



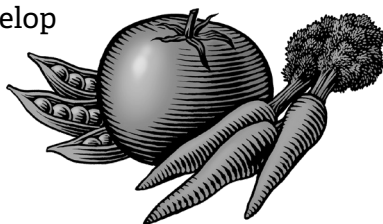
Face Mask Requirements and the Americans with Disabilities Act: *What should farmers markets do to comply with the ADA during the COVID-19 pandemic?*

During the COVID-19 pandemic, farmers markets across the country have had questions about how to ensure the health and safety of market vendors and customers by requiring the use of masks at markets. In general, markets have a duty to take reasonable steps necessary to protect the health and safety of market participants. Having a mask policy can help markets mitigate public health risks. However, markets must respect the rights of individuals who are not able to wear a mask due to a disability. Markets can protect themselves from legal risks by assessing their ability to provide reasonable modifications and keeping thorough records of ADA requests.

Markets Can Create Their Own Mask Policy

In general, a farmers market can create its own mask policy to require anyone entering the market to wear a mask. Many retailers have already taken this step because of the harmful nature of COVID-19. The Centers for Disease Control and Prevention (CDC) has recommended the use of masks and keeping a physical distance of at least six feet to prevent transmission of the virus.

Some states have issued COVID-19 mask requirements specifically for farmers' markets in addition to requiring individuals to wear masks in public. While there is variation from state to state about what the rules are, markets should feel confident about creating their own mask policy to protect the health and safety of market personnel, volunteers, vendors, and customers. However, unlike privately operated markets, publicly operated markets may have different processes they need to follow to develop a mask policy and they should first consult with their municipality's legal department for guidance.



How does a state or local mask mandate affect a market's ability to create its own mask policy?

A mask mandate is a term often applied to a situation where the state or local government requires the use of masks in public places. A mask mandate applies to individuals and is legally binding, similar to traffic rules and other laws we follow on a daily basis.

It is important to check with the state and local health department for the most up to date laws regarding the COVID-19 pandemic. Because of the uncertainty of the situation, states may have issued temporary orders and then extended them to a later date. Additionally, states may have loosened restrictions and then tightened them again as case counts increase. Without a federal mask mandate in place, there is variation between states. Some states require masks in all public settings. Others require masks only in indoor public places, including public transportation and business settings. Some states do not have a statewide mandate regarding the use of masks, but municipalities in those states have issued a mask order. As the pandemic situation evolves, state and municipal laws evolve as well.

State Guidance for Farmers Markets During COVID-19

Some states that have issued a mandate requiring the use of masks in public have also issued guidance for farmers markets. A guidance document that lays out requirements for farmers markets to follow during the pandemic – if one has been made for that state – can usually be found on the state department of agriculture and/or via the state farmers market association’s website(s). Such guidance may require markets to adhere to state mandates and require all vendors, customers, and market personnel and volunteers to wear masks. The market would adopt a mask policy as part of its operations, and would work to enforce its policy. Markets must comply with all applicable requirements, but it is not their responsibility to act as law enforcement officers.

The guidelines states have provided are meant to help farmers markets operate safely during the pandemic. Especially where individuals are already bound by the state mask mandate, following the state’s recommended safety measures helps markets encourage individuals to follow the law.

State Guidance Example: *Indoor Farmers Market Guidance* from the Vermont Agency of Agriculture, Food & Markets

Involving Local Safety Officials in Enforcing Mask Policies

Some farmers markets have reported threats of violence from customers who do not want to comply with the market’s mask policy or are worried that they are now responsible for enforcing state law. If someone is causing an unsafe situation at the market, such as threatening to use violence, it’s important to call the police. However, markets should take care to train market personnel on racial equity and be sure that decisions to involve the police are not being carried out as a result of implicit bias. The report, *Equitable Enforcement to Achieve Health Equity: An Introductory Guide for Policymakers and Practitioners*, highlights the negative implications that can result from unnecessarily involving local enforcement:

“Over-reliance on criminal enforcement can exacerbate inequities and prompt unnecessary interactions with law enforcement in underserved communities, which may already mistrust police and other institutional actors due to historical mistreatment and persistent disparities in the criminal justice system.”

Recommended Steps for Implementing a Mask Policy

- Update vendor agreements to ensure that vendors will comply with the mask policy
- Communicate the mask policy on the market’s website, on social media platforms, and at the entrance of the market using signage
- Have masks available in case someone wants to enter the market but doesn’t have their own mask
- Talk to local public health and safety officials in advance about how best to enforce mask requirements and how to do so safely and equitably
- Ensure all market personnel and volunteers receive training on the mask policy and how or when to enforce it



Applying ADA Rules to Mask Policies

A market’s mask policy may conflict with the ADA’s protections for people who cannot wear a mask due to a disability. This is not to say that a market has to let someone into the market without a mask just because they cannot wear it. Rather, a market must be prepared to offer a modification to that customer who wants to shop at the market. Reasonable modifications to the in-person shopping experience can enable customers who cannot wear a mask to access the same goods and services that any other customer would be shopping for.

How does the ADA apply to farmers markets?

Title III of the ADA applies to places of public accommodation like farmers markets. In this way, the ADA sets forth rules about how farmers

markets should conduct business so as not to discriminate against individuals with a disability.

In particular, it is unlawful to inquire about a customer’s medical condition or ask for any personal medical information, including asking for proof of a disability. It is the responsibility of the person seeking a modification to acknowledge their disability and communicate their request. Market personnel can ask if the customer is exempt from wearing a mask either because they meet exceptions defined by the state or local government or they are not recommended to do so in accordance with CDC guidelines. If the individual acknowledges the disability, then the market must identify what reasonable modifications they can provide for a customer who requests an accommodation.

What to do (and not do) if a person approaches the market without a mask . . .

DO

- Ask if the person is able to wear a mask
- Offer the person a mask
- Ask if the person is exempt from wearing a mask, showing the person a list of CDC exemptions (see list on page 10)
- Offer a reasonable modification to shopping at the market in person
- Record the interaction, including the request made, the market personnel’s response to the request, and reasons why or why not the request was fulfilled

DON’T

- Ask for proof of disability
- Ask for any information about a medical condition, except for a yes or no confirmation that they are exempt from wearing a mask

Offering Reasonable Modifications

Reasonable modifications are just what they sound like. They are meant to be simple, cost-effective measures that a business can take to promote equal participation in its services among its customer base.

For a farmers market this means the person would be able to access the same goods and services available at the market using the modification. A reasonable modification should be feasible, meaning the market can adapt its system to aid a person with a disability without expending an exorbitant amount of time or money. If the market cannot readily achieve the modification, it is the same as denying the person the service. Therefore, it is good to conduct an assessment of what the market could do to serve people with a disability and list the reasons why a modification is feasible or not.

There are several things that markets can do to reasonably modify the shopping experience for someone who cannot wear a mask due to a disability:

- Set up an online pre-order and curbside pick-up system
- Have a market volunteer shop for the customer and pre-box goods for curbside pickup
- Designate a timeframe for vulnerable customers to shop; a decrease in the volume of shoppers may allow markets to offer personal assistance to those who cannot wear a mask
- Any other creative ideas the market has that would suit the needs of the market and its vendors



Are there situations where markets might not have to provide reasonable modifications?

In some situations, a market may be exempt from providing a proposed modification. According to the law, markets may not have to provide a modification if the modification poses a direct threat to the health and safety of others or if it fundamentally alters the nature of the service. Markets should take care to determine if other alternative modifications can be provided in such instances.

1 Direct Threat

If the person with a disability poses a significant risk to the health and safety of others, and a modification cannot eliminate this risk, then the modification may fall under the “direct threat” exception. The market must determine first whether the risk to the health and safety of others is significant. To this end, the market must individually assess the risk for its nature, duration, severity, and the probability that it will cause actual injury or illness. If the market concludes that the risk is significant, then the business does not have to provide access to the service with the proposed modification. Note that this is not the same as denying a person with a disability access to the business service. If another reasonable modification exists, then the business still must offer the alternative modification.

For example, if a person was unable to wear a mask inside the market and requested a modification to the mask policy so that they could shop inside the market without a mask, the market must assess the risk to see whether it is significant.

Farmers markets must rely on an objective source of evidence to make this determination. In the case of the COVID-19 pandemic, courts would likely uphold a market’s decision not to modify their mask policy to let someone shop at the market without a mask because of the high chance of transmitting COVID-19, even if the person does not have symptoms of the illness. A market, however, might decide in this same situation to use its discretion to determine that letting a person in without a mask is a reasonable

modification because the flow and structure of the market allows the customer to maintain six feet of distance from all people and all transactions are contact free and therefore the modification does not pose a significant risk.

The direct threat exception does not let markets deny service to a person who cannot wear a mask. Markets must still take care to apply other reasonable modifications that could be made to accommodate a person with a disability.

2 Fundamental Alteration

The “fundamental alteration” exception applies when the nature of the market’s service would change due to how much labor or time is required to ensure equal access for all customers by offering a particular modification. The determination of what constitutes a fundamental alteration is fact specific. Since a farmers market is in the business of selling food, a reasonable modification would accomplish this goal without too much hassle. For a larger, more established market, a pre-ordering system with curbside pickup or a personal shopper may be feasible options to accommodate people with a disability. For a market with few personnel, limited time available, and a small operating budget, those same modifications might not be feasible due to the extra costs and administrative burden required. In the latter case, the market should document the reasons why the modification would be unreasonable and would fundamentally change the nature of the business.

Recommended Steps for Accommodating People with a Disability

- Make an assessment of the market's ability to provide reasonable modifications to people who cannot wear a mask due to a disability (See [page 7](#) for a list of possible modifications).
- Keep a record or log for writing down requests for modifications and reasons why the market was or was not able to meet the request (See [template on page 9](#)).
- Contact local public health and safety officials to better understand state and local requirements and enforcement mechanisms.
- Reach out to the regional ADA offices for additional support on navigating the requirements of state mask mandates and the ADA.
- Ensure all market volunteers and personnel receive training on ADA requirements and how to accommodate people with a disability.



Web Resources

- [Centers for Disease Control and Prevention COVID-19 information](#)
- [ADA National Network website](#)
- [Farmers Market Coalition Resource Library, COVID-19 resources](#)
- [Changelab Solutions report on equitable enforcement](#)



Name _____

Role _____ Date _____

What reasonable modifications can your market provide?

Pre-ordering and curbside pickup

Are the extra costs and administrative requirements of this modification unreasonable for your market?

- Yes; provide detail:
- Undue costs: _____
 - Administrative burdens: _____
- No

Would providing this modification result in a direct threat to the health and safety of others?

- Yes; provide detail of risk:
- Nature: _____
 - Duration: _____
 - Severity: _____
 - Probability of Injury: _____
- Source of Authority: _____
- No

Designate market volunteer or personnel to shop for customer

Are the extra costs and administrative requirements of this modification unreasonable for your market?

- Yes; provide detail:
- Undue costs: _____
 - Administrative burdens: _____
- No

Would providing this modification result in a direct threat to the health and safety of others?

- Yes; provide detail of risk:
- Nature: _____
 - Duration: _____
 - Severity: _____
 - Probability of Injury: _____
- Source of Authority: _____
- No

Other:

Are the extra costs and administrative requirements of this modification unreasonable for your market?

Yes; provide detail:

- Undue costs: _____
- Administrative burdens: _____

No

Would providing this modification result in a direct threat to the health and safety of others?

Yes; provide detail of risk:

- Nature: _____
 - Duration: _____
 - Severity: _____
 - Probability of Injury: _____
- Source of Authority: _____

No

Other:

Are the extra costs and administrative requirements of this modification unreasonable for your market?

Yes; provide detail:

- Undue costs: _____
- Administrative burdens: _____

No

Would providing this modification result in a direct threat to the health and safety of others?

Yes; provide detail of risk:

- Nature: _____
 - Duration: _____
 - Severity: _____
 - Probability of Injury: _____
- Source of Authority: _____

No

Other Steps

Reach out to ADA regional office for guidance

Contact local officials to better understand state and local requirements and enforcement mechanisms

Public health officials: _____

Safety officials: _____

Train all vendors and market personnel (including volunteers) in ADA requirements and how to accommodate customers with a disability: _____

*This log should be maintained for all instances in the order that they occur,
and copied or scanned to be added to market records.*

Date: _____ Time: _____

Market Location: _____

Details of ADA Request: _____

Market Personnel Involved: _____

Action Taken by Market Personnel: _____

Reasons why request was not fulfilled (if any): _____

Date: _____ Time: _____

Market Location: _____

Details of ADA Request: _____

Market Personnel Involved: _____

Action Taken by Market Personnel: _____

Reasons why request was not fulfilled (if any): _____

Date: _____ Time: _____

Market Location: _____

Details of ADA Request: _____

Market Personnel Involved: _____

Action Taken by Market Personnel: _____

Reasons why request was not fulfilled (if any): _____

Who should not wear a mask?

According to Centers for Disease Control and Prevention

- ▶ Children younger than 2 years old
- ▶ Anyone who has trouble breathing
- ▶ Anyone who is unconscious, incapacitated or otherwise unable to remove the mask without assistance
- ▶ Anyone with sensory, cognitive, or behavioral issues who cannot tolerate wearing a mask or who cannot wear a mask properly



Centers for Disease Control and Prevention
CDC 24/7: Saving Lives, Protecting People™

Steps to take if a person approaches the market without a mask:

- 1 **Ask** if the person is able to wear a mask
- 2 If the answer is “no,” **show** the list of exemptions above and ask the person to confirm that they are exempt from wearing a mask
- 3 If they are exempt from wearing a mask, **offer** a reasonable modification
- 4 **Record** the request and response in the ADA log

Don't Forget

- ★ Do not ask for proof of disability
- ★ Do not ask for any information regarding a medical condition
- ★ If the customer can wear a mask and wants to enter without a mask, restate the market policy and offer them a mask to wear at the market