

MEMORANDUM

TO: WVMA Membership

FROM: Attorneys Stephen A. DiTullio, Jordan K. Lamb, and J. Wesley Webendorfer

DATE: August 17, 2020

RE: Wisconsin's Mask Mandate: Compliance and Liability Considerations

This memorandum provides answers and guidance to frequently asked questions about Wisconsin's statewide mask mandate and related liability issues. If you have specific questions about how particular orders or guidance apply to you or your business, please contact [DeWitt LLP](#).¹

What Government Orders Are Mandatory for Me and My Business?

Statewide Order from the Governor/State of Wisconsin

Wisconsin's only statewide, mandatory order with the force of law is [Emergency Order #1](#) ("Order #1"), which requires "face coverings" in certain situations. Order #1 was issued in accordance with [Executive Order #82](#), which declared a public health emergency relating to the COVID-19 pandemic. The Governor has issued an instructive [FAQ document](#) that provides answers to common questions regarding Order #1.

Order #1 remains in effect until September 28, 2020, or until a subsequent, superseding order is issued. The Wisconsin Legislature also has the power to end Order #1 if it acts to do so. No other statewide orders are currently in place.

Local Government Orders and Ordinances

Several Wisconsin municipalities and counties have adopted their own rules mandating, among other things, that face coverings be worn in enclosed spaces.² Order #1 sets a minimum statewide standard. Local governments may issue orders or adopt ordinances that are more restrictive than Emergency Order #1 (but not less restrictive). WVMA membership is advised to pay close attention to the orders and actions of their municipality, county, and/or local health department.

¹ The information provided in this memorandum does not, and is not intended to, constitute legal advice. Instead, all information is for general reference and informational purposes only. Readers of this memorandum should contact the authors, or their DeWitt LLP attorney, for advice specifically tailored to their individual situation.

² For example, Public Health Madison & Dane County has issued [Emergency Order #8](#), which mandates face coverings in certain situations.

Federal Government

There are no federal mandates regarding face coverings or other matters impacting veterinary businesses. The federal Centers for Disease Control, however, has issued advisory [guidance](#) for individuals and businesses that should be incorporated into a veterinary clinic's COVID-19 safety plan for employees and customers.

Does Order #1 Mandate a Face Covering for all Employees at my Veterinary Clinic?

Yes, unless a specific exception applies. Employees need to wear a face covering whenever they are indoors or in an enclosed space, and when other people are present in the same room or space. The governor's [FAQ](#) document explains, however, that if an employee is the only person in a room (e.g., a private office), that the employee is not required to wear a mask. The face covering should be worn at all other times, including if another person is in the room or office with anyone other than someone from that employee's immediate family.

How Do I Handle an Employee Who Refuses to Wear a Face Covering?

Employers should communicate to all employees in writing that they must wear a face mask in accordance with Order #1, unless a specific exemption applies. Posting signs in the workplace reminding employees of the face covering requirement is a best practice. Employers should first consider education and training for employees who do not follow the face covering mandates and/or instigate disciplinary measures consistent with the employers' written discipline policy.

What About a Customer Who Refuses to Wear a Face Covering in My Clinic?

Businesses may decline service to customers who refuse to follow the law—including the mandates in Order #1. Businesses should consider posting signs stating the requirement for face coverings on their premises. While business owners may require customers to wear a face covering and may choose to confront those customers about the matter, prudence and caution is advised because some individuals have medical conditions or other circumstances that make wearing a face covering unsafe.

Businesses may consider obtaining a supply of face coverings to offer customers free of charge at the entrance of the premises. Customers who refuse to wear a face covering can be asked to at least maintain a six-foot distance from others. If the customer is hostile, law enforcement may be necessary to assist in removing the individual from the premises.

Am I Required to Supply Employees, Customers, or Vendors with a Face Covering?

Not according to Order #1, but it is expected under OSHA Guidance. As such, it is a best practice to have a supply of face coverings available to offer to individuals who do not have one available.

What Liability Issues Should I Be Aware of Relating to Order #1?

In complying with Order #1, employers should consider various potential liability risks, including the following:

- **Local Government Enforcement of Order #1.** Employers who do not enforce Order #1 and whose employees are not in compliance risk enforcement from local law enforcement, which may subject the violator to a \$200 civil forfeiture.
- **OSHA Enforcement.** Employers are required under the OSH Act to provide a safe workplace for employees that is free of hazards that can cause serious physical harm or death. To that end, employers are advised to have a written safety plan distributed to workers with directives for employees that are consistent with Order #1, [CDC guidance](#), and [OSHA's interim guidance](#) with the goal of reducing the risk of workplace exposures to COVID-19. The CDC has also issued [guidance](#) for infection prevention and control for veterinary clinics treating companion animals during the COVID-19 Response, which should be followed and incorporated into a written safety plan. In the event OSHA conducts an inspection of a workplace relating to COVID-19, these written employment policies that are consistent with government mandates and guidance will help reduce the possibility of OSHA enforcement.
- **Workers Compensation.** The Wisconsin Department of Workforce Development has issued guidance stating that an employee may make a worker's compensation claim against an employer for COVID-19 if it is established that contracting the disease was work-related. There must be evidence to prove that contracting COVID-19 arose out of your employment while you were performing services arising out of and incidental to your employment. Employers should, therefore, take steps to minimize the risk of contracting COVID-19 in the workplace, including but not limited to, establishing a written policy for the business regarding donning masks consistent with Order #1, CDC guidance and OSHA's interim guidance.
- **Third-Party Tort Liability to Customers/Vendors.** It is possible that businesses could be sued by a customer or vendor for negligence—*i.e.*, the breach of a reasonable standard of care and a causal connection between the breach and the individual contracting COVID-19. Additionally, Wisconsin has a "Safe Place Statute" that requires every employer to "furnish employment which shall be safe for employees therein and for frequenters thereof." The statute is intended to address liability for unsafe business *conditions*, not negligent acts or omissions. This means that employees and customers/vendors of the business who contract COVID-19 may have a claim under the Safe Place Statute.

Whether third-party tort litigation against businesses relating to COVID-19 diagnoses will gain traction with courts in Wisconsin remains to be seen. However, to limit exposure to these potential third-party claims, strict adherence to Order #1 and all other state, local and federal guidelines is recommended.

What Are Best Practices for Managing COVID-Related Liability?

In addition to the best practices and guidance suggested earlier in this memorandum, business should consider the following:

- **Review Insurance Coverage.** Contact your insurance agent and/or attorney and understand the scope of your business liability policies. Your policies may have exclusions that limit coverage for COVID-related claims.
- **Establish a COVID-19 Safety Policy.** Ensure all employees are trained and follow the policy's requirements.
- **Adhere to All Guidance Issued by Local, State, and Federal Authorities.** Mandates and guidance established by the federal, state, and/or local government may be evidence of the standard of care in any claim or lawsuit relating to an individual who has contracted COVID-19. A court could find that those mandates or guidance establish the minimum standards required for a business to meet the standard of care and to avoid liability.

For more information on Order #1, follow the links on page 1 of this memorandum. Additionally, the [Wisconsin Department of Health Services](#) and [Wisconsin Economic Development Corporation](#) have information on their websites on wearing, cleaning, and making face coverings.