevertheless require patients and visitors to wear a mask before entering the practice. But what if a patient or other clinic visitor refuses to wear a mask? Be prepared with a written policy that includes a standard procedure to respond to mask-related concerns.

Title III of the Americans with Disabilities Act (“ADA”) prohibits public accommodations from discriminating against individuals due to a mental or physical disability. See 28 U.S.C. § 36-101(A). Physicians’ practices are “places of public accommodation” according to the ADA. See 28 U.S.C. § 36-104. The ADA does not specifically address face masks, but generally requires public accommodations to consider reasonable modifications to any policy that restricts full and equal access to services by individuals with disabilities. One exception to the reasonable modification requirement is the “direct threat” rule. When an individual poses a “direct threat” to the health or safety of others, physicians and other health care professionals may not be required to modify their policy to ensure access to their facilities or services. See 28 U.S.C. § 36-208(a). A “direct threat” is a significant risk to the health or safety of others that cannot be eliminated by modifying policies, practices, or procedures, or by providing auxiliary aids or services.^[1] See 28 U.S.C. § 36-104. Public accommodations must make an “individualized assessment” to determine whether an individual poses a direct threat.

The assessment must be based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

See 28 U.S.C. § 36-208(b).

As long as the CDC and state and local public health agencies continue to recommend face coverings in health care settings and other public areas, practices have a strong argument that face mask policies are legitimate safety requirements that fall within the scope of the “direct threat” rule (Centers for Disease Control, 2020; de Chavez-Lau & Stein, 2020; Southeast ADA Center & Burton Blatt Institute at Syracuse University, 2020). The U.S. Equal Employment Opportunity Commission (“EEOC”), the agency that enforces ADA rules governing employment, declared in March that the COVID-19 pandemic meets the direct threat standard based on CDC guidance outlining restrictions necessary to reduce the risk of community spread (Wong, 2020).^[2]

The U.S. Department of Justice (“DOJ”), charged with enforcing ADA rules applicable to public accommodations, has not commented on the direct threat standard and COVID-19. However, on June 30, 2020, the DOJ issued a news release responding to the circulation of flyers and cards, bearing the DOJ seal, that purport to exempt individuals from face mask requirements. The DOJ declared the documents are fraudulent and not endorsed by DOJ. Further, the DOJ explained, “The ADA does not provide blanket exemption to people with disabilities from complying with legitimate safety requirements necessary for safe operation” (Department of Justice, 2020).

Recommendations and Risk Mitigation Strategies

Consider the following when formulating and implementing face mask policies:

- Regularly monitor guidance and recommendations from the CDC and your state’s health agency concerning infection control. Consider retiring face mask policies once these agencies are no longer recommending masks for patients in health care settings.
- Create a written policy outlining the practice’s face mask requirements for patients and visitors.
- As part of the policy, include a written procedure for patients with disabilities to request reasonable modifications.
 - When scheduling or confirming appointments, notify patients that requests for accommodations must be made ahead of the scheduled appointment.
 - Designate one or two staff members to receive and consider patient modification requests. Train these staff members to engage the patient in an interactive process to identify a solution which could accommodate the patient’s legitimate needs while protecting the health and safety of employees and other patients.
 - Develop a procedure for evaluating patient requests, and specify the types of information that will be considered.
 - Determine how to notify patients of the decision. When denying the request for accommodation, practices should provide a written statement to the patient explaining the reasons for the denial. Keep a copy in the patient’s chart.
- Notify patients of the policy AND the procedure to request accommodation by:
 - posting a notice on the front door of the office,
 - posting the policy on your website,
 - including the policy with initial check-in forms and documents provided to patients online prior to appointments,
 - sending an email to patients,
 - explaining the policy to patients scheduling appointments,
 - reminding patients of the policy when you call to confirm their appointment and to confirm that they are not exhibiting COVID-19 type symptoms, and
 - mentioning the policy during phone recordings that patients hear when on hold with the practice.
- Document in detail in the patient chart:
 - all communications from the patient regarding a request for modification,
 - identity of the practice employee(s) who received and processed the request,
 - information considered by the employee processing the request,
 - final decision on the request, and the specific reasons for that decision,
 - all modifications or accommodations offered to the patient, and
- Keep masks available for patients and visitors who arrive without a mask.
- Post CDC posters and other printed materials that educate patients about face mask recommendations and other infection control methods during the COVID-19 pandemic. Download and print posters in English and many other languages from the CDC website: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/stop-the-spread-of-germs-11x17-en.pdf> (English) and <https://www.cdc.gov/coronavirus/2019-ncov/communication/print-resources.html?Sort=Date%3A%3Adesc> (other languages).
- Train staff not to argue with patients about whether they have a disability (Switzer & Gower, 2020).
- Train staff on communication methods that will help them avoid heated confrontations.
- Where appropriate, attempt to strike a balance between patients’ legitimate needs and the safety of employees and other patients. Talk to patients regarding the CDC guidance. Consider offering reasonable accommodations which could include:
 - telemedicine appointments;
 - postponing care where medically indicated; and
 - allowing patients to wear scarves or face shields instead of a mask.
- Make a plan that outlines how to deal with aggressive or angry patients, and train staff accordingly. Post security or law enforcement phone numbers in case staff needs them.

Senior Risk Management Consultants are ready to help with questions and provide more information. You can reach a Consultant Monday- Friday 8:30 am-5:00 pm MST at 800.352.402 x2137, 602.808.2137, or rm_info@mica-insurance.com.

^[1] “Auxiliary aids and services” are defined in 28 U.S.C. § 36-303. https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=2ab2aab2d3d2fd0f544a5ce7aad8f04c&rqn=div5&view=text&node=28:1.0.1.1.37&idno=28:se28.1.36_1303

^[2] Regarding workplace infection control policies, the EEOC guidance states, “Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence.” The EEOC guidance further declares that an employer may require employees to wear protective masks and gloves and observe infection control practices, but must consider making reasonable accommodations requested by employees with disabilities where such accommodations are feasible and not an “undue hardship” on business operations. U.S. Equal Employment Opportunity Commission. (2020, June 17). What you should know about COVID-19 and the ADA, the Rehabilitation Act, and other EEO laws. <https://www.eeoc.gov/wyski/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

References

Adler, E.L. (2020, July 21). Prepare for patients who refuse to wear a mask in your practice. Physicians Practice. <https://www.physicianspractice.com/view/prepare-for-patients-who-refuse-to-wear-a-mask-in-your-practice>

Buppert, C. (2020, July 9). Patients who refuse to wear a mask: Responses that woCenters for Disease Control. (2020, July 15). Interim infection prevention and control recommendations for healthcare personnel during the coronavirus disease 2019 (COVID-19) pandemic. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html>

De Chavez-Lau, J. & Stein, J. (2020, July 21). No mask, no service? ADA considerations for business owners requiring face masks in retail stores. *The National Law Review*, X(203). <https://www.natlawreview.com/article/no-mask-no-service-ada-considerations-business-owners-requiring-face-masks-retail>

Department of Justice. (2020, June 30). The department of justice warns of inaccurate use of flyers and postings regarding the use of face masks and the Americans with Disabilities Act [press release]. <https://www.justice.gov/opa/pr/department-justice-warns-inaccurate-flyers-and-postings-regarding-use-face-masks-and>

Devji, I. (2020, July 28). COVID-19 legal risks: Requiring masks at your practice. Physicians Practice. <https://www.physicianspractice.com/view/covid19-legal-risks-requiring-masks-at-your-practice>

Southeast ADA Center & Burton Blatt Institute at Syracuse University. (2020, July 20). Disability issues brief: The ADA and face mask policies. <https://www.adasoutheast.org/ada/publications/legal/ada-and-face-mask-policies.php>

Switzer, E. & Gower, W.S. (2020, July 2). Disabilities, face masks, and the ADA. The ILR School at Cornell University. <https://www.ilr.cornell.edu/work-and-coronavirus/employer-best-practices/disabilities-face-masks-and-ada>

Wong, M. (2020, May 11). ADA implications: I don’t want to wear a mask.... JD Supra. <https://www.idsupra.com/legalnews/ada-implications-i-don-t-want-to-wear-a-91357/>

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