

***FHMS COVID-19 Resource Center:***

**LIMITED IMMUNITY FOR PA BUSINESSES ENFORCING MASK MANDATE**

We previously reported on efforts to obtain limited immunity from COVID-19 exposure claims for businesses in compliance with guidelines [here](#). On November 23, 2020, Pennsylvania Governor Tom Wolf issued a new [Order for Mitigation, Enforcement, and Immunity Protections](#) that incorporated the Pennsylvania Secretary of Health's [Updated Order Requiring Universal Face Coverings](#), effective November 18, 2020.

*Limited Immunity:*

Section 14 of the Order for Mitigation, Enforcement, and Immunity Protections provides limited immunity for certain individuals and entities when enforcing the Updated Order Requiring Universal Face Coverings. Effective November 27, 2020, business (including nonprofit) and restaurant owners and employees are considered to be engaged in the essential emergency services activities when enforcing the Updated Order Requiring Universal Face Coverings, discussed below. Under that classification, such entities are entitled to immunity from civil liability pursuant to 35 Pa. C.S. § 7704(a) of the Emergency Management Services Code, except in cases of willful misconduct, gross negligence, recklessness, or bad faith. Also, the immunity does not apply to liability of employers with respect to their employees or activities that are outside the scope of the limited immunity.

*Overview of Universal Face Coverings Requirements:*

The Universal Face Coverings Order expands the statewide requirements for wearing a mask or other face covering. Every individual, age two and older, is required to wear a face covering in almost every indoor setting and in most outdoor settings. Face coverings are required indoors or in enclosed spaces where there are persons who are not of the same household present in the same space, including gyms; fitness centers; waiting for or riding in or on public transportation, paratransit, taxi, private car service, or ride-sharing vehicle; health care sector settings including hospitals, pharmacies, medical clinics, laboratories, physician or dental offices, veterinary clinics, or blood banks; and in any space where food is prepared or packaged. Certain facilities, including hospitals, shelters, long-term care facilities, residential treatment facilities, and correctional facilities, may require visitors and residents, patients, or inmates to wear face coverings even when in a living unit. Face coverings are also required outdoors when members of different households are present and unable to maintain sustained physical distance.

For the purposes of the Order, a "face covering" is defined as a "covering of the nose and mouth with material that is secured to the head with ties, straps, or loops over the ears or is wrapped around the lower face." A plastic face shield is considered an alternative to a face covering and should be an option when a cloth face covering is not otherwise feasible. The order also defines "sustained physical distance" as "the practice of staying at least six feet away from others to avoid becoming a close contact". There are multiple factors promulgated by the Center for Disease Control (CDC) as to when someone becomes a close contact, including duration of contact, whether the person is exhibiting symptoms of the virus, and environmental conditions like crowds or inadequate ventilation.

The requirement to wear a face covering has limited exceptions, mainly for health and safety reasons. If wearing the covering would create an unsafe condition in which to operate equipment or execute a task, or if the covering would cause a medical condition or exacerbate an existing condition, the covering does not need to be worn. In addition, coverings are not required when seeing a person's entire face is necessary to confirm an individual's identity or is essential for communication, such as with a hearing-impaired person. Finally, face coverings are not required while obtaining a service that requires the removal of the covering, such as dental services, or where a person works alone and isolated from other people with little or no expectation of in-person interaction.

The Universal Face Coverings Requirement Order imposes specific obligations on businesses and schools. The Order defines school entities but leaves open for interpretation which entities fall under a "business" for the purposes of the Order. Businesses must require all people, including employees, customers, and visitors to wear a face covering and take reasonable steps to enforce the requirement. They must mitigate or eliminate employee, visitor and customer exposure to people who cannot, or refuse to, wear a face covering. They must post prominent signs that are visible to all people stating that face coverings are required by Order of the Secretary of Health. They may not enforce face covering requirements when it is unsafe or illegal to do so. Businesses should not restrain, assault, use force, or physically remove individuals who refuse to comply with the Order when it is not otherwise legal to do so, and they may not violate other laws, including state and federal anti-discrimination laws.

Finally, businesses must make reasonable accommodations to people who state they have a medical condition, mental health condition, or disability that makes it unreasonable for them to wear a face covering. Businesses are permitted to decline services to individuals not wearing a face covering, so long as they attempt to provide a reasonable accommodation. Reasonable accommodations for the purpose of the Order include the use of a face shield or providing service options that do not require a customer to enter the business, which may include offering curbside pickup, or other innovative solutions.

#### *PA Governor Vetoes Bill Providing Immunity from COVID-19 Liability:*

On November 30, 2020, Governor Wolf vetoed [HB 1737](#), which would have provided limited immunity to businesses permitted to be open during a from claims for "damage to property or personal injury, related to an actual or alleged exposure to COVID-19, absent a showing, by clear and convincing evidence, or gross negligence, recklessness, willful misconduct, or intentional infliction of harm." Any act or omission in compliance with public health directives would not be considered gross negligence, recklessness, willful misconduct, or intentional infliction of harm. The limited immunity would not prevent an employee from pursuing a workers' compensation claim against his or her employer. The bill also sought to extend immunity to schools, day cares, certain healthcare providers, and manufacturers, suppliers, and distributors of personal protective equipment.

Although the Pennsylvania Senate and House of Representatives passed the bill, it was vetoed by Governor Wolf. Accordingly, the only immunity from COVID-19 claims in Pennsylvania comes from the executive orders issued in May 2020, providing immunity to certain healthcare providers as discussed [here](#), and the November 2020 order discussed above.

#### *Additional Resources:*

- A guide to all legislative activity related to **workers' compensation** can be found [here](#).
- A guide to all legislative efforts to provide immunity for **manufacturers, healthcare providers, and businesses** can be found [here](#).
- Our article on mask policies and legal considerations for businesses can be found [here](#).

FHMS is closely monitoring the claims related to COVID-19 filed against businesses and are prepared to defend them. Information about those cases, efforts to obtain immunity from such claims, and more, can be found in our [FHMS COVID-19 Resource Center – Premises Liability](#). As always, we are available to discuss your questions or concerns. Please do not hesitate to contact us.

**Fowler Hirtzel McNulty & Spaulding, LLP**

*COVID-19 Resource Team*

Jacqueline E. Campbell, Esquire  
[jcampbell@fhmslaw.com](mailto:jcampbell@fhmslaw.com)  
215-789-4844

Zoe A. Otway  
[zotway@fhmslaw.com](mailto:zotway@fhmslaw.com)  
267-570-3400

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