

SUMMARY OF THE LEGAL BASIS FOR FACE MASK MANDATES IN NEW YORK

1. The CDC guidelines expressly state that people with breathing problems should NOT wear a mask:

Who Should Not Wear a Mask

Masks should not be worn by:

- Children younger than 2 years old
- Anyone who has trouble breathing
- Anyone who is unconscious, incapacitated, or otherwise unable to remove the mask without assistance

See: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>

2. Governor Cuomo's executive order 202.17, as amended and extended through Executive Order No. 202.34, states as follows:

"NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of this Executive Order through June 27, 2020:

Business operators and building owners, and those authorized on their behalf shall have the discretion to ensure compliance with the directive in Executive Order 202.17 (requiring any individual over age two, and able to medically tolerate a face-covering, be required to cover their nose and mouth with a mask or cloth face-covering when in a public place), including the discretion to deny admittance to individuals who fail to comply with the directive in Executive Order 202.17 or to require or compel their removal if they fail to adhere to such directive, and such owner or operator shall not be subject to a claim of violation of the covenant of quiet enjoyment, or frustration of purpose, solely due to their enforcement of such directive. Nothing in this directive shall prohibit or limit the right of State and local enforcement authorities from imposing fines or other penalties for any violation of the directive in Executive Order 202.17. This directive shall be applied in a manner consistent with the American with Disabilities Act or any provision of either New York State or New York City Human Rights Law, or any other provision of law."

Based on the above, the executive order only applies to those "able to medically tolerate a face-covering." In addition, the executive order must be applied in a manner consistent with ADA and applicable law. Therefore, it cannot be applied in a manner that discriminates against an individual with a medical disability, i.e. it cannot be used to mandate an individual to wear a face covering, if he/she cannot medically tolerate a face covering.

3. Face coverings include cloth masks and any other type of covering, including a face shield.

The NY Department of Health's Interim Guidance on **Executive Order 202.16 Requiring Face Coverings for Public and Private Employees Interacting with the Public** During the COVID-19 Outbreak, dated April 14, 2020 states as follows:

- Face coverings include, but are not limited to, cloth (e.g. homemade sewn, quick cut, bandana), surgical masks, N-95 respirators, and face shields. Please visit the Centers for Disease Control and Prevention's "Coronavirus Disease 2019 (COVID-19)" [website](#) for [information](#) on cloth face covers and other types of personal protective equipment (PPE), as well as instructions on use and cleaning.

See also, Interim Guidance on Executive Orders 202.17 and 202.18 Requiring Face Coverings in Public During the COVID-19 Outbreak dated April 17, 2020

(https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_eo20217-20218publicfacecovering_041720.pdf) also states that masks include face shields:

"Face coverings include, but are not limited to cloth (e.g. homemade sewn , quick cut, bandana), surgical masks, N-95 respirators, and face shields."

4. No one has the right to request any medical information from an individual explaining his/her medical conditions that preclude her from wearing a mask. A customer entering a store without a mask must be allowed to enter if the customer states that they have a medical condition that precludes them from wearing a mask.

Interim Guidance on **Executive Orders 202.17 and 202.18** Requiring Face Coverings in Public During the COVID-19 Outbreak dated April 17, 2020 states that:

"...essential business operators and enforcement authorities are prohibited from requesting or requiring medical or other documentation from an individual who declines to wear a face covering due to a medical or other health condition that prevents such usage."

The NY DOH's guidance also states that:

"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."

5. Based on the above, there is no legal basis to apply a facial covering mandate that goes beyond the CDC's own recommendations and is not supported by Governor Cuomo's executive orders in that it forces an individual that is unable to medically tolerate a facial covering, to wear a facial covering.