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LEGAL UPDATE

August 30, 2021

To: Superintendents, Member School Districts (K-12)
From: Jennifer Henry, Associate General Counsel *J.H.*
Subject: CDPH Toughens Stance on K-12 Mask Mandates; and
Masking FAQs
Memo No. 28-2021

On August 23, 2021, the California Department of Public Health (“CDPH”) issued its “Requirement for Universal Masking Indoors at K-12 Schools.”¹ The CDPH states: “To be clear: failure to enforce the mask requirement breaches not only a legal duty, but also the first and foremost duty of every school leader—to protect students.”

CDPH reiterates and clarifies that it’s updated August 2, 2021, Guidance for K-12 Schools universally required indoor masking for students and adults, with some exceptions, as well as required schools to “develop and implement local protocols to enforce the mask requirements.”² In short, while Local Educational Agencies (“LEAs”) have flexibility over how to enforce the mask requirement, they do not have the discretion to opt out of enforcing the mask mandate.

The CDPH then outlines several legal risks schools take by not enforcing the mandate, which include financial liability if a student or staff member dies as a result of failure to enforce the mask mandate, civil lawsuits, Commission on Teacher Credentialing (“CTC”) disciplinary action for administrators, and fines or civil enforcement actions by local health officers.

Frequently Asked Masking Questions:

Is there an outdoor mask mandate?

Although the CDPH is currently saying masking is optional outdoors in K-12 settings, your county may be stricter. For Sonoma County districts, please note that as of August 23, 2021, the Sonoma County Department of Health Services and the Sonoma County Office of Education are now jointly “strongly recommending” outdoor masking in most school settings. Socially distanced outdoor mask breaks are acceptable.

¹<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Requirement-for-Universal-Masking-Indoors-at-K-12-Schools.aspx>.

²<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx>.



What types of masks are required?

The CDPH does not designate which type of face coverings are required. The CDPH recommends (but does not mandate) specific types of masks in its June 21, 2021 “Get the Most out of Masking” website post.³ If N95 masks are not available or feasible, a three-layer cloth mask, a fitted surgical mask, or a disposable mask doubled with a cloth mask are recommended. The CDPH does not recommend cloth masks with less than 3 layers, bandanas, or gaiters. Similarly, Cal-OSHA COVID-19 Emergency Temporary Standards (“ETS”), which apply to all employees, do not consider bandanas, gaiters, or single layers of fabric to be a sufficient “face covering.”⁴

Does the District have to provide masks?

Schools must provide a face covering to students who forget to bring one.⁵ For employees, Cal-OSHA’s ETS states that “employees can request face coverings from the employer at no cost to the employee.” (ETS, Section 3205(c)(5)(J)).

How to respond to students who refuse to mask:

If the parent provides documentation from a licensed medical professional that substantiates a disability, engage in the interactive process.⁶ Students without a documented disability who refuse to mask should be subject to the LEA’s enforcement protocols that schools are required to adopt. CDPH also notes that “schools should offer alternative educational opportunities for students who are excluded from campus because they will not wear a face covering” and “public schools should be aware of the requirements in AB 130 to offer independent study programs for the 2021-22 school year.”⁷

How to respond to employees who refuse to mask:

If the employee provides documentation from a licensed medical professional that substantiates a disability, engage in the interactive process. Employees without a documented disability, who refuse to mask that share indoor space with students (or elsewhere if county rules require it), should be subject to the LEA’s enforcement protocols that schools are required to adopt. This may include progressive discipline for failure to follow orders.

Verified medical exemption for mask wearing:

As per the August 2, 2021, CDPH Guidance:

- c. Persons exempted from wearing a face covering due to a medical condition, must wear a non-restrictive alternative, such as a face shield with a drape on the bottom edge, as long as their condition permits it.

Please contact our office with questions regarding this Legal Update or any other legal matter.

³ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Get-the-Most-out-of-Masking.aspx>.

⁴ <https://www.dir.ca.gov/oshsb/documents/Jun172021-COVID-19-Prevention-Emergency-apprvdtx-Readoption.pdf>. Section 3205(b)(8)

⁵ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx>. Section 1d

⁶ Through a meeting held in accordance with Section 504 of the Rehabilitation Act of 1973 (“Section 504”) or an Individualized Education Program (“IEP”) meeting held in accordance with the Individuals with Disabilities Education Act (“IDEA”).

⁷ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx>.



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The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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