

# **DE Coronavirus Tracker: Governor Carney Issues Order on Face Coverings; Updated PPP FAQs – 5.4.20**

## **Governor Carney's Order on Face Coverings**

Delaware Governor John Carney issued an order on face coverings last week. The modified State of Emergency declaration requires the use of cloth face coverings in public settings where other social distancing measures are difficult to maintain, including in grocery stores and pharmacies, especially in areas of significant community-based transmission. Guidance emphasizes that a cloth face covering is not a substitute for existing guidance about handwashing and social distancing, and that Delawareans are urged to use cloth face coverings and reserve medical-grade masks for use by health care workers and first responders. Notably, the guidance specifically permits a business to decline entry to a customer that do not have a face covering or if one is not available for them.

The Governor has released additional public and business guidance. The general public guidance states:

- Governor Carney's order does not require children aged 12 or younger to wear a face covering.
- Any child 2-years-old or younger MUST NOT wear a face covering, due to the risk of suffocation.
- Delawareans wearing a face covering should practice strict hand-washing before and after touching the face covering.
- Face coverings are not a replacement for washing hands, practicing physical distancing, and staying home.
- If you are sick, wear a cloth face covering over your nose and mouth if you must be around other people – even while at home.
- The best defense against COVID-19 is frequent hand washing, avoiding being around sick people, staying home/physical distancing, and avoiding touching your face, mouth, eyes, and nose with unwashed hands.

The business guidance requires that all businesses must:

- Require employees to wear a face covering while working in areas open to the public and in areas where coming within 6 feet of other staff is likely.
- Provide, at the business' expense, face coverings and hand sanitizer for their employees.
- Deny entry to individuals who do not have a face covering – or if one is not available for them.
- If any business denying entry is providing medication, medical supplies, or food, the business should provide alternate methods of pickup or delivery.

A number of frequently asked questions are offered on the state's website:

### **Q: What is a cloth face covering?**

- A cloth face covering is a material that covers the nose and mouth. It can be secured to the head with ties or straps or simply wrapped around the lower face. It can be made of a variety of materials, such as cotton, silk, or linen. Research has shown that certain more densely-woven fabrics may be more effective. A cloth face covering may be factory-made or sewn by hand, or can be improvised from household items such as scarfs, T-shirts, sweatshirts, or towels.

### **Q: How effectively do cloth face coverings prevent the spread of COVID-19?**

- The primary role of cloth face coverings are to reduce the release of infectious particles into the air when someone speaks, coughs, or sneezes, including someone who has COVID-19 but may not show symptoms. Cloth face coverings are not a substitute for washing hands, physical distancing while performing essential activities, and staying home, but they may be helpful when combined with these actions.

**Q: When should I wear a cloth face covering?**

- You are required to wear a face covering in public settings, including in grocery stores, convenience stores, pharmacies, doctor’s offices, and on public transportation. Wearing a cloth face covering does not eliminate the need to physically distance yourself from others. If you are sick, you should wear a cloth face covering, over your nose and mouth if you must be around other people — even while at home.

**Q: How should I care for a cloth face covering?**

- Washing your cloth face covering frequently, ideally after each use, or at least daily is strongly recommended. Use a bag or bin to store cloth face coverings until they can be laundered with detergent and hot water and dried on a hot cycle. If you must re-wear your cloth face covering before washing, wash your hands immediately after putting it back on or adjusting the mask, and avoid touching your face. Discard cloth face coverings that:
  - Have stretched out or damaged ties or straps
  - No longer cover the mouth and nose
  - Don’t stay on the face
  - Have any rips or holes in the fabric

The Executive Order continues through the earlier of the termination of the emergency or its rescission, and may be found [HERE](#).

**Updated SBA PPP FAQs on Forgiveness, Seasonal Employers, and Nonprofit Hospitals**

**Question:** Will a borrower’s PPP loan forgiveness amount (pursuant to section 1106 of the CARES Act and SBA’s implementing rules and guidance) be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?

**Answer:** No. As an exercise of the Administrator’s and the Secretary’s authority under Section 1106(d)(6) of the CARES Act to prescribe regulations granting de minimis exemptions from the Act’s limits on loan forgiveness, SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act’s loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee’s rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.

**Question:** Can a seasonal employer that elects to use a 12-week period between May 1, 2019 and September 15, 2019 to calculate its maximum PPP loan amount under the interim final rule issued by Treasury on April 27, 2020, make all the required certifications on the Borrower Application Form? 15 Questions 38 – 39 published April 29, 2020. As of May 3, 2020

**Answer:** Yes. The Borrower Application Form requires applicants to certify that “The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program.” On April 27, 2020, Treasury issued an interim final rule allowing seasonal borrowers to use an alternative base period for purposes of calculating the loan amount for which they are eligible under the PPP. An applicant that is otherwise in compliance with applicable SBA requirements, and that complies with Treasury’s interim final rule on seasonal workers, will be deemed eligible for a PPP loan under SBA rules. Instead of following the instructions on page 3 of the Borrower Application Form for the time period for calculating average monthly payroll for seasonal businesses, an applicant may elect to use the time period in Treasury’s interim final rule on seasonal workers.

**Question:** Do nonprofit hospitals exempt from taxation under section 115 of the Internal Revenue Code qualify as “nonprofit organizations” under section 1102 of the CARES Act?

**Answer:** Section 1102 of the CARES Act defines the term “nonprofit organization” as “an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and that is exempt from taxation under section 501(a) of such Code.” The Administrator, in consultation with the Secretary of the Treasury, understands that nonprofit hospitals exempt from taxation under section 115 of the Internal Revenue Code are unique in that many such hospitals may meet the description set forth in section 501(c)(3) of the Internal Revenue Code to qualify for tax exemption under section 501(a), but have not sought to be recognized by the IRS as such because they are otherwise fully tax-exempt under a different provision of the Internal Revenue Code. Accordingly, the Administrator will treat a nonprofit hospital exempt from taxation under section 115 of the Internal Revenue Code as meeting the definition of “nonprofit organization” under section 1102 of the CARES Act if the hospital reasonably determines, in a written record maintained by the hospital, that it is an organization described in section 501(c)(3) of the Internal Revenue Code and is therefore within a category of organization that is exempt from taxation under section 501(a).<sup>16</sup>

The hospital’s certification of eligibility on the Borrower Application Form cannot be made without this determination. This approach helps accomplish the statutory purpose of ensuring that a broad range of borrowers, including entities that are helping to lead the medical response to the ongoing pandemic, can benefit from the loans provided under the PPP. This guidance is solely for purposes of qualification as a “nonprofit organization” under section 1102 of the CARES Act and related purposes of the CARES Act, and does not have any consequences for federal tax law purposes. Nonprofit hospitals should also review all other applicable eligibility criteria, including the Interim Final Rules on Promissory Notes, Authorizations, Affiliation, and Eligibility (April 28, 2020) regarding an important limitation on ownership by state or local governments. 85 FR 23450, 23451.17

#### Footnote

This determination need not account for the ancillary conditions set forth in section 501(r) of the Internal Revenue Code and elsewhere associated with securing the tax exemption under that section. Section 501(r) states that a hospital organization shall not be treated as described in section 501(c)(3) unless it meets certain community health and other requirements. However, section 1102 of the CARES Act defines the term “nonprofit organization” solely by reference to section 501(c)(3), and section 501(r) does not amend section 501(c)(3). Therefore, for purposes of the PPP, the requirements of section 501(r) do not apply to the determination of whether an organization is “described in section 501(c)(3)