

## New York Essential Businesses Must Provide Employees with Protective Face Masks

Among the various new legal requirements applicable to employers in connection with the COVID-19 pandemic, effective April 15, 2020, essential New York businesses must provide face masks to their customer-facing and public-facing employees.

This obligation arises from an Executive Order issued by Governor Cuomo. The Executive Order provides, in relevant part: “For all essential businesses or entities, any employees who are present in the workplace shall be provided and shall wear face coverings when in direct contact with customers or members of the public. Businesses must provide, at their expense, such face coverings for their employees.”

According to an Interim Guidance issued by the Department of Health (“Guidance”), face coverings include, but are not limited to cloth (e.g. homemade sewn, quick cut, bandana), surgical masks, N-95 respirators, and face shields. Information on cloth face covers and other types of personal protective equipment (PPE), as well as instructions on use and cleaning of such materials, can be found at the Centers for Disease Control and Prevention’s “Coronavirus Disease 2019 (COVID-19)” website. The Guidance further provides that if an employer is unable to obtain or create face coverings for their employees, it may consult with its local office of emergency management to determine if extra supplies exist for this purpose. If supplies are available, the employer may submit a request for face coverings. However, the Guidance notes that supplies are extremely limited and it ultimately remains the employer’s responsibility to supply face coverings to their employees.

Employees may be permitted to use their own face coverings, however employees may not be required to do so by the employer. Also, in addition to face coverings, employees must be permitted to wear additional protective gear (e.g. surgical masks, N-95 respirators, or face shields) if the employee possesses such PPE, or if the employer otherwise requires employees to wear more protective PPE due to the nature of their work.

The Guidance further states which employees are in direct interaction with the public shall be determined by the employer, but, “at a minimum, shall include any employee who is routinely within close contact (i.e. six feet or less) with members of the public, including but not limited to customers or clients.” Face coverings should also be provided to independent contractors as well as employees if they are in customer-facing or public-facing roles.

While the Guidance addresses the mandate for employees to wear masks, it also provides for exceptions. Specifically, “Employees are required to wear face coverings when in direct contact with members of the public except where doing so would inhibit or otherwise impair the employee’s health. Employers are prohibited from requesting or requiring medical or other documentation from an employee who declines to wear a face covering due to a medical or other health condition that prevents such usage.” Accordingly, if an employee states that wearing a face mask would inhibit or impair his or her health, the employer may not seek medical documentation in support of that assertion.

Employees who are unable to wear face coverings and are susceptible to COVID-19 (i.e. those who are 70 or older, and those with compromised immune systems or underlying illnesses) may consult with their employer to consider reasonable accommodations, including but not limited to different PPE, an alternate work location, or a different work assignment with fewer interactions with the public. Employers must work with such employees to see if they can be accommodated to ensure the employee can continue to deliver essential services in the safest possible manner.

The Executive Order states that it may be enforced by local governments or local law enforcement as if it were an order pursuant to Section 12 or 12-b of the Public Health Law.

### KD IS HERE TO HELP

The experienced Labor & Employment attorneys at Kaufman Dolowich & Voluck are available to assist. We will continue to keep you apprised of any further developments impacting the workplace, and are available to answer any questions and provide additional guidance to help you navigate the ever-changing landscape of the laws during the COVID-19 pandemic and its interplay with any other local, state or federal laws. For more information, please contact an experienced member of KD’s Labor & Employment Law Practice

Group.