



## Behind the (face) mask

By **Chris Coombes** - 15 July 2020

If you've had an eye on the news over the past few days, you won't have been able to escape the big debate about face masks since it was announced that it will become mandatory to wear "face coverings" in shops and supermarkets from 24 July. The main questions people seem to be asking are focused on the burden this places on shoppers. Fewer people are asking about the potential burden this could place on employers and staff if the practice of wearing masks becomes more widespread.

So what is the current position on face masks and coverings in the workplace?

- Face coverings are not the same as PPE (which would include face masks), and according to Government guidance may be "marginally beneficial" as a precautionary measure in the workplace in certain circumstances – see [here](#);
- Public Health England has not yet recommended the use of personal protective equipment (PPE) in all workplaces – this recommendation is currently limited to clinical settings (such as hospitals);
- However, employers are encouraged to "support their workers" if they choose to wear face coverings at work by telling them how to use them safely – see [here](#) for the guidance for offices; and
- Matt Hancock, the Health Secretary, suggested on 15 July that there are no plans to make face coverings mandatory in the office, despite news reports to the contrary – see [here](#).

Given how much we have seen the official health guidance change in the UK over the past few months, it is not entirely out of the question that face coverings could become mandatory in other contexts before long. Even now, we know that some employers are considering requiring employees to wear face coverings at work, despite this not being legally mandatory. There are some interesting questions which are coming out of this discussion, and we have given some thought to these from an employment law perspective:

### **Do employers have a legal basis for requiring employees to wear face coverings at the workplace?**

Our thoughts: What this essentially boils down to is whether requiring employees to wear face coverings constitutes a reasonable management instruction. Managers are empowered to give reasonable instructions and commence disciplinary action against

employees who refuse to comply. Given that the current position is that it is not mandatory for employees to wear face coverings at work, employers need to have some other objective basis to show that the instruction is “reasonable”. Employers do have a statutory duty to provide a safe place of work, and so employers could argue that they have made face-covering at the workplace obligatory in order to comply with this duty. The strength of this argument will increase if there is a particular feature of the workplace which makes other preventative measures difficult and/or the risk of infection and transmission higher (e.g. social distancing is not possible, or it is not practicable to introduce screens/barriers). In any event, if employers do require employees to wear face coverings as a health and safety measure, the official guidance states that employers should provide these and not expect employees to purchase them personally.

#### **What if employees refuse to wear a face covering at work?**

Our thoughts: Given the backlash from the general public to being told they will have to wear face coverings in shops, and given that there is currently no official guidance mandating face-covering at the workplace, we wouldn't be surprised if employees strongly objected to being told they need to wear a face covering while at work. In this scenario, employers who insist on making this a mandatory requirement would need to be confident that they have a strong, objective basis for showing that it is a reasonable instruction, before they decide to discipline employees who refuse to comply. If the employer is able to implement the other preventative measures recommended by the Government, and if the employer has failed to identify a particular risk which justifies face-covering, then there is an increased risk that this would be considered arbitrary and potentially an “unreasonable” instruction. Disciplining employees for refusing to follow an unreasonable instruction could result in constructive dismissal claims. Another very important point to consider is whether there is any particular religious or health-related reason for a particular employee refusing to wear a face covering – if this is not taken into consideration, then employers could be at risk of discrimination claims.

#### **What if employees will not attend work unless everyone at the office is required to wear a face covering?**

Our thoughts: Employees benefit from special legal protection from being dismissed or suffering detriment if they, in circumstances of danger that they reasonably believed to be serious and imminent, take appropriate steps to protect themselves or others from danger or refuse to return to the workplace. It is foreseeable that some employees may not feel comfortable returning to the office in the current circumstances, and may even argue that their place of work is not safe unless everyone is wearing a face covering (similar to the guidance being issued for shops). Whether or not this would be considered a reasonable belief is questionable, particularly given that the official advice is that face coverings are only “marginally beneficial” and that employers should consider other precautionary measures as part of its COVID-19 workplace risk assessment. However, an employee does not need to show that serious and imminent danger actually exists – to benefit from the legal protection they only need to show that they had a reasonable belief that it did. This is a difficult question to answer and one which we expect will become hotly debated (and potentially litigated) in the months to come. In any event, we would recommend that employers think carefully and speak to a legal adviser before disciplining or withholding pay from employees who do not feel safe returning to work.

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