

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

FEBRUARY 10, 2022

NYDOL Clarifies Face Covering Requirements Under NY HERO Act

On the evening of Feb. 9, 2022, the NYS Department of Labor updated its [Model Airborne Infectious Disease Exposure Prevention Plans](#) again. Earlier on the same day, New York Gov. Hochul [announced an end to the statewide mask mandate](#) (commonly referred to as the “vax-or-mask” rule), effective Feb. 10, 2022.

With respect to face coverings, the new model plan replaces the prior language with respect to face coverings with the following:

Effective February 10, 2022: Employees will wear appropriate face coverings in accordance with guidance from State Department of Health or the Centers for Disease Control and Prevention, as applicable. Consistent with the guidance from the State Department of Health, if indoor areas do not have a mask or vaccine requirement as a condition of entry, appropriate face coverings are recommended, but not required. It is also recommended that face coverings be worn by unvaccinated individuals, including those with medical exemptions, in accordance with federal CDC guidance. Further, the State’s masking requirements continue to be in effect for pre-K to grade 12 schools, public transit, homeless shelters, domestic violence shelters, correctional facilities, nursing homes, health care, child care, group homes, and other sensitive settings in accordance with CDC guidelines. New York State and the State Department of Health continue to strongly recommend face coverings in all public indoor settings as an added layer of protection, even when not required.

This change indicates that the State is **not** requiring employers to mandate employees to wear masks, unless the setting is specifically referenced in the language cited above (hospitals, nursing homes, pre-K to grade 12 schools, etc.). However, the guidance still emphasizes that at this time masking in all indoor settings is still “strongly recommended.”

It is also worth noting that despite the changes in the model plans, the regulations have not been changed and still provide, in relevant part, “*The employer shall require that employees wear appropriate face coverings when physical distancing cannot be maintained and in accordance with applicable guidance from State Department of Health or the Centers for Disease Control and Prevention, as applicable.*”

Ultimately, employers have a few options:

- If an employer’s workplace is specifically enumerated in the new HERO Act model plan (pre-K to grade 12 schools, public transit, homeless shelters, domestic violence shelters, correctional facilities, nursing homes, health care, child care, group homes and other sensitive settings as provided by CDC guidance), they must continue to require employees to wear masks.
- If an employer’s workplace is not in one of these enumerated categories, then it appears the employer is not required to mandate employees to wear masks under the NY HERO Act.

- An employer may choose to continue to follow current NYSDOH and [CDC guidance](#) on masking, which currently recommends:
 - individuals who are not “up to date” with COVID-19 vaccines to wear masks indoors; and
 - all individuals, regardless of vaccination status, to wear masks in indoors in public when in an area of “high or substantial transmission.”

The NY HERO Act [designation](#) with respect to COVID-19 continues to be in effect through Feb. 15, 2022, at which time it will be reviewed and subject to renewal. As such, employers must continue to keep their NY HERO Act Airborne Infectious Disease Exposure Prevention Plans in place until the designation is no longer in effect. The designation refers to the CDC’s classifications of [levels of transmission](#). The designation indicates that the NYS Commissioner of Health will review the level of transmission in New York to determine whether or not to extend the designation. As of the date of this article, New York (and most of the nation) is classified as an area of “high” transmission.

If you have any questions or need Bond’s help, please contact [Andrew D. Bobrek](#), [Stephanie H. Fedorka](#), [Adam P. Mastroleo](#), any attorney in Bond’s [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.

