Cullen | Dykman

Important Developments on Face Covering Requirements: Governor Cuomo Announces New Executive Order and Department of Health Issues Interim Guidance for Executive Order 202.16

April 16, 2020

New Executive Order

On Wednesday, April 15, 2020, Governor Cuomo announced the newest Executive Order aimed at preventing the further spread of the coronavirus ("COVID-19") within New York State. That same day, Governor Cuomo signed Executive Order 202.17 ("the Order"), which requires all New Yorkers over two years old and who are "medically able to tolerate a face-covering" to wear a mask or mouth/nose covering (collectively referred to here as a "face covering") while in public situations where social distancing is not or cannot be maintained. A face covering is therefore now required on public transit, in a grocery store, on a busy street, or in any other situation where an individual will be less than six (6) feet away from other people.

In light of the Order, New Yorkers should have a face covering with them whenever they leave the house. The Governor noted that if someone is walking down the street alone, the face covering would not have to be worn; however, once the individual was around other people, for example at a busy intersection, the covering would be required to be worn around the nose and mouth. The face covering can be a mask or cloth such as a bandana or scarf; the only requirement is that it must cover the nose and mouth.

New Yorkers are being given a three-day grace period to comply with the Order, which is set to go into effect on Friday, April 17, 2020 at 8 pm. The Governor stated that no fines would be issued at this time for noncompliance; however, the Order would be enforced by local government and fines or other penalties could be imposed in the future if there was widespread noncompliance.

The announcement of the newest Executive Order comes as the number of confirmed cases of COVID-19 in New York reached 213,779 and the number of deaths in New York State due to COVID-19 surpassed 11,500.

Additional Guidance Regarding Executive Order 202.16

The newly announced Order seems to be a natural progression of Executive Order 202.16, which was issued on Sunday, April 12, 2020. Executive Order 202.16 stated, among other directives, that effective Wednesday, April 15,

2020 at 8 pm, any employees of essential businesses who are present in the workplace must wear face coverings (to be provided by the employer, free of charge) “when in direct contact with customers or members of the public.” This directive would be enforced “as if it were an order pursuant to section 12 or 12-b of the Public Health Law,” which means that violators may be subject to civil fines or criminal penalties.

On April 14, 2020, the New York State Department of Health issued Interim Guidance on Executive Order 202.16 (“Interim Guidance”) specifically directed at the face covering requirement. The Interim Guidance stated that, in addition to essential businesses, state and local government agencies were also covered by the Executive Order’s requirement. Further, essential business must also provide face coverings to contractors, including independent contractors.

Notably, the Interim Guidance clarified the meaning of terms, such as “face covering,” which were not defined in Executive Order 202.16. The Interim Guidance states that “[f]ace coverings include, but are not limited to, cloth (e.g. homemade sewn, quick cut, bandana), surgical masks, N-95 respirators, and face shields.” Regarding “direct interaction,” the Interim Guidance states that “[d]irect 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.”

Under the Interim Guidance, an employee is permitted to use his or her own face covering but cannot be required by the employer to do so. The Interim Guidance also discusses an employer’s options if an employee is unable to wear a face covering. In this regard, “[e]mployees 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.” However, if an employee is unable to wear a face covering and is “susceptible to COVID-19 based on the ‘Matilda’s Law’ criteria (i.e. individuals who are 70 years of age or older, individuals with compromised immune systems, and individuals with underlying illnesses)”, the employee should consult with his or her employer to discuss reasonable accommodations such as different personal protective equipment ("PPE"), an alternate work location, or an alternate work assignment.

Finally, if the employer cannot obtain face coverings for its employees, it may contact the local office of emergency management and, if sufficient supplies are available, can submit a request to receive face coverings. Importantly, “[n]ot being able to source face coverings does not relieve an employer’s obligation to provide such face coverings to their employees.”

Further Information

We will continue to update this as more information becomes available. In the meantime, if you have questions regarding any aspects of employment law and/or the implications of the coronavirus on your place of business, feel free to contact Thomas B. Wassel at (516) 357-3868 or via email at **twassel@cullenllp.com**, James G. Ryan at (516) 357-3750 or via email at **jryan@cullenllp.com**, or Hayley B. Dryer at (516) 357-3745 or via email at **hdryer@cullenllp.com**.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Practices

- Labor and Employment