

Companies Consider Transparent Face Masks as an ADA Accommodation During Pandemic

by Gabrielle Wirth and Steve Bell

Lawsuits from the deaf and hard-of-hearing community may require companies to consider new reasonable accommodations during the COVID-19 pandemic, such as transparent face masks for employees and clean writing tools for customers, in order to comply with state and federal disability discrimination laws.

On September 22, 2020, the shoe company, Nike, Inc., was sued by a San Diego customer who is deaf after the customer was unable to communicate with an employee in a Nike retail store who was wearing an opaque face mask in compliance with Nike's face mask requirements. According to court filings, the customer alleged that Nike violated state and federal law, including 42 U.S.C. section 12182(1)(A)(1), by denying "goods, services, facilities, privileges, advantages, or accommodations" to a person with a disability. The customer also alleged that Nike failed to provide auxiliary aids and services to ensure effective communication for customers, as required by 28 C.F.R. section 36.303(a).

Nike reached a settlement in the action, pending court approval, in which Nike has agreed to (1) pay \$85,000 in attorneys' fees and costs; (2) provide guidance to California store employees on how to accommodate customers who have difficulty communicating due to employees' opaque face covering; (3) post notices in all California store entrances noting that accommodations are available for customers with hearing loss; (4) ensure that transparent face masks and clean writing tools are available upon request; and (5) pay the class plaintiff up to \$5,000. Nike may still face additional monetary claims from class members as the proposed settlement will only resolve claims for injunctive relief, not compensatory or other damages.

Retail companies can proactively ensure that their employees are trained on how to respond to requests for accommodations from deaf and hard-of-hearing customers during the COVID-19 pandemic. If transparent face masks are not immediately available, employees can provide clean pens and paper to communicate with customers

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in order to minimize any liability under the Americans with Disabilities Act (ADA).

In addition, employers can also take steps to avoid employment-related disability claims by ensuring that transparent face masks and/or other auxiliary aids are available for employees who are deaf or hard-of-hearing.

Finally, companies should consider other areas in which new pandemic-related policies may adversely affect employees or customers with disabilities, such as specific social distancing requirements, virtual communications, and remote working policies.

Please do not hesitate to contact a Dorsey employment expert to help tackle the many ADA and employment-related issues created by the COVID-19 pandemic.