

Face Coverings for COVID-19 Prevention

Effective: 4/22/22 – 6/20/22

Pursuant to the authority vested in the Public Health and Health Planning Council and the Commissioner of Health by Sections 201, 206, and 225 of the Public Health Law, Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by repealing Subpart 66-3 and repealing and replacing Section 2.60, to be effective upon filing with the Secretary of State, to read as follows:

Subpart 66-3 is hereby repealed.

Section 2.60 is repealed and replaced to read as follows:

2.60. Face Coverings for COVID-19 Prevention

(a) As determined by the Commissioner based on COVID-19 incidence and prevalence, as well as any other public health and/or clinical risk factors related to COVID-19 disease spread, any person who is two years of age or older and able to medically tolerate a face-covering may be required to cover their nose and mouth with a mask or face-covering when: (1) in a public place and unable to maintain, or when not maintaining, physical distance; or (2) in certain settings as determined by the Commissioner, which may include schools, public transit, homeless shelters, correctional facilities, nursing homes, and health care settings, and which may distinguish between individuals who are vaccinated against COVID-19 and those that are not vaccinated.

The Commissioner shall issue findings regarding the necessity of face-covering requirements at the time such requirements are announced.

(b) Businesses must provide, at their expense, face-coverings for their employees required to wear a mask or face-covering pursuant to subdivision (a) of this section.

(c) large-scale indoor event venues with more than five thousand attendees shall require patrons to wear face coverings consistent with subdivision (a) of this section; may require all patrons to wear a face covering irrespective of vaccination status; and may deny admittance to any person who fails to comply. This regulation shall be applied in a manner consistent with the federal Americans with Disabilities Act, New York State or New York City Human Rights Law, and any other applicable provision of law.

(d) No business owner shall deny employment or services to or discriminate against any person on the basis that such person elects to wear a face-covering that is designed to inhibit the transmission of COVID-19, but that is not designed to otherwise obscure the identity of the individual.

(e) For purposes of this section face-coverings shall include, but are not limited to, cloth masks, surgical masks, and N-95 respirators that are worn to completely cover a person's nose and mouth.

(f) Penalties and enforcement.

- (i) A violation of any provision of this Section is subject to all civil and criminal penalties as provided for by law. Individuals or entities that violate this Section are subject to a maximum fine of \$1,000 for each violation. For purposes of civil penalties, each day that an entity operates in a manner inconsistent with the Section shall constitute a separate violation under this Section.

- (ii) All local health officers shall take such steps as may be necessary to enforce the provisions of this Section accordance with the Public Health Law and this Title.

REGULATORY IMPACT STATEMENT

Statutory Authority:

The statutory authority for adding a new Section 2.60 is sections 201, 206, and 225 of the Public Health Law.

Legislative Objectives:

The legislative objective of PHL § 201 includes authorizing the New York State Department of Health (“Department”) to control and promote the control of communicable diseases to reduce their spread. Likewise, the legislative objective of PHL § 206 includes authorizing the Commissioner of Health to take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto and exercise the functions, powers and duties of the department prescribed by law, including control of communicable diseases. The legislative objective of Public Health Law § 225 is, in part, to protect the public health by authorizing PHHPC, with the approval of the Commissioner, to amend the State Sanitary Code to address public health issues related to communicable disease.

Needs and Benefits:

The 2019 Coronavirus (COVID-19) is a disease that causes mild to severe respiratory and other symptoms, including fever, cough, and difficulty breathing. People infected with COVID-19 have had symptoms ranging from those that are mild (like a common cold) to severe pneumonia that requires medical care in a general hospital and can be fatal, with a disproportionate risk of severe illness for older adults, those who have serious underlying medical health conditions and those who are unvaccinated.

On January 30, 2020, the World Health Organization (WHO) designated the COVID-19 outbreak as a Public Health Emergency of International Concern. On a national level, the Secretary of Health and Human Services determined on January 31, 2020 that as a result of confirmed cases of COVID-19 in the United States, a public health emergency existed and had existed since January 27, 2020, nationwide. Thereafter, the situation rapidly evolved throughout the world, with many countries, including the United States, quickly progressing from the identification of travel-associated cases to person-to-person transmission among close contacts of travel-associated cases, and finally to widespread community transmission of COVID-19.

Now, two years after the first cases were identified in the United States, the COVID-19 pandemic continues to impact New York State. Beyond the ongoing COVID-19 burden in communities, certain settings such as crowded indoor spaces, public transit, nursing homes, and health care settings, have been at increased risk for transmission. These regulations provide that masking may be required under certain circumstances, as determined by the Commissioner based on COVID-19 incidence and prevalence, as well as any other public health and/or clinical risk factors related to COVID-19 disease spread. The regulations are necessary to permit flexibility to allow the Department to quickly adapt to changing circumstances related to the spread of COVID-19 and increasing transmission rates.

COSTS:

Costs to Regulated Parties:

As part of ongoing efforts to address the COVID-19 pandemic, regulated parties have been a partner in implementing measures to limit the spread and/or mitigate the impact of COVID-19

within the state since March of 2020. Accordingly, this regulation does not impose additional costs to regulated parties.

Costs to Local and State Governments:

State and local government are authorized to enforce civil and criminal penalties related to the violation of these regulations, and there may be some cost of enforcement, however such costs are anticipated to be minimal as these provisions continue existing enforcement requirements.

Paperwork:

This regulation imposes no additional paperwork.

Local Government Mandates:

As part of ongoing efforts to address the COVID-19 pandemic, local governments have been partners in implementing and enforcing measures to limit the spread and/or mitigate the impact of COVID-19 within their jurisdictions since March of 2020. Further, local governments have separate authority and responsibilities to control disease within their jurisdictions pursuant to PHL § 2100 and Part 2 of the State Sanitary Code.

Duplication:

There is no duplication of federal law.

Alternatives:

The alternative would be to not promulgate these emergency regulations. However, this alternative was rejected, as the Department believes this regulation will facilitate the Department's ability to respond to the evolving nature of this serious and ongoing communicable disease outbreak.

Federal Standards:

States and local governments have primary authority for controlling disease within their respective jurisdictions. Accordingly, there are no federal statutes or regulations that apply to disease control within NYS.

Compliance Schedule:

The regulations will become effective upon filing with the Department of State and will expire, unless renewed, 60 days from the date of filing. As the COVID-19 pandemic is consistently and rapidly changing, it is not possible to determine the expected duration of need at this point in time. The Department will continuously evaluate the expected duration of these emergency regulations throughout the aforementioned 60-day effective period in making determinations on the need for continuing this regulation on an emergency basis or issuing a notice of proposed ruling-making for permanent adoption. This notice does not constitute a notice of proposed or revised rule making for permanent adoption.

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REGULATORY FLEXIBILITY ANALYSIS

Effect on Small Business and Local Government:

As part of ongoing efforts to address the COVID-19 pandemic, businesses and local government have been a partner in implementing measures to limit the spread and/or mitigate the impact of COVID-19 within the state since March of 2020. Accordingly, this regulation will not have a significant impact on or cost to small business and local government.

Compliance Requirements:

These regulations update previously filed emergency regulations to provide that masking may be required under certain circumstances, as determined by the Commissioner based on COVID-19 incidence and prevalence, as well as any other public health and/or clinical risk factors related to COVID-19 disease spread.

Professional Services:

It is not expected that any professional services will be needed to comply with this rule.

Compliance Costs:

As part of ongoing efforts to address the COVID-19 pandemic, regulated parties have been a partner in implementing measures to limit the spread and/or mitigate the impact of COVID-19 within the state since March of 2020. Accordingly, this regulation will not have a significant impact.

Economic and Technological Feasibility:

There are no economic or technological impediments to the rule changes.

Minimizing Adverse Impact:

As part of ongoing efforts to address the COVID-19 pandemic, regulated parties have been a partner in implementing measures to limit the spread and/or mitigate the impact of COVID-19 within the state since March of 2020. Accordingly, any adverse impacts are expected to be minimal.

Small Business and Local Government Participation:

Due to the emergent nature of COVID-19, small business and local governments were not consulted.

RURAL AREA FLEXIBILITY ANALYSIS

Type and Estimated Numbers of Rural Areas:

While this rule applies uniformly throughout the state, including rural areas, for the purposes of this Rural Area Flexibility Analysis (RAFA), “rural area” means areas of the state defined by Exec. Law § 481(7) (SAPA § 102(10)). Per Exec. Law § 481(7), rural areas are defined as “counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, and programs and such other entities or resources found therein. In counties of two hundred thousand or greater population ‘rural areas’ means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein.”

The following 44 counties have an estimated population of less than 200,000 based upon the 2019 United States Census county populations projections:

Allegany County	Greene County	Schoharie County
Broome County	Hamilton County	Schuyler County
Cattaraugus County	Herkimer County	Seneca County
Cayuga County	Jefferson County	St. Lawrence County
Chautauqua County	Lewis County	Steuben County
Chemung County	Livingston County	Sullivan County
Chenango County	Madison County	Tioga County
Clinton County	Montgomery County	Tompkins County
Columbia County	Ontario County	Ulster County
Cortland County	Orleans County	Warren County
Delaware County		

Essex County	Oswego County	Washington County
Franklin County	Otsego County	Wayne County
Fulton County	Putnam County	Wyoming County
Genesee County	Rensselaer County	Yates County
	Schenectady County	

The following counties of have population of 200,000 or greater, and towns with population densities of 150 person or fewer per square mile, based upon the 2019 United States Census population projections:

Albany County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	
Monroe County	Orange County	

Reporting, recordkeeping, and other compliance requirements; and professional services:

These regulations update previously filed emergency regulations to provide that masking may be required under certain circumstances, as determined by the Commissioner based on COVID-19 incidence and prevalence, as well as any other public health and/or clinical risk factors related to COVID-19 disease spread.

Compliance Costs:

As part of ongoing efforts to address the COVID-19 pandemic, regulated parties have been a partner in implementing measures to limit the spread and/or mitigate the impact of

COVID-19 within the state since March of 2020. Accordingly, this regulation does not impose additional costs to regulated parties.

Economic and Technological Feasibility:

There are no economic or technological impediments to the rule changes.

Minimizing Adverse Impact:

As part of ongoing efforts to address the COVID-19 pandemic, regulated parties have been a partner in implementing measures to limit the spread and/or mitigate the impact of COVID-19 within the state since March of 2020. Accordingly, adverse impacts are expected to be minimal.

Rural Area Participation:

Due to the emergent nature of COVID-19, parties representing rural areas were not consulted.

JOB IMPACT STATEMENT

The Department of Health has determined that this regulatory change is necessary to prevent further complete closure of the businesses impacted, and therefore, while there may be lost revenue for many businesses, the public health impacts of continued spread of COVID-19 are much greater.

EMERGENCY JUSTIFICATION

The 2019 Coronavirus (COVID-19) is a disease that causes mild to severe respiratory and other symptoms, including fever, cough, and difficulty breathing. People infected with COVID-19 have had symptoms ranging from those that are mild (like a common cold) to severe pneumonia that requires medical care in a general hospital and can be fatal, with a disproportionate risk of severe illness for older adults and/or those who have serious underlying medical health conditions.

On January 30, 2020, the World Health Organization (WHO) designated the COVID-19 outbreak as a Public Health Emergency of International Concern. On a national level, the Secretary of Health and Human Services determined on January 31, 2020 that as a result of confirmed cases of COVID-19 in the United States, a public health emergency existed and had existed since January 27, 2020, nationwide. Thereafter, the situation rapidly evolved throughout the world, with many countries, including the United States, quickly progressing from the identification of travel-associated cases to person-to-person transmission among close contacts of travel-associated cases, and finally to widespread community transmission of COVID-19.

Now, two years after the first cases were identified in the United States, the COVID-19 pandemic continues to impact New York State. Beyond the ongoing COVID-19 burden in communities, certain settings such as crowded indoor spaces, public transit, nursing homes, and health care settings, have been at increased risk for transmission.

To that end, these regulations provide that masking may be required under certain circumstances, as determined by the Commissioner based on COVID-19 incidence and prevalence, as well as any other public health and/or clinical risk factors related to COVID-19 disease spread. Based on the foregoing, the Department has determined that these emergency

regulations are necessary to permit flexibility to quickly adapt to changing circumstances and increasing transmission rates and control the spread of COVID-19, necessitating immediate action. Accordingly, pursuant to the State Administrative Procedure Act Section 202(6), a delay in the issuance of these emergency regulations would be contrary to public interest.

ASSESSMENT OF PUBLIC COMMENT

The Department of Health (“Department”) received well over 10,000 comments from members of the public. Given the extraordinarily high volume of comments received, the Department is still processing comments and will provide a detailed summary of all comments, along with responses, after a full assessment can be completed. Based on a preliminary review of the comments received, the majority of commenters expressed opposition to the emergency regulation and the use of face coverings more broadly. Commenters also questioned the effectiveness of masks and expressed frustration with being required to wear facemasks or having to enforce the masking requirement. Commenters also expressed concern that the emergency regulation circumvents the regulatory and legislative process. Commenters suggested that the Department allow the emergency regulation to lapse. This alternative was not incorporated into the emergency regulation because it would significantly undermine the Department’s ability to control the spread of COVID-19 and would render the emergency regulation ineffective. Based on the comments reviewed to date, the only change being made to this re-adoption of the emergency regulation is to clarify that masks may be required for persons “two years of age or older” instead of stating “over age two.”