



## **COVID-19 FOR COPS LOCAL FACE MASK LAWS**

Issued April 28, 2020 – May be copied and circulated without limitation

### ***Local face mask ordinances and bylaws — police role***

- 1. A local Board of Health (BOH) may enact an emergency regulation requiring that citizens wear face masks.** During this state of emergency for COVID-19, a local BOH is undeniably empowered to enact its own emergency regulation provided it is not inconsistent with the Governor's orders. See 111, §§ 31 and 122 (local regulations may deal with contagious disease).<sup>1</sup>

While the Commissioner of Public Health has “urged” that people maintain “social distance,” wash their hands, and “practice proper respiratory etiquette,” she has *not* mandated face masks *or* prohibited a local BOH from regulating this activity.<sup>2</sup> As a result, a local BOH may issue a face mask mandate.

- 2. Police commanders should immediately get a copy of any emergency regulation enacted by the BOH.** Read it and consult with your BOH to answer basic questions:

- **Are my officers explicitly given an enforcement role?** Sometimes the local law will place enforcement responsibilities exclusively with BOH officials or “agents.” If it refers to “agents” (like alcohol enforcement sometimes does), you will need to get officers designated (I recommend in writing) if they are going to help with enforcement. Sometimes the regulation explicitly mentions police authority.<sup>3</sup>
- **Did the BOH issue an advisory or a regulation? And, if it's a regulation, what is the penalty?** Sometimes the BOH might issue an “advisory” — which is the legal equivalent of “We really think this is a good idea and hope you will voluntarily comply” — versus a “regulation,” which insists on compliance (i.e., “You don't have a choice. Do this!”). At the same time, even a regulation may have a variety of possible responses and/or penalties. The regulation may say the BOH can enforce, but then mandate only a warning or education class. Or the regulation may require that the BOH get an injunction or hold a hearing before imposing a fine. In short, be clear about the method of enforcement. Typically, it will be a civil fine authorized by the procedure in 40, § 21D,<sup>4</sup> which officers will recognize from their civil marijuana enforcement efforts.

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<sup>1</sup> Today, the Boston Globe had a front page article discussing Somerville's “face mask” regulation.

<sup>2</sup> See § 15 of DPH Revised Guidance issued March 31, 2020.

<sup>3</sup> See § 8 of the Town of Essex BOH regulation, which appears as Attachment A to this bulletin.

<sup>4</sup> Id. at §§ 9 and 10.

- **What specific behavior is prohibited?** Some local regulations require that face masks be worn in any public area, including while driving a car. Others cover public and private areas. Other regulations only require that a face mask be worn if the citizen enters a public building. Some have separate provisions mandating that employers provide masks to workers in proximity to each other and the public.

**3. Police commanders and supervisors should explain the local law, enforcement mechanism, and policy to all personnel.** Here are a few simple recommendations:

- **Keep it short.** You can do a Zoom chat, roll call presentation, or video talk in 5 to 10 minutes.
- **Train everyone — dispatchers, administrative support personnel, custodians, detectives, officers.** Anyone who works for your department is going to be asked about the policy. For example, dispatchers need to be able to quickly explain the face mask rules over the phone. Any employee can encourage compliance in the community, which supports the idea of departments informing every staff member of the new rules. Wide communication makes a difference.
- **Emphasize education as the primary response.** The default response for officers: Education, education, education.<sup>5</sup> People may not be aware of the local rule or, for a variety of emotional reasons, may fail to comply. It's easy for officers (and all of us!) to assume that someone is deliberately defiant. Keep the contact positive — “Excuse me, are you aware of our local face mask law?” — and then go from there. Issue a warning if the citizen needs a stronger message. Save the fine for the extreme case or multiple offender.
- **Keep a box of masks in each cruiser.**<sup>6</sup> Instead of issuing a ticket, officers can help a citizen immediately comply with the local law. [It's like those great cops who let an unregistered motorist go on the RMV website and register their car on the side of the road!] This is a simple, positive method to gain compliance. Interestingly, for weeks now, police officers from around the country have been passing out masks to citizens when responding to calls for service.<sup>7</sup>
- **Set a good example!** If your officers and staff practice “social distancing” and wear face masks, it goes a long way toward educating the community. It also prevents and deflects criticism of the department when officers need to issue a money fine — or even arrest someone for a pandemic-based crime.

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<sup>5</sup> I forgot. What were the three rules about “fight club”?!

<sup>6</sup> There are basically two kinds of masks: (1) N-95 masks afford officers and other first responders protection from a person with the virus (as do face shields); (2) surgical masks and cloth face-covers do not. The surgical masks and face-covers offer some protection to others from droplets that an officer or civilian may be distributing. They reduce the chance of infecting someone else. On the other hand, N-95 masks also protect the people who wear them.

<sup>7</sup> See COVID-19 Daily Report of April 15, 2020 from the Police Executive Research Forum (PERF).

- **Provide officers with a copy of the regulation and explain the enforcement process.** When the marijuana law changed, I taught thousands of officers how to specifically write a ticket for any civil infraction. It was assumed that officers knew the process, but most didn't. And they felt uncomfortable asking for clarification. Cops deserve to be confident before they are placed in difficult, unfamiliar situations.

### ***Learning from the Essex face mask regulation<sup>8</sup>***

**What does the Essex emergency regulation prohibit?** You can see the two-page regulation at Attachment A. It was enacted on April 23, and it requires that all members of the public “wear a cloth face covering . . . over [their] nose and mouth” when entering any place open to the public. The regulation goes on to specify that it applies to people waiting for takeout food both inside and outside an establishment. It also directs all establishments open to the public to post a sign about the face mask rule. In addition, employees of essential businesses open to the public must wear their own mask or one provided by their employer. Finally, any resident or member of the public must wear a mask in common areas *and* practice social distancing in a residential or commercial building with more than one unit.

Notice how there are several distinct provisions in what, at first glance, seems like a simple two-page regulation! You will also notice that BOH officials and police officers are given enforcement authority to issue \$300 civil tickets.

**How will a police officer enforce this “face covering” regulation?** It bears repeating: The vast majority of violations should be handled through education, assistance, and warning.

But what if our fictitious officer, Patricia Police, tries the soft approach with Johnny Contagion at the local restaurant, Alice's Seafood Shack?<sup>9</sup> Johnny is loudly uncooperative and refuses to use a mask that Officer Police calmly offers him. Other citizens are watching the interaction. The majority clearly object to Johnny's behavior. Will the officer vindicate their concerns about our collective public health? Some are curious — maybe even amused. Will Johnny show that this regulation is the town joke some citizens say it is?

Officer Patricia Police decides to issue a ticket. Johnny reluctantly provides his identification. See the officer's ticket at Attachment B.

Because this is a novel area of local law, Officer Police also writes a brief police report to educate the town clerk when her ticket is filed and/or appealed. A template for any local officer involved in this type of situation appears as Attachment C. Her report states:

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<sup>8</sup> Special thanks to Chief Paul Francis and Sergeant Thomas Shamshak from Essex, who helped me understand the issues.

<sup>9</sup> This is a fictitious scenario for educational purposes only.

Pursuant to the Governor's emergency order and guidance from the Commissioner of Public Health (DPH), the Essex Board of Health (BOH) is allowed to enact local regulations that are not inconsistent with state guidance concerning the COVID-19 pandemic. The Essex BOH on April 23, 2020 enacted an emergency order effective on April 24 at 12:01 a.m.

All individuals in public must wear a cloth face cover over their nose and mouth when entering or outside of a restaurant waiting for takeout food. This regulation authorizes Essex Police enforcement by issuing a local bylaw ticket with a civil fine of \$300.

On April 28, 2020 at 12:00 p.m., I, Officer Patricia Police, encountered Mr. Johnny Contagion at Alice's Seafood Shack, 31 Main Street, waiting to receive a takeout order. Mr. Contagion was not wearing a face cover as required by the emergency regulation. I explained the law to Mr. Contagion and offered to provide him with a mask from my cruiser. He refused to comply. I then issued him local bylaw ticket IR# 20731 in the amount of \$300.

There were seven people waiting in line for food, not including restaurant staff.

***Last resort criminal enforcement***

BLATANT BEHAVIOR	CRIME
<p><b><i>Coughing, getting close to others in a way that causes alarm, annoyance or inconvenience</i></b> (emphasize public reaction to bad behavior).</p>	<p><b><i>Disorderly Conduct</i></b> (272, § 53). The behavior creates a "hazardous condition" for no legitimate purpose. Right of arrest: 272, § 54 authorizes "in presence" warrantless arrest. See <i>LED Criminal Law, Chapter 23</i>.</p>
<p><b><i>Intentionally touching, spitting, or coughing on another person</i></b> (no need for person to be positive for COVID-19).</p>	<p><b><i>A&amp;B</i></b> (265, § 13A). Right of arrest: If in officer's presence, it is a breach of peace that justifies warrantless arrest. If not in presence, apply for complaint. <i>Comm. v. Cohen</i>, 55 Mass. App. Ct. 358 (2002) (intentionally spitting constitutes A&amp;B).<sup>10</sup></p>
<p><b><i>Threatening to infect or spread COVID-19</i></b> (does not matter whether threat is true or false; offender's intent is irrelevant — e.g., "only joking" is no defense).</p>	<p><b><i>Threat of Dangerous Substance</i></b> (269, § 14). Any direct or indirect threat about the location of a dangerous substance — like COVID-19 — that causes another person to experience "discomfort." Right of arrest: Felony. See <i>LED Criminal Law, Chapter 19</i>.</p>

<sup>10</sup> *Comm. v. Smith*, 58 Mass. App. Ct. 381 (2003) (defendant knew he had HIV and yelled that he intended to kill a prison guard; he then bit the officer's arm; this was assault with intent to murder or maim in violation of 265, § 15). For more detail, see *LED Criminal Law, Chapters 4 (A&B), 5 (ABPO), and 6 (assault with intent)*.

# ATTACHMENT A



## BOARD OF HEALTH

Town Hall 30 Martin Street, Essex, MA 01929-1219  
Telephone (978) 768-7614 email: boh@essexma.org



**Public Health**  
Prevent. Promote. Protect.

### USE OF MASKS AND OTHER PROTECTIVE MEASURES

Pursuant to the declaration of a state-wide public health emergency on March 10, 2020, Massachusetts General Laws, Chapter 111, Sections 31 and 122, 310 CMR 11.05, 105 CMR 300.200 and all other authorizing statutes and regulations, we, the members of the Board of Health in the Town of Essex, Massachusetts, hereby order the following:

1. All members of the public entering any place allowed to be open to the public pursuant to Governor Baker's Covid-19 Executive Orders, including but not limited to grocery stores, gas stations, home improvement stores, the Town's transfer station and the like must wear a cloth face covering that covers their nose and mouth, such as a fabric mask, scarf or bandana, over his or her nose and mouth.
2. The cloth face coverings required are not surgical masks or N-95 respirators, which should be left for medical professionals and first responders. See the following links for information on cloth face coverings:
  - a. **Graphic:** <https://www.cdc.gov/coronavirus/2019-ncov/images/face-covering-checklist.jpg>
  - b. **How to make a mask:** <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>
  - c. **How to wear/wash cloth face coverings:** <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>
3. The face covering requirements of this Order shall also apply to all members of the public picking up food from a restaurant or other establishment serving food to be consumed off-premises. This requirement shall apply whether the food is picked-up inside or outside. If customers are waiting in line, they shall be wearing masks and standing at least six feet apart. Establishments shall make markings on the floor to ensure that this requirement is met.
4. All establishments open to the public shall post a sign on their main entrance doors advising consumers that they are required to wear a face covering upon entering.
5. All employees of all essential businesses open to the public shall wear a face covering over their mouth and nose when interacting with the public and within six feet of a coworker. Employers shall provide face coverings to employees who do not use their own. Employers and employees must use previously prescribed protocols and guidelines for personal protective equipment and hand sanitizer is to be provided by the employer for staff use.

6. Any resident or member of the general public entering or exiting a residential or commercial building complex of greater than one (1) unit must wear a face covering over their nose and mouth while in common areas and communal spaces and must exercise social distancing in these spaces in accordance with CDC guidelines. See these guidelines at: [www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html](http://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html)
7. Brick and mortar establishments included on Governor Baker's list of essential businesses will be allowed to operate in accordance with the orders and guidance of the Governor and Department of Public Health, including but not limited to effective social distancing and occupancy limit measures.
8. To the extent necessary, this Order shall be enforced by Board of Health officials and Essex Police Officers.
9. Whoever violates any provision of this Order may be penalized by a noncriminal disposition process as provided in Massachusetts General Laws, Chapter 40, section 21D and the Town's non-criminal disposition by-law.
10. If non-criminal disposition is elected, then any person who violates any provision of this Regulation may be subject to a penalty in the amount of three hundred dollars (\$300.00) for each violation. Each day or portion thereof shall constitute a separate offense. If more than one, each condition violated shall constitute a separate offense.

**This emergency order shall be effective beginning FRIDAY, APRIL 24 AT 12:01AM and remain in effect until notice is given, pursuant to the Board of Health's judgement that the Public Health Emergency no longer exists.**



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**Erin Kirchner, R.S.**

**Board of Health Administrator, As Agent of the Board of Health**

**April 23, 2020**

ATTACHMENT B

Essex Police Department  
Civil Disposition Violations

Number generated by IMC

APRIL 28, 2020

20731

Date of this Notice:

IR#

JOHNNY CONTAGION

Name of the Offender:

8 SEASHORE DRIVE

OBVIOUSLY NOT A REAL PERSON OR ADDRESS!!

Address of Offender:

ESSEX, MA 01929

12/03/1979

City, State, Zip Code

D.O.B:

020-38-2665

NOT APPLICABLE

SSN #:

Registration Number:

Offense:

MAXIMUM MUNICIPAL FINE UNDER 40, 21D PROCESS

DECIDE HOW OFFICERS SHOULD RECORD VIOLATION ON TICKET

MGL 94C s. Possession of one ounce or less of marijuana/THC

Civil Penalty: \$ 300

A FAILURE WEAR FACE MASK, BOH 4/23/20

B

APRIL 28. 12:00PM (NOON)

Date and Time of Violation

ALICE'S SEAFOOD SHACK

Location of Violation

Patricia Police

20

POLICE GIVEN ENFORCEMENT POWER IN UNDERLYING BOH REGULATION

Officer's Signature

Badge

Agency Code

REFUSED TO SIGN

Signature of Offender

Unable to obtain signature of offender

Offender under age of 18

Date mailed

40, 21D APPEAL/PAYMENT PROCESS

YOU HAVE THE FOLLOWING ALTERNATIVES TO DISPOSE OF THIS MATTER:

- (1) You may elect to pay the above civil penalty, either by appearing in person OR by mailing a check, money order or postal note, and enclosing a copy of this citation, WITHIN TWENTY-ONE (21) DAYS OF THE DATE OF THIS NOTICE to:

Essex Town Clerk  
30 Martin Street  
Essex, MA 01929

This will operate as a final disposition of the matter, with no resulting criminal record.

## Attachment C

### POLICE REPORT TEMPLATE

Pursuant to the Governor’s COVID-19 state of emergency order and guidance from the Commissioner of Public Health (DPH), the [Your municipality] Board of Health (BOH) is allowed to enact local regulations that are not inconsistent with state guidance concerning the COVID-19 pandemic. Pursuant to its emergency authority, the [Your municipality] BOH on [insert date] enacted local regulation, [insert number or title of regulation], requiring that all individuals in public wear an appropriate face mask [or use exact language from emergency order describing specific mask and circumstances].

This regulation authorizes the [Your municipality] Police Department to enforce its provisions by issuing a local bylaw ticket with a civil fine of [typically \$300]. See G.L. c. 40, § 21D.

On [date], I, Officer [Your name], encountered [name of citizen] at [location], which is an area of public access in [Your municipality]. This individual was not wearing a face mask as required by the emergency BOH regulation, which is the reason I issued local [ordinance or bylaw] ticket No. [insert number from top of ticket] in the amount of [insert fine amount, typically \$300].

[If necessary, officer can add another paragraph if something else noteworthy happened – e.g., citizen refused to ID himself, used profanity/threats; person accompanying the offender said, “I told him to wear one and he wouldn’t listen”; etc.]