

LEGALLY SPEAKING

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MANDATORY MASK MANDATES – WHAT EMPLOYERS NEED TO KNOW (CONSTRUCTION INDUSTRY IS NOT EXEMPT)

In the latest installment of government mandates, a new Ohio Department of Health Director's Order became effective July 8 at 6:00 p.m., which mandates anyone in a public space to wear a face covering if within specific counties designated as "red" Level 3 Public Emergency by the Ohio Public Health Advisory System, accessible [here](#). Among the counties designated Level 3 in the Director's Order are Butler, Cuyahoga, Franklin, Hamilton, Huron, Montgomery, and Trumbull. This Order follows the growing list of cities across the State of Ohio that have implemented facemask requirements for all individuals. The particulars of the city-based mandates vary between cities, but the bottom line is consistent – masks are now mandatory in public, regardless of industry. Among the cities that have implemented mandatory mask mandates include: Bexley, Cincinnati, Cleveland, Columbus, Dayton, Dublin, Grandview Heights, Hilliard, and Whitehall, among others. The Dayton, Columbus, and Cleveland mandates took effect on July 3, while Cincinnati's took effect July 9. Toledo City Council is considering its own version of a

mask ordinance and may very well join the growing list of city ordinances and orders requiring facial coverings in public.

In Dayton, individuals within the City of Dayton must wear face coverings or face a civil penalty of \$85 – few exceptions exist. Employers doing business in Dayton will have to require their employees to wear masks under most circumstances. However, when an employee is in his or her “work office,” “conference room” or “other space not intended to be used by the general public,” or inside personal or commercial vehicles, or in settings where it is not “feasible or practicable” to wear coverings, face masks need not be worn. In addition, if an employee has a medical condition which precludes the wearing of such a mask, the employer cannot insist upon use but may request verification of the medical condition. So, some latitude exists for employers – especially those not having employees coming into contact with the general public. It appears, however, that the “not feasible or practicable” exception is somewhat narrow and employers should be careful in attempting to use it. Importantly, the Dayton ordinance does not provide an exemption for when workers are six feet apart. Thus, in Dayton, even employees and members of the public who are socially distanced must wear a mask if they are entering, exiting, waiting in line, or while inside a place of business that is accessible to the public.

In Cleveland, “mandatory masks” are required “for all individuals out in public or in public spaces including businesses, restaurants, etc.” **No exemptions exist within Mayor Frank Jackson’s proclamation.**

In Columbus, Mayor Ginther’s executive order requires individuals to wear face coverings “in indoor areas accessible to the public and within the confines of public or private transportation regulated by the City of Columbus,” including in retail businesses,

in restaurants and bars, in salons, spas, and tattoo parlors, in childcare facilities, and in high-density occupational settings where social distancing is difficult. The Columbus order provides exemptions from the requirement based on medical or behavioral conditions or disabilities, children under the age of six, when actively eating or drinking, when engaged in strenuous exercise, when seeking to communicate with someone who is hearing-impaired, when giving a speech, when working from home or in a personal vehicle, when wearing the face covering would impede visibility to operate equipment or a vehicle, or if the individual would be at risk from wearing the face covering at work, as determined by local, state, or federal regulations or workplace safety guidelines. The Columbus mandate indicates that citations shall be written only to businesses or organizations that fail to enforce the requirement (but not to individuals).

In Cincinnati, the mask requirement is similar to the mandates in Columbus and Dayton, also with some limited exemptions for health conditions, children, and employees who cannot safely perform their jobs while masked. Refusal to wear a mask could result in a \$25 fine.

In the new Director's Order ([available here](#)) impacting Level 3 counties, facial coverings must be worn **"in any indoor location** that is not a residence," **while outside and unable to consistently socially distance** from others, and **while waiting for, riding, driving, or operating public transportation**. While the mask mandate in the Director's Order is an expansive one, it also contains its own set of exceptions and states that facial coverings need not be worn in the Level 3 counties when:

- 1) a child is under the age of ten;
- 2) the wearing of a face mask is not advisable due to a medical condition or disability;

- 3) an individual is communicating with someone who is hearing-impaired or disabled such that the ability to see the mouth for communication is essential;
- 4) an individual is alone in an enclosed area not intended for use or access by the public, such as a personal office space;
- 5) actively engaged in physical activity, provided that strict 6-feet or more social distancing is maintained;
- 6) actively engaged in athletic practices, scrimmages, or competitions permitted under a prior Department of Health Order;
- 7) actively engaged in a public safety role, such as law enforcement or emergency response services;
- 8) actively consuming food or beverages in a restaurant or bar;
- 9) the wearing of facial coverings is in violation of documented industry standards;
- 10) the wearing of facial coverings is in violation of a business's documented safety policies;
- 11) actively engaged in broadcast communications; or
- 12) an individual is an officiant of a religious service.

The new Director's Order directs enforcement questions to local health departments. However, Governor DeWine reminded Ohioans during a July 7 press conference on the new Director's Order that the current penalty for violating an Ohio health order is a criminal misdemeanor punishable by up to 90 days in jail or a fine not greater than \$750. Although the Governor indicated that anticipated enforcement measures are still being evaluated at this time, several law enforcement agencies across the state, including the Cincinnati Police Department, the Norwood Police Department, and the Butler County Sheriff's Department, have indicated that because this is a public health order, local law enforcement agencies will not enforce the state order or respond to calls related to mask mandates. Rather, those agencies have directed that all issues and potential violations be directed to local health department officials instead.

Critically, the new Director's Order does not rescind prior orders, which means that a previous order by the Ohio Department of Health concerning updated and revised business guidance and social distancing ([available here](#)) remains in effect and requires

all businesses across the state – not just those in level 3 counties – to require employees to wear facial coverings, except when the use of facial coverings:

- 1) is prohibited in the work setting by law or regulation;
- 2) is in violation of documented industry standards;
- 3) is not advisable for health reasons;
- 4) is in violation of the business's documented safety policies;
- 5) is not needed because the employee works alone in an assigned work area;
- or
- 6) is not functional or practical to be worn by an employee in the workplace – i.e., safety, breathing conditions, increased risk of heat stress, etc.

Under this previous Department of Health order, businesses must provide written justification, upon request, explaining why an employee is not required to wear a facial covering. Many employers attempting to utilize one of these exceptions are now preparing the written justification for such in a preemptive fashion so it will be available if a local health department inquires. Beware that several of the city mandates offer fewer exemptions than the state guidance, and several mayors have said that law enforcement will investigate complaints and potentially pursue the imposition of fines against businesses that fail to adhere to the mandatory mask mandates.

Given the varying orders between cities and counties, and even the variation among the two relevant state orders, contractors must take the time to read, understand, and implement the provisions of these mandatory mask mandates, where required. But most importantly, contractors should assess the conditions of their construction jobsites to evaluate the safety concerns specific to its jobsites and its workforce so that it can expediently determine best practices for its workforce with respect to the use of face coverings while working. This assessment will vary between contractors, jobsites, crews, and even day-to-day on a particular jobsite or within a specific crew. The ultimate inquiry is whether the wearing of a face covering will increase an employee's exposure to a

hazard or create a greater hazard to the employee than if the employee were not wearing a face covering. Ultimately, face coverings will be required to be worn by workers within cities that have passed mandatory mask mandates, even in the construction industry, unless one of the exemptions justifies nonuse.

The use of face coverings can be highly problematic in construction, and in many cases it is likely that the use of face coverings will be considered not to be industry best practice as it would increase an employee's exposure to a hazard or create a greater hazard to the employee. For example, facial coverings may obstruct vision or "steam up" safety glasses or regular glasses. Masks may also impact the employee's ability to perform safety-sensitive tasks. Masks may also create asphyxiation hazards if worn too tightly or improperly constructed on a homemade basis. Homemade face masks made of impermeable materials or face masks covered with mucus or saliva may excessively limit an employee's breathing, which can cause rebreathing of carbon dioxide or other infectious materials. Employees with respiratory or other underlying health conditions may be particularly susceptible to this hazard. Of course, a restriction of breathing of fresh air can also create an asphyxiation hazard. Caught-in-entanglement hazards may also arise and could create a greater hazard to employees if used. The ability to communicate may be diminished by the use of facial coverings, which would be detrimental for certain positions requiring detailed communications, such as in a control room where the use of facial coverings may be a safety hazard and not practical. Facial coverings may also exacerbate heat stress issues, and interfere with hydration practices that must often be maintained by workers in high-heat environments.

As outlined above, numerous circumstances exist where it is not industry best practice to use face coverings, and in fact, certain uses could increase the hazards to which workers are exposed. Thus, employers should consider the potential hazards and the impact of face coverings on those hazards to determine whether facial coverings should be mandatory for certain positions, certain individuals, or in a particular work environment. The justifications should be documented by the employer so that the rationale can be made available upon request from the state or city to justify the exemption to the mandatory mask mandate. Of course, if some employees are permitted to utilize the facial coverings and are exposed to hazards (that created the exception to the use), then the justification could appear to be pre-textual, so employers should carefully make these determinations based only on the available exemptions contained within the ordinances and orders.

It goes without saying that these mandatory mask mandates are problematic in many work environments, but especially for work crews that must perform certain operations outdoors or on a construction jobsite where the wearing of masks is not practical, whether due to safety or industry standard reasons. Based on several of the reasons outlined above, it may very well be the case that the required use of face coverings does not constitute industry best practice, and that the mandated use of face coverings, under certain circumstances, may create a greater hazard than noncompliance with the city ordinances and orders. Where use of face masks is deemed unsafe or creates a greater hazard than noncompliance with the mandatory mask mandates, employers should not require use of face coverings. Outside of those circumstances,

employers should require the use of face coverings where the use would be both mandatory and safe.

Needless to say, these most recent orders create compliance challenges for employers. While the above guidance will assist employers in dealing with these complicated issues, please be reminded that this is an overview of developing legal issues and is not intended to be and should not be construed as legal advice. If you desire assistance in determining whether your workforce is covered by a mandatory mask mandate, or if you wish to have written justifications for exemptions prepared, or if you or your business receive a fine related to these new ordinances, contact experienced labor and employment law attorneys **Bob Dunlevey** at rdunlevey@taftlaw.com (937) 641-1743 or **Nadia A. Lampton** at nlampton@taftlaw.com (937) 641-2055.