

COVID-19 health and safety – to mask or not to mask

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The latest COVID-19 lockdown in Auckland, and the return to Alert Level 2 across the country, has seen New Zealand join the rest of the world in the widespread use of face coverings. Although not compulsory yet, businesses will need to consider whether requiring their workers to use them is an appropriate health and safety control in their workplace.

Health and safety obligations

We all know that employers have a duty of care to protect the health and safety of their workers, customers and other people in their workplaces. But the uniqueness of the COVID-19 outbreak raises a number of questions around the appropriate health and safety systems and protocols in order to do so. Simply relying on what was done when we last came out of lockdown in May 2020 may not be enough this time round.

Importantly, businesses must keep up to date with the latest Government guidance and directions. This has changed as New Zealand has moved in and out of Alert Levels, and as we learn more about the virus and the best methods of preventing its spread. Steps that an employer should take to protect their workers, customers and others in the workplace include:

- Requiring sick workers to stay home
- Identifying high-risk workers and taking specific steps for them
- Implementing contact tracing measures, which includes at a minimum displaying the official New Zealand COVID tracer QR code
- Regular cleaning of the workplace
- Supplying cleaning products and hand sanitiser
- Ensuring that physical distancing rules are observed.

Under the current Alert Level 2 rules, all businesses must maintain 1-metre physical distancing for workers and 2-metres for any other persons, such as customers, entering the workplace (to the greatest extent practicable). For businesses in some industries, these distancing rules are relaxed slightly, for example:

- Hospitality businesses, including restaurants, cafes and bars, must have no more than 100 customers in any one defined space, keep customers seated, keep groups 1-metre apart and have one server per group
- Category A businesses, including transport services, courts and welfare services, must maintain 1-metre physical distancing
- Businesses and services with controlled access, which includes gyms, must maintain 1-metre physical distancing to the greatest extent practicable
- Close proximity businesses, such as hair salons and massage therapy practices, must maintain 1-metre physical distancing, except when physical contact or close proximity is required to carry out the activity of that business.

However, in all of these cases, the businesses must mitigate the risks that arise where the required distances cannot be maintained. The obvious solution may be to require their workers to wear a face covering. But can they do so?

Can workers be required to wear a face covering?

Currently face coverings are only compulsory on public transport. Beyond this, we consider an employer could require its workers to wear a face covering while working, provided:

- This is justifiable. This will be the case where physical distancing cannot be maintained, such as workers in the close proximity businesses discussed above. The presence of high-risk individuals in the workplace might be another reason for face-coverings, or if workers are required to visit a large number of other workplaces or homes, such as delivery agents. Other factors may also suggest this, such as an elevated risk of transmission of COVID-19 due to contact with workers in isolation facilities.
- It is not inconsistent with any employment agreements or policies.
- The employer acts in good faith when implementing a face covering policy, which will require consultation with workers before

doing so. As employers will need to be mindful of workers who for health or other reasons cannot wear a face covering, consultation will assist in identifying this and whether an exemption is required.

Should an employer provide masks?

If an employer requires its workers to wear a face covering, then they are likely to need to provide these for workers. This is because the risks associated with not doing so may defeat the purpose of requiring them to be worn, as a worker-supplied face covering may not be suitable. For example, if an employer allows its workers to wear cloth face coverings, there may be no way for the employer to ensure that the worker is washing it correctly or often enough. It may also be seen as unreasonable to require workers to supply a face covering given the cost of doing so and if the nature of the work means that other controls might be available.

Also, the incorrect use of face coverings can pose additional health risks. Therefore, any policy will need to include guidance on how to use them correctly, and the employer may need to provide training – although in practice this can usually be achieved through explanatory diagrams and posters.

Ultimately, it will be the employer to decide upon what additional health and safety controls are required. But in any business where at least a 1 metre distance cannot be maintained (even if temporarily), requiring a face covering to be worn is likely to be both reasonable and expected. It will also ensure compliance with the Government's current guidance.

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