

### **Masks in the Workplace: Walking the Tightrope of Compliance While Avoiding Employment Claims**

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Keeping with CDC guidelines, Michigan Executive Order 2020-161 requires the use of facial coverings in the workplace by most employees to help prevent the spread of COVID-19. Executive Order 2020-161 further requires employers to provide facial coverings to their employees. However, while complying with mask mandates, employers may face other issues arising out of the use of masks. Executive Order 2020-161 does not require employees to wear the face masks that are provided by their employers, but does require employers to require face coverings be worn when employees cannot consistently maintain six feet of separation from other individuals in the workplace, and consider face shields when employees cannot consistently maintain three feet of separation from other individuals in the workplace. Further, it is silent on whether an employer may require a particular type of mask.

#### **Political Messages**

With the presidential election only two months away employers should have a plan for addressing masks with political messages. An employer seeking to avoid conflict between employees due to politics should consider banning offensive or politically-themed masks. An employer may also consider requiring employees to wear masks with the company logo (for those employees who wear masks) or plain masks. Alternatively, because employers are already required to make masks available under Executive Order 2020-161, an employer trying to avoid political conflicts may consider requiring employees to wear a disposable, single use mask.

#### **Union Logos**

If the employer decides to ban all masks with a slogan, it needs to be careful not to run afoul of the National Labor Relations Act ("NLRA"). Masks with union logos may be viewed as akin to union buttons. It is well-established that employees may wear union buttons and other insignia to show support for a union under Section 7 of the NLRA. There may be "special circumstances," however, where an employer can maintain a stricter dress code policy and restrict this type of insignia. For example, employers whose employees frequently come into contact with the public (e.g., wait staff, store clerks) may have a stronger case for prohibiting items with certain messages.

**Offensive, Discriminatory and Harassing Messages**

Employers should review their dress code policies to make sure they accurately reflect the current dress code and enforce the policies in a uniform manner. Additionally, employers should make it clear that antidiscrimination and anti-harassment policies apply to messages on masks. Employers have the right to prohibit masks with messages that have offensive language that would contribute to a hostile work environment on the basis of a protected category. Additionally, allowing some employees to wear masks to show their support for specific social justice causes while prohibiting masks with messages such as “Black Lives Matter” or “Women’s Rights are Human Rights” may give rise to allegations of disparate treatment in violation of antidiscrimination laws.

**Reasonable Accommodations**

Employers also need to be aware that if they generally require those who wear masks to wear company provided plain or logoed masks, they should bear in mind that they may need to make exception for employees who have health issues related to the fitting of the mask and permit them to wear a different mask as an accommodation of a disability. Employers will need to be careful to engage in the interactive process to reasonably accommodate any employee’s disability, while still complying with state law face covering requirements. Also, even if no health issue is involved, employers should allow employees to wear their own masks if they can show that the company-provided masks do not fit properly to ensure the effectiveness of the masks.

Employers should contact any member of Bodman’s Workplace Law Group to discuss facial covering requirements. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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