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BEFORE FEDERAL COURTS AND AGENCIES

MEMORANDUM

July 27, 2020

TO: Chris Jones
National Grocers Association

FROM: Olsson Frank Weeda Terman Matz PC

RE: Legal Considerations for Independent Grocers: Requiring Customer Use of Facemasks

The recent spike in COVID-19 cases, especially in the southern and western states, has renewed concerns that grocers may face potential liability¹² if their customers contract the virus while shopping in stores and/or when interacting with store employees. Concerns about a dramatic increase in COVID-19-related claims could inhibit businesses from fully reopening, stall economic recovery, and further injure the already weakened economy. This memorandum addresses, at a high level, potential liability concerns and provides recommendations for grocers related to varying state and local COVID-19 mask requirements.

¹ Establishing a causative link for legal liability purposes between a grocer's business operations and a customer's contracting COVID-19 may be difficult in light of the absence of admissible scientifically-based proof. However, grocers would be well advised to take prudent steps that conform with state orders, CDC guidelines, and appropriate business practices in order to limit the likelihood that customers file lawsuits in the event they contract COVID-19. Conversely, failing to require customers to adhere to state orders and other requirements could be deemed evidence of gross negligence, thereby greatly increasing the likelihood of lawsuits, complaints to state authorities, potential fines, and adverse posts on social media.

At this time, neither President Trump nor any federal agency has imposed a nationwide mask requirement. Instead, the Center for Disease Control (CDC) has issued guidance recommending the [Use of Cloth Face Coverings to Help Slow the Spread of COVID-19](#). CDC Director Robert R. Redfield has commented that “[c]loth face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus – particularly when used universally within a community setting. All Americans have a responsibility to protect themselves, their families, and their communities.” However, the CDC also advises that cloth face coverings should NOT be worn by children under the age of 2 or by anyone who has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove the mask without assistance.

Governors across the country have issued a wide variety of Executive Orders and other issuances in response to the COVID-19 pandemic.³ These orders are based, in part, on virus transmission rates in each jurisdiction and other considerations. As of July 27, 2020, nearly 40 states, the District of Columbia, and Puerto Rico have issued some form of mask requirement. These state-wide issuances vary considerable. Several states, including Illinois, Massachusetts, New York, New Jersey, and Pennsylvania, require most customers of essential businesses, including grocers, over the age of 2 to wear masks. Several other states, including Arkansas, Ohio, and Texas, have relatively similar mask requirements, except that children under age 9 are exempt. A few other states, including [Kentucky](#), require children over age 5 to wear masks. Virtually all states exempt individuals from mask requirements if they have respiratory or other health conditions that could endanger their health and/or safety. A few states, including [Massachusetts](#), [New York](#) and [Pennsylvania](#), have expressly permitted businesses to exclude or remove most individuals who fail to comply with state mask orders. Pennsylvania’s order, however, requires grocers (and certain other essential businesses) to provide customers who cannot wear masks due to health-related reasons to provide alternate methods of pick-up or delivery of goods. While Massachusetts’ order permits retailers to decline entry to those who decline to wear a mask for *non-medical* reasons, it also prohibits asking customers for medical documentation from those who are not wearing a mask “because of a medical condition.”

At the other end of the spectrum, Alaska, Florida, Georgia, Idaho, Iowa, Missouri, South Carolina, South Dakota, Tennessee, and Oklahoma, and Wisconsin have no mandatory state-wide mask orders obligating customers to wear masks. Instead, each state has issued formal or informal recommendations encouraging customers to wear masks in retail establishments. No state appears to have prohibited grocers from requiring healthy customers to wear mask.

Grocer Mask Policies and Liability Concerns

During the COVID-19 pandemic, retailers across the United States have been taking and are well-advised to continue taking appropriate steps designed to ensure the safety of their employees and customers. The starting point for grocers with respect to mask requirements for their customers is ensuring that they are in compliance with federal, state, and local laws and ordinances. Unfortunately, given the lack of any federal statutes, regulations, or orders requiring consumers to wear masks, as well as the ever-changing array of state and local issuances, grocers must be proactive in staying abreast of the current directives. Grocers are generally permitted to establish policies, regardless of

³ This memorandum does not address mask-related requirements relating to employees.

state and local orders, that require customers to wear masks and to exclude those who refuse to abide by these requirements. These policies can include the posting of signs at entrances and in other conspicuous locations requiring customers to use masks.

While grocers may develop mask policies that are consistent with state and local requirements, they cannot exclude customers who refuse to wear masks for discriminatory reasons. These include, but are not limited to, discriminating against customers based on race, gender, national origin, sex, age, or *disability*. The latter “protected class” is of importance in determining whether retailers may exclude persons with medical conditions that preclude them from wearing masks or which may cause adverse health impacts. Excluding those with disabilities without providing a reasonable accommodation may constitute a violation of the Americans with Disabilities Act (ADA) and applicable state law. As noted by the [Department of Justice in a June 30, 2020, Press Release](#), the ADA does not provide a blanket exemption to people with disabilities from complying with legitimate safety requirements necessary for safe operations. Moreover, a retailer will not violate the ADA by denying goods or services to disabled individuals if they constitute a direct threat⁴ to the health and safety of others and if such threat cannot be addressed by providing them with a reasonable accommodation. For example, if a grocer turns away a customer who refuses to wear a mask and fails to advise that he or she has a medical condition that makes doing so injurious to their health, store personnel should create a written record detailing the interaction in order to permit the company to defend itself in the event that the decision is later challenged.

On the other hand, grocers must provide customers who cannot wear masks for health-related reasons with reasonable accommodations. These may include providing online services, curbside pick-up, and/or no-contact delivery. Alternatives to masks, including scarfs and face shields, may also be an appropriate accommodation. It is important to note that those who are hearing impaired and lip read to communicate may be adversely impacted by mask requirements and require an accommodation. In all instances, retailers should designate a store manager or other senior employee to review requests for accommodations; in most instances, a resolution suitable to the customer and store will be promptly reached. Signs posted by grocers must be consistent with state and/or local requirements and exclusions, and should also include a statement about accommodations in order to reduce or eliminate ADA violations.

In sum, when drafting COVID-19 policies, grocers must provide all customers with equal access, including those who cannot wear a mask for medical and other reasons protected by the ADA and state disability laws, and must make reasonable accommodations to the extent that doing so does not impose an undue hardship. The alleged failure of [a Pennsylvania grocer](#) to provide equal access has already triggered a slew of ADA lawsuits. During the COVID-19 pandemic, grocers and other essential business must therefore tread a narrow path between protection of the public and employees, and ensuring that the disabled are provided with equal access to stores. While grocers may exclude customers who refuse to wear masks for non-discriminatory reasons, including those who object to wearing them for political or other social reasons, they are also sharply limited in what they can ask

⁴ In the employment context, the EEOC has held that the COVID-19 pandemic meets the “direct threat” standard.

customers with respect to their alleged disability. Under the Department of Justice’s [ADA regulations](#), public accommodations (including grocers) are generally permitted to establish eligibility criteria necessary to safely operation stores. Implicit in that right is the right to ask if an individual meets the criteria. However, any eligibility or safety standard established by grocers and other public accommodations must be based on actual risk, must be uniformly applied to all customers, and inquiries from store personnel must be limited to matters necessary to apply the store’s policies. Grocers may therefore encounter conflicts between federal ADA regulations and state mask orders in Pennsylvania and other states with broad COVID-19 mask orders. In jurisdictions whose mask orders expressly provide that customers need not show medical documentation if they are exempt from an otherwise applicable mask requirement, retailers should consult with their attorneys in developing mask-related policies and procedures.

Finally, COVID-19 orders, ordinances, and requirements are frequently changing and vary considerably between states and, in some instances, within states. Accordingly, grocers are urged to consult with counsel in their respective jurisdictions and should strictly adhere to their state and, if applicable, local⁵ laws, ordinances, and orders.

⁵ Mask orders issued by counties and cities are beyond the scope of this Memorandum. In at least one prominent example, Georgia’s Governor sued the Mayor of Atlanta over the city’s mask ordinance. That lawsuit remains pending as of the date of this Memorandum.