



Legal Alert, COVID-19 News & Legal Alerts

## OSHA ANNOUNCES THE WITHDRAWAL OF ITS COVID-19 VACCINE- OR-TEST MANDATE AS AN EMERGENCY TEMPORARY STANDARD

January 25, 2022

The Occupational Safety and Health Administration (OSHA) announced today, Jan. 25, 2022, that it is withdrawing its November 5, 2021 Emergency Temporary Standard (ETS), which would have required many private

employers with 100 or more employees to mandate vaccination or weekly COVID-19 testing of their employees who work on-site. The withdrawal becomes effective on January 26, 2022, when it is scheduled to be published in the Federal Register.

The withdrawal comes days after the U.S. Supreme Court stayed enforcement of the ETS pending disposition of the lawsuit challenging the rule in the Sixth Circuit Court of Appeals. (For more information about the Supreme Court's January 13, 2022 opinion, see our earlier alert.)

OSHA's announcement makes clear that it has not given up on its vaccine-or-test rule for good. It states that "[a]lthough OSHA is withdrawing the vaccination and testing ETS as an enforceable emergency temporary standard, the agency is not withdrawing the ETS as a proposed rule." This means that while OSHA's vaccine-or-test mandate will not be in effect in the immediate future as an emergency temporary standard, we may see its return in the form of a permanent standard. We will provide updates regarding the status of the proposed rule as they become available.

OSHA's withdrawal of its ETS does *not* affect the Centers for Medicare and Medicaid Services (CMS) COVID-19 vaccination mandate. Read our New York Health Care Blog post on the CMS vaccine mandate for more detail.

If you have any questions, please contact the Harris Beach attorney with whom you usually work.

*This alert does not purport to be a substitute for advice of counsel on specific matters.*

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## **MASK MANDATE; NASSAU COUNTY COURT DECISION; WHERE ARE WE?**

January 26, 2022

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*This Legal Alert pertains to an issue, which is fluid and currently being considered in court.*

*This information will be updated as court decisions are made and/or guidance from state agencies is provided.*

On Monday, January 24, 2022, a Nassau County trial court judge decided that the New York State Department of Health (“NYSDOH”) rule mandating masks be worn in all public buildings, including schools, was unconstitutional and invalid. That mandate was in place and was to continue through February 21, 2022.

Almost immediately after being issued, the state appealed the decision. The state requested a stay of the decision so the mandate would remain in effect while the lower court’s decision was being reviewed by the appellate court. The stay was granted, until at least Friday, January 28, 2022, when further argument in the case will be heard.

The New York State Attorney General, New York State Department of Health (NYDOH), and New York State Education Department (NYSED) have indicated the decision applies statewide, not just in Nassau County. The decision has raised many questions about the implications for school districts moving forward. While the issues in this case may not be finally decided for some weeks given the possibility of additional appeals, it is prudent for schools to consider options should the lower court’s decision ultimately be upheld.

The following Q & A offers perspective on the considerations for school districts and BOCES as they address these issues.

### **Is it possible the NYSDOH could put another mask mandate in place for the future?**

Yes, it is possible, but will depend on how the appellate court rules. If the appellate court agrees just with the portion of the decision that finds the NYSDOH did not comply with the State Administrative Procedure Act, because a rationale was not provided, this error could potentially be fixed moving forward. If, however, the appellate court agrees the rule transcends providing “definition” and “guidance” and that the line between administrative rule making and policy making (the role of the legislature) has been crossed, then the NYSDOH would not have authority to mandate masks, unless it

could point to other specific legal authority allowing it to do so. Take-away? It is nuanced and right now a little uncertain.

### **Could NYSED mandate masks if the NYSDOH regulation is invalidated?**

Maybe. NYSED is a separate state agency but subject to the same limitations in terms of being limited to providing definitions, guidance and implementing regulations to carry out statutes. In short, NYSED, like NYSDOH, would need to rely on statutory authority to implement a mask mandate. As NYSED has acquiesced to the NYSDOH and the Governor on these matters to date, it is unclear where their authority lies.

### **In the absence of a state mandate, can a local school board still mandate mask wearing despite the court's ruling?**

Likely, yes. Various Education Law provisions provide school districts the authority to take measures to protect the safety and health of students. For example, Education Law 1709(13) provides that boards of education “have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes.”

Education Law 2801(2) requires that districts adopt “*a code of conduct for the maintenance of order on school property ... which shall govern the conduct of students, teachers and other school personnel as well as visitors and shall provide for the enforcement thereof*” and include “*standards and procedures to assure security and safety of students and school personnel.*”

Thus, reasonable school district health protocols determined in accordance with guidance from the CDC, the NYSDOH, NYSED, and local health departments should be within a school district's discretion.

We caution, however, that given the current polarized environment regarding masks, any mandate could be subject to legal challenge. Therefore, we believe that if a board of education wishes to continue a mask mandate in the absence of a directive from the state, it should establish the criteria on which it will base its decision, seek guidance from the district's medical director, gather and consider community input (including staff), and consider time frames for periodic review to ensure that if conditions become such that a mask mandate is no longer warranted, the decision is modified.

As it is impossible to thoughtfully address all implications of such an action here, if you are considering taking such an action, we encourage you to review your plan with the Harris Beach attorney with whom you normally work.

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Legal Alert

## RECORD-KEEPING PROTOCOLS MUST BE UPDATED TO COMPLY WITH THE GENDER RECOGNITION ACT

January 28, 2022

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The New York Gender Recognition Act took effect on December 21, 2021. School district and BOCES recordkeeping protocols and procedures must be updated to verify compliance with the Act.

- **Name Change:** The Act amended New York Civil Rights Law Section 64 by adding new subsection 3 to provide that a name change order or other documentation of name change is sufficient to change an individual's name on any document or record issued or maintained by the state of New York or any subdivision thereof, or any private entity, including but not limited to, all **school records for current and past students**, archival records and marriage certificates. The failure of a public or private entity to comply with such request may constitute a violation of the Human Rights Law, the Civil Rights Law and any applicable local non-discrimination law. A refusal to comply may be the basis for a complaint to the New York State Division of Human Rights or other enforcement entity.
- **Sex Designation:** The Act amended the New York Civil Rights Law to add new Section 67, which allows for a petition for leave to change sex designation to be made, and allows the petition to change the sex designation of an infant to be made by the infant through either of the infant's parents or guardian. Such request may be made simultaneously with a petition for name change or on its own. When an individual petitions the court to recognize their gender identity or to amend the sex designation on an identity document, the court must issue the order upon receipt of an affidavit from such individual attesting to gender identity or the reason for the change. No additional medical evidence will be required to grant the request. Importantly, Section 67 further provides that no such order shall be required to amend an identity document issued within New York State, and that no such order shall be required to otherwise recognize the gender of an individual and treat the individual consistent with the individual's gender identity within New York State or under New York State law.

The Act additionally added new Section 67-a to the New York Civil Rights Law, which provides that if the court is satisfied that the documents submitted for purposes of the sex designation are true, there is no reasonable objection to the change of sex designation proposed, and in the case of an infant the interests of the infant will be substantially promoted by the change, the court will make an order authorizing the petitioner to assume the sex designation proposed.

- **“X” Designation on Driver’s Licenses and State-Issued Identification Cards:** The Act amended the New York Vehicle and Traffic Law Sections 490(2) and 502(1) to allow New Yorkers to use “X” as a non-binary sex designation on New York State driver’s licenses and state-issued identification cards.
- **Parent Designation on Birth Certificates:** The Act amended New York Public Health Law Section 4132 by adding new subsection 5, which allows each parent of the child to choose to be designated on the child’s original birth certificate or by amendment as “father” or “mother” or “parent”.
- **Birth Certificates Designation “X”:** The Act amended New York Public Health Law Section 4138 by adding new subsection 1(f), which provides that a new birth certificate shall be made whenever any person born in New York state submits an application to change the gender on the birth certificate and an affidavit attesting under penalty of perjury that the request for a change of gender to (female, male, or X) is to conform the person’s documents and records to the person’s gender identity and is not made for any fraudulent purpose. While allowing a sex designation of X, the law states that no entity shall require X as a sex designation of any individual. Upon receipt of the documentation, the Commissioner of Health shall establish a new birth certificate reflecting the gender stated in the application and any change in name, if accompanied by a court order for a change of name. If such application is made on behalf of a person younger than seventeen, the affidavit must be signed by the person’s parent, legal guardian, mental health or medical provider, or social services provider.
- **Streamlining of the Name-Change Process:** The Act streamlined the name change process by removing certain notice, publication and consent requirements.

Schools district and BOCES must continue to adhere to the regulations promulgated by the New York State Education Department pursuant to the New York Dignity for All Students Act related to the accommodation of transgender and gender non-conforming students, as well as the 2015 guidance entitled, “New York State Education Department Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students.” This is the case even in the absence of a court order.

The Gender Recognition Act, however, is a reminder to school districts and Boards of Cooperative Educational Services that they must be prepared to update the name and gender reflected in certain records of current and former students upon request. In the absence of a court order or other proof of a name change or sex designation, some limitations in changing name or gender designation will continue to exist (e.g., state testing and insurance claims). Student management systems should also reflect a non-binary option moving forward.

In the education and employment context, school districts must also continue to comply with the Gender Expression Non-Discrimination Act, known as “GENDA,” which explicitly prohibits discrimination based on “gender identity or expression” which is defined as “a person’s actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.”

Finally, school districts should already have designated all single occupancy bathrooms as gender neutral, removing designations of male and female, pursuant to a law signed by the Governor in December 2020. If they have not, they should do so immediately.

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