

# When Are Employees Justified in Refusing to Wear Masks? – Quiz



You must make certain exemptions to your mandatory masks in the workplace policy.

Companies that don't follow current COVID-19 public health guidelines and government emergency orders (which we'll refer to collectively as "guidelines") face the risk of fines and even closure orders. And the guidelines say that individuals in workplaces must wear a mask or face covering. But there are also exceptions. As the human rights commissions of several jurisdictions have clarified, there are 3 basic grounds for individuals to be exempt from mandatory mask rules:

1. They work in a setting that allows them to maintain the minimum social distance of 2 metres/6 feet apart from others;
2. The mask endangers their health or safety;
3. They can't safely use the mask due to a disability or other personal characteristic requiring accommodation under human rights laws.

Here's a scenario you can use to apply these rules.

## SITUATION

ABC Company has adopted and strictly enforces a mandatory face mask policy at its workplace. While most people are cooperative, there are also a few objectors. **Your job:** Determine whether the person objecting has a valid case for an exemption.

1. Ava, who works alone in an enclosed office, doesn't want to wear a mask because it musses up her makeup;
2. Brianne, who works in an office with 2 co-workers, has similar complaints;
3. Cal claims he doesn't have to follow the workplace mask since he's a customer and not a worker;
4. Dave, an on-site maintenance worker, claims he's exempt because he's not an ABC Company employee, even though he works very close to them;
5. Evan, who works in a crowded space, claims he can't breathe with the mask on
6. Felicia, who works right next to Evan, says the mask makes her break out in hives
7. Greg, who works alongside Evan and Felicia, has no physical objections but

contends that being forced to wear a mask violates his creed and libertarian political principles

8. Hillary, who is hard of hearing, doesn't mind wearing the mask herself but doesn't want her co-workers to do so because the mask makes it impossible for her to read their lips

## QUESTION

Which of the above has/have a valid claim to be exempt from the mandatory mask policy under the current guidelines?

## ANSWER

Ava, Evan, Felicia and Hillary all have valid claims for an exemption; Brianne, Cal, Dave and Greg do not.

## EXPLANATION

1. **Ava WOULD BE exempt.** Although preserving makeup isn't a valid justification, Ava doesn't have to wear a mask because she works alone in an enclosed office. However, she does have to put her mask on whenever she goes to the restrooms or leaves the office for any other reason.
2. **Brianne WOULD NOT BE exempt.** While it sounds similar to Ava's situation, the big difference is that Brianne shares her office with 2 co-workers. So, all 3 office occupants must wear a mask to avoid exposing each other.
3. **Cal WOULD NOT BE exempt.** Customers must also wear masks, unless they're dining at tables kept 2 metres/6 feet away or otherwise maintaining social distancing.
4. **Dave WOULD NOT BE exempt.** Workplace mask rules apply not just to a company's employees but also visitors like employees of contractors or vendors who work at the site and can't social distance.

Ava and Brianne don't want to wear masks because they find them uncomfortable. Ava works alone in an office; Brianne shares an office with a pair of co-workers. She works alone in an office.

**QUESTION:** Which office worker(s) has/have a valid case for an exemption?

1. Ava only
2. Brianne only
3. Both Ava and Brianne
4. Neither Ava nor Brianne

**ANSWER:** A. Ava doesn't have to wear a mask as long as she's in the office alone since she's not exposing anybody else. However, she does have to put her mask on whenever she uses the restrooms, common areas or leaves the office for any other purpose.

## EXPLANATION:

**Fact 2:** The OHS Act also requires employers to carry out "appropriate" investigations of workplace harassment complaints but doesn't say they must prevent harassment.

## Question

**Does the employer have to let the OHS investigator see the unredacted Findings Report?**

1. No, because it contains sensitive and private information
2. No, because the investigator just needs to determine if there was an appropriate investigation, not whether harassment actually occurred
3. Yes, because Section 54(1)(c) powers cover any and all documents related to workplace harassment
4. Yes, because the unredacted report will enable her to determine if the company met its OHS harassment duties

## Answer

1. **Demanding access to the unredacted report is a legitimate use of the investigator's Section 54(1)(c) powers**

## Explanation

Investigating workplace harassment complaints is a legal obligation not just in Ontario but all jurisdictions. But such investigations often uncover personal and confidential information, including personal medical information, information about private family matters and compromising photos and text messages. Employers must keep this material confidential and not disclose it, except where the law requires. This scenario, which is based on an actual Ontario case, illustrates where the lines are drawn.

The OLRB ruled that disclosing the unredacted Findings Report was required by law, specifically Section 54(1)(c). The company's argument that the investigator had no authority to determine if harassment occurred might ultimately prove true. But that wasn't the issue in this case. All this case was about is whether the investigator was entitled to see the unredacted report to determine if the company did an appropriate harassment investigation. "I have difficulty accepting that the Act leaves it to the employer" to decide what information from the Findings Report the investigator does and doesn't need to make that determination, the OLRB concluded [*Wal-Mart Canada Logistics ULC v Gail Stewart*, 2020 CanLII 2070 (ON LRB), Jan. 10, 2020].

## Why Wrong Answers Are Wrong

**A is wrong** because OHS investigator powers override personal privacy protections; investigators are also legally bound not to disclose the private information they access for purposes of carrying out their investigatory duties.

**B is wrong** because the investigator's purpose in accessing the unredacted report was, in fact, to determine if the company did an appropriate investigation and not to decide if harassment occurred.

**C is wrong** because an OHS investigator's Section 54(1)(c) powers can be used only to exercise *bona fide* investigation activities. But accessing the unredacted report to investigate whether there was a proper investigation of a harassment complaint was well within those limits.