

A ‘Get Out of Masking Free’ Card Based on the ADA?

July 7, 2020

By [James M. Paul](#)



It should come as no surprise that the masking debate continues to heat up. In the past week, news outlets and social media platforms have been abuzz about face mask exemption cards.



It should come as no surprise that the [masking debate](#) continues to heat up. In the past week, news outlets and social media platforms have been abuzz about face mask exemption cards.

These cards are fake, of course. The United States Department of Justice (DOJ) has already issued two notices (on [June 25](#) and [June 30](#)) disavowing fraudulent face mask postings or flyers. But, with a simple internet search, anyone can print and laminate their very own “[FACE MASK EXEMPT](#)” card. The idea behind the card is that the holder gets to flash it to a business owner or manager and request entry to a business or be allowed to work without an otherwise required face mask. The phone number on the card is the DOJ’s actual hotline number for reporting violations of the Americans with Disabilities Act (ADA), but the card itself—and the purpose behind it—is misinformation.

Cards like this are nothing new. They have previously come up in the service animal context. Anyone with access to the internet can procure a service animal vest and laminated identification card for less than \$29.99. Those service/emotional support animal cards are not legitimate (and neither are the vests when worn by a pet). In response to this trend of abuse, about half of the states have passed laws making it a crime to [misrepresent that an animal is a service animal](#). An official identification card certifying that someone has a disability under the ADA, or requires a particular accommodation, does not exist. Additionally, to make matters even more confusing, [almost any animal could theoretically qualify as a reasonable accommodation](#) in the employer-employee context (though only dogs and miniature horses are valid service animals in the public accommodation setting under federal law).

Nonetheless, the sudden appearance of fraudulent identification cards gives business owners and managers an opportunity to review the contours of disability access and reasonable accommodation law. Here are three points to remember:

1. Reasonable Accommodations

The ADA requires certain businesses, in certain circumstances, to provide reasonable accommodations to applicants, employees, and visitors.

The identification cards may be fake, but the ADA is a real (and important) law. For employees and applicants with disabilities, covered employers must make reasonable accommodations unless doing so would present an undue hardship. In addition, public accommodations and commercial facilities must make their services and spaces accessible to people with disabilities.

2. Mask Mandates & the ADA

The ADA must factor into the analysis when governments mandate masks and require businesses to enforce these orders. Many states, counties, and cities—such as [California](#); [Austin](#), [San Antonio](#), [Dallas County](#), and [Harris County, Texas](#); and the [Tampa Bay area in Florida](#)—have required the wearing of masks in public spaces.

Some of the laws and ordinances could potentially punish and fine a business for allowing customers into its establishment without a mask, thereby putting the business in the difficult position of policing and enforcing the masking requirement or turning the customer away. Accommodation issues [can sometimes be complex](#), and situations may be further complicated by viral videos showing customers taking matters in their own hands, mask shaming, or even physically and verbally threatening individuals who are not donning face coverings (or vice versa). Accordingly, employers may want to be on guard for fake identification/face-mask exemption cards that could deter enforcement of masking requirements. Employers will nevertheless want to comply with the ADA when a need for an accommodation is properly raised by a disabled individual.

3. Employers and Accommodations

Employers may have to determine whether it would be a reasonable accommodation to make an exception to its workplace rules for an employee's disability or religious belief, or to accommodate a business visitor's disability. Employers can use the usual interactive process required by the ADA in the mask, vaccine, and service animal situations.

How to Handle Accommodation Requests

So, how might employers respond to a person who objects to a rule that masks must be worn? The analysis will likely depend on the context and on a variety of factors.

- In the non-employment context (i.e., a customer relationship), a business generally cannot demand documentation confirming that an individual is disabled or needs a particular accommodation, so businesses may run the risk of alienating customers with disabilities, or even draw a bona fide complaint to the DOJ or a lawsuit, by requiring a showing of such proof. A disabled individual's right to access and entitlement to a reasonable accommodation could possibly trump a masking requirement.
- In the employment context, when facing a situation involving a disabled employee who is seeking exemption from mask-wearing requirements, an employer can request proof that the employee's medical restrictions make wearing a mask unsafe or unhealthy. A medical certification of both the underlying health condition and the necessity of an accommodation would likely be needed to support a request to be excused from a masking requirement. Similarly, Title VII of the Civil Rights Act of 1964 requires an employer to accommodate an employee's sincerely held religious beliefs or practices unless the accommodation would impose an undue hardship on the employer. If an employee asks for an exemption due to religion, proof of a sincerely held religious belief that contradicts the use of a mask can be required. This is no different from when an employee claims a medical or religious exemption from a mandatory flu vaccine policy. Again, the ADA interactive process applies to these situations.
- Upon a showing by an employee or visitor of a potential basis for exclusion from a mask-wearing requirement, an employer's likely next step is to explore possible accommodations and whether an undue hardship to the employer exists. The prospect of criminal liability being imposed on the business or the employer if a mask is not worn may very well make certain accommodations less reasonable or an undue hardship. However, there may be acceptable alternatives, such as offering services to the customer outside the walls of the store, or allowing an employee to work in an isolated and socially distanced area.

So it seems that we may need to brace ourselves for a contentious era of debate and pushing the limits on the use of masks, service animals, and vaccines. There are no "get out of jail free" cards during a global pandemic crisis. Employers and/or public accommodations will want to know and understand their responsibilities and rights under the ADA. Titles I, II, and III of the ADA assign different responsibilities and rights with regard to businesses and organizations, and customers, clients, patients, patrons, and employees. Nearly every business and organization wears both hats—as an employer and as a place of public accommodation—and has employees and customers to address. Figuring out which hat a business is wearing at any given time and how to comply with rules is yet another challenge of the COVID-19 pandemic.

RELATED ARTICLES

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic. We will provide updates in the firm's [Coronavirus \(COVID-19\) Resource Center](#) as additional information becomes available. Important information for employers is also available via the firm's

November 17, 2022

AUTHOR



1. Paul January 25, 2023
OFCCP's Scheduling List
Targets Contractors That
Didn't Certify in OFCCP's
Contractor Portal

RELATED WEBINAR

February 9, 2023
I-9 Compliance Series: The
Basics, Part 1—What Does
Good Faith Compliance
Mean? Contractors'...

RELATED SEMINAR

February 16 | Miami, FL
Employment Law Briefing

Browse More Insights

PODCASTS

SEMINARS

WEBINARS



Sign up to receive emails about new developments and upcoming programs.

SIGN UP NOW



