



NYS MASK MANDATE EFFECTIVE DEC. 13, 2021: WHAT BUSINESSES NEED TO KNOW

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New York State Governor Kathy Hochul recently announced that beginning on December 13, 2021, face masks are required to be worn in all “indoor public places,” except those that require proof of vaccination as a condition of entry. The announcement was issued as part of the State’s action to address the rise of COVID-19 cases and hospitalizations statewide. The requirement

will be in effect through January 15, 2022, at which point the State will reevaluate based on the COVID-19 conditions at that time.

The New York State Acting Health Commissioner issued a brief determination in support of Governor Hochul’s announcement. The State also published Frequently Asked Questions (“FAQs”) on its website to address questions regarding the determination.

In addition to the new requirement for “indoor public places”, Governor Hochul’s announcement and the determination indicate that the State’s masking requirements continue to be in effect for pre-K to grade 12 schools, public transit, homeless shelters, correctional facilities, nursing homes, and health care settings per CDC recommendations.

What is considered to be an “indoor public place”?

The new requirement applies to all “indoor public places”, defined broadly as *any* indoor space that is not a private residence. Both public and private business entities are therefore subject to the new requirement, including indoor entertainment venues, concert halls, indoor sports stadiums, recreational spaces, restaurants, office buildings, shopping centers, grocery stores, pharmacies, houses of worship, common areas in residential buildings, and office buildings.

What is the new requirement?

Indoor public places must either: (A) implement a vaccination requirement, mandating proof of vaccination from all individuals as a condition of entry inside the business or venue; or, alternatively, (B) implement a mask-wearing requirement, mandating that all persons over the age of two and medically able to tolerate a face covering wear a mask at all times while indoors.

Whichever mandate the business or venue implements, it must be applied to “all within the business/venue’s capacity, including staff, patrons, visitors, and guests.” (See the FAQs). The FAQs make clear that businesses and venues cannot do a “combination” or “mix-and-match” mandate, meaning they must specifically determine which mandate will be implemented, and apply it consistently to all individuals, at all times.

- *Proof of Vaccination Mandate*

Businesses and venues that implement a proof of vaccination mandate must ensure that anyone 12 years of age or older is “fully vaccinated” before entering indoors. Businesses and venues can accept Excelsior Pass, Excelsior Pass Plus, SMART Health Cards issued outside of New York State, full-course vaccination through NYC COVID Safe app, a CDC Vaccination Card, or other official immunization record.

The FAQs define “fully vaccinated” as 14 days past an individual’s last vaccination dose in their initial vaccine series (14 days past the second shot of a two-dose Pfizer-BioNTech or Moderna vaccine; or 14 days past the one-shot Janssen/Johnson & Johnson vaccine). Boosters are not currently required to qualify for “fully vaccinated” status at this time.

- *Mask-Wearing Mandate*

Businesses and venues that implement a mask-wearing mandate must ensure that all individuals over the age of two and medically able to tolerate a face covering —regardless of vaccination status— wear a mask at all times, except when eating or drinking (or, with respect to office spaces, when alone in an enclosed room).

Through previous executive orders and State and local law, many employers were required to provide masks to employees. The obligation for businesses and venues to provide *patrons* masks, however, has not been addressed in Governor Hochul’s announcement, the determination, or the FAQs.

How does the new requirement interact with businesses’ obligations under the New York State HERO Act?

The FAQs specify that employers must continue to comply with the NYS Health and Essential Rights Act (the “HERO Act”), which, among other things, affords protections for private sector employees against an airborne infectious disease outbreak by requiring employers to ensure employees wear appropriate face coverings in accordance with Department of Health guidance. The FAQs state that for purposes of complying with the HERO Act, the determination constitutes Department of Health guidance related to face coverings, meaning employers must ensure their employees adhere to masking requirements or require proof of vaccination as a condition of entry into the business.

How will the new requirement be enforced?

Local health departments are responsible for enforcing the new requirement. A violation may result in civil and criminal penalties, including a maximum fine of up to \$1,000 per violation.

While the FAQs provide some clarification on unanswered questions pertaining to Governor Hochul’s announcement and the determination, many open questions remain. We will continue to monitor for developments and provide updates as warranted.

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

Harris Beach has offices throughout New York State, including Albany, Buffalo, Ithaca, Long Island, New York City, Rochester, Saratoga Springs, Syracuse and White Plains, as well as New Haven,

Connecticut and Newark, New Jersey.



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SIXTH CIRCUIT LIFTS STAY ON OSHA'S VACCINE MANDATE FOR LARGE EMPLOYERS

December 20, 2021

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The U.S. Court of Appeals for the Sixth Circuit dissolved an order staying enforcement of the emergency temporary standard (“ETS”) issued by the Occupational Safety and Health Administration (OSHA). The ETS requires all employers with 100 or more employees to implement policies mandating that employees either receive a COVID-19 vaccination or

undergo regular testing.

The “vaccinate or test” requirement in the ETS was originally set to take effect on January 4, 2022, but the U.S. Court of Appeals for the Fifth Circuit issued a preliminary injunction staying enforcement of the ETS. Last week, the Sixth Circuit granted the Biden Administration’s request to dissolve the Fifth Circuit’s stay.

OSHA announced that it will not begin enforcing the ETS until January 10, 2022. In addition, OSHA will not issue citations for noncompliance with the testing requirement prior to February 9, “so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.”

The Sixth Circuit’s ruling is being appealed to the Supreme Court, and the high court could ultimately decide the fate of the ETS. For now, however, covered employers should take necessary steps to comply with the ETS.

For more information about OSHA’s ETS, read our previous legal alert.

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