

No Longer Taken at Face Value: Executive Order 7NNN and the New Requirement for Medical Documentation from Non-Mask Wearers (and What It Means to Connecticut's Employers)

Working Together

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Back on April 17, 2020, Governor Lamont issued Executive Order 7BB generally requiring persons to wear “face-coverings” (e.g., masks) in public. The Order created an exemption to the obligation to use a mask or cloth face covering for, among others, anyone for whom doing so would “be contrary to his or her health or safety because of a medical condition”. Creating a significant loophole, the Order provided that a person declining to wear a mask or face covering because of a medical condition could **not** be required to produce medical documentation verifying the stated condition. That loophole has just been closed.

Executive Order 7NNN's General Command: Late on Friday, August 14, 2020, Lt. Governor Bysiewicz (in Lamont's absence) issued Executive Order 7NNN, which took effect immediately and amends the prior Order. Executive Order 7NNN continues that prior requirements that 1) any person in a public place in Connecticut (whether indoors or outdoors) who does **not** maintain a safe social distance of approximately six feet from every other person must cover their mouth and nose with a mask or cloth face-covering, and 2) persons wear such coverings whenever using the services of a taxi, car, livery, ride-sharing or similar service, or any means of mass public transit, or while within any semi-enclosed transit stop or waiting area.

Executive Order 7NNN's Exceptions: Executive Order 7NNN contains exemptions to the obligation to wear a mask for 1) anyone for whom doing so would be contrary to his or her health or safety, because of a medical condition, 2) a child in a child care setting, or 3) anyone under the age of 2 years. Interestingly, the general exemption contained in Executive Order 7BB for a child whose parent or guardian is unable to place a mask safely on the child's face is NOT contained in Executive Order 7NNN. More importantly, Executive Order 7BB expressly provides that any person who declines to wear a mask or face covering because of a medical condition shall now be exempt from the mask mandate **only** if such person provides “written documentation

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that the person is qualified for the exemption from a licensed medical provider, the Department of Developmental Services or other state agency that provides or supports services for people with emotional, intellectual or physical disabilities, or a person authorized by any such agency." Such documentation need not name or describe the condition that qualifies the person for the exemption.

Implementation and Enforcement of Executive Order 7NNN: Executive Order 7NNN requires the Commissioner of the Department of Economic and Community Development ("DECD") to issue updated versions of its "Sector Rules", "Safe Workplace Rules for Essential Employers," and other rules issued pursuant to previous executive orders with respect to the requirement to wear masks in these various settings. Executive Order 7NNN also expressly provides that it supersedes and preempts any current or future conflicting municipal order. Finally, Executive Order 7NNN does **not** specify a direct consequence for disobedience of this new requirement, likely leaving the enforcement up to localities, although prior DECD guidance specifically empowered entities to refuse service to anyone not wearing a mask. Executive Order 7NNN states that it will remain in effect for six months, even though the current State of Emergency is set to expire on September 9, 2020.

What Does This Mean for Employers? Previously, work place policies addressing the mask mandate had to tip toe around the need for some level of verification for those claiming the medical exemption to this mandate. We had often urged something akin to an interactive process with such employees, understanding that while an employer could at least 1) require employees to notify it of the fact that they would not be wearing a mask due to a medical reason, and 2) have a conversation with the employee to understand the basis of the employee's objection to wearing a mask, the employer could not require the employee to provide medical documentation to support the exemption. Executive Order 7NNN not only permits an employer to seek supporting documentation, it now essentially requires it to secure such documentation. The DECD has already revised its various "sector rules" to provide that employees "that cannot wear a mask due to a medical condition must provide documentation to their employer." Allowing an employee to avoid wearing a mask for a medical condition without supporting medical documentation would put the employer in violation of Executive Order 7NNN and the various DECD sector rules, exposing the employer to possible enforcement actions, along with possible claims of an unsafe workplace.

It goes without saying that any supporting medical documentation (and information therein) submitted by an employee must be afforded confidentiality consistent with state and federal law. It is important to note that Executive 7NNN expressly provides that the documentation need NOT get into the details of the medical condition qualifying the employee for the mask exemption. This lack of information may make it more difficult for an employer to seek or obtain a "second opinion" from a medical professional of its choosing should it disagree with the documentation provided by the employee.

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Pullman & Comley has policy templates and other useful resources available to aid employers in navigating the confusing web of executive orders, laws, regulations, and other guidance related to COVID-19. If your organization is unsure about its obligations under the FFCRA or other COVID-19 guidance, please contact any of our Labor and Employment Law attorneys for assistance.

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