

CLIENT NEWS BRIEF

Questions Remain Regarding Face Coverings in Schools

As California's local educational agencies (LEAs) examine how and when schools can reopen, a frequent question has been the extent to which face coverings will be required for staff and students. While there have been numerous questions and some confusing guidance from the California Department of Public Health (CDPH), the issue has come more into focus with the latest guidance. Based on the July 17 CDPH "COVID-19 Industry Guidance: Schools and School-Based Programs," school staff will be required to wear masks absent particular exceptions, as will students of particular age groups, again subject to specified exceptions.

Background Information

Governor Newsom has issued various executive orders directing California residents to conform to guidance issued by State health officials. The Governor's orders establish that public health "directives" automatically include an enforceable order to comply.

Employees

As a result of guidance from the California Department of Public Health (CDPH), school employees will be required to wear face coverings in most circumstances. The July 17 CDPH guidance states that "[a]ll staff must use face coverings in accordance with CDPH guidelines unless Cal/OSHA standards require respiratory protection." This appears to put to rest the question of whether staff will be required to wear masks.

The July 17 guidance includes a link to prior CDPH guidance dated June 18. The June 18 guidance required face coverings for Californians in "high-risk situations." The list of "high-risk situations" expressly includes people who are working, and who are interacting, with members of the public; working in any space visited by the public, regardless of whether anyone from the public is present at the time; working in spaces where food is prepared for distribution to others; or working in or walking through common areas, or in any room or enclosed area where other people are present when unable to physically distance. To the extent that students may be considered "members of the public" within the meaning of the CDPH, the June 18 CDPH guidance seems to require teachers to wear face coverings in their classrooms at all times, even when they are alone. LEAs may wish to consult with their attorneys regarding that specific issue.

The June 18 guidance also includes specific exemptions from the face covering requirement, including persons with a medical condition or disability that prevents them from wearing a face covering; persons who are hearing impaired, or communicating with a person who is hearing impaired, where the ability to see the mouth is essential for communication; and persons who are engaged in outdoor work when they are able to maintain a distance of at least six feet from others, among other circumstances. LEAs should provide an opportunity for employees to request a reasonable accommodation, and engage in the

July 2020
Number 59



Harold M. Freiman
Partner
Walnut Creek Office
hfreiman@lozanosmith.com



Sophia V. Cohn
Associate
Walnut Creek Office
scohn@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

July 2020
Number 59

interactive process, if they feel they are unable to wear a mask. If engaged in the interactive process, it is important to recognize that the question of whether a face covering is an essential function of an employee's job is open for debate.

Students

In his July 17, 2020 press conference, Governor Newsom stated "all staff and students in third grade and above must wear masks." That requirement is reflected in the July 17, 2020 CDPH guidance for schools, which provides the most direction to date regarding student use of face coverings in schools. The document states that children under two years old are not required to wear face coverings; children two years old through second grade are "strongly encouraged" to wear face coverings; and children in third grade through high school are required to wear face coverings, unless exempt.

The recent guidance additionally states the following:

In order to comply with this guidance, schools must exclude students from campus if they are not exempt from wearing a face covering under CDPH guidelines and refuse to wear one provided by the school. Schools should develop protocols to provide a face covering to students who inadvertently fail to bring a face covering to school to prevent unnecessary exclusions. School should offer alternative educational opportunities for students who are excluded from campus.

The guidance is silent on the type of alternative offerings, but they may potentially include distance learning or independent study. (For information regarding distance learning issues raised by recent legislation, see [CNB No. 56](#).)

The July 17 guidance provides qualifiers for wearing face coverings, including anyone who has trouble breathing; anyone who is unable to remove the face covering without assistance; for meals and snacks; and during naptime and recreation. The guidance refers back to the prior guidelines, indicating that they are still in effect. While the July 17 document uses strong language indicating a legal mandate, and the Governor has referred to the guidance as a mandate, the document itself includes qualifiers. The guidance states that "[a]ll guidance should be implemented only with county health officer approval following their review of local epidemiological data including cases per 100,000 population, rate of test positivity, and local preparedness to support a health care surge, vulnerable populations, contact tracing, and testing." Also, the document is titled "Guidance," further bringing into question its binding effect. LEAs continue to wait for the CDPH to indicate with greater clarity that their guidance is indeed intended as a mandate.

To the extent that there remains an unresolved question regarding whether the use of masks by students as set forth in the most recent guidance is a mandate, it is noteworthy that the July 17 CDPH guidance does "require" cloth face coverings for students while at school, whereas the prior guidelines limited themselves to "recommending" and "encouraging" coverings. CDE's prior recommendations, issued on June 8, 2020, combined with both prior CDPH guidance and the most recent guidance of July 17, 2020, lead to the likely conclusion that students should be required to wear face coverings, subject to the indicated exceptions. Regardless of the legally binding effect of these various recommendations and guidelines, they can be taken together to establish a standard of care that could be cited by aggrieved individuals seeking to establish liability against an LEA for failure to comply with that standard.

As an additional consideration, school districts may need to review and possibly revise or suspend any existing Board Policies restricting the use of face coverings.

Takeaways

From a safety and liability perspective, the more precautions an LEA can take, the better, which could include requiring everyone (including students of an appropriate age) to wear face coverings while in school, unless particular, narrow

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

July 2020
Number 59

exceptions apply, such as health conditions that limit the wearing of a mask, or the other exceptions addressed in the July 17 guidance.

If you have any questions about school reopening plans, including the use of face coverings, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.