



## COVID-19 FOR COPS

# FACE MASKS — STATEWIDE ENFORCEMENT

Issued May 1, 2020 — May be copied and circulated without limitation

**My face mask updates are starting to have more sequels than Rocky Balboa! Mercifully, this should be our last because the Governor has spoken.** At 9:30 a.m. today, Governor Baker issued Order No. 31 “requiring face coverings in public.” Let’s break down the issues.

**Issue 1 — Local Board of Health (BOH) regulations on face covering should no longer be enforced.** The order of the Governor is supreme. According to § 8A of Chapter 639 of the Acts of 1950, “Any . . . [local] regulation . . . [.] to the extent that such provision is inconsistent with any order or regulation issued or promulgated [by the Governor,] shall be inoperative while [the Governor’s] order . . . is in effect.” In short, follow the Commonwealth’s rules exclusively.<sup>1</sup>

**Issue 2 — The new face covering rules take effect on Wednesday, May 6.** They last until rescinded by the Governor or until the emergency is over.

**Issue 3 — Here is what’s required:**

- Any person over age 2 in the Commonwealth;<sup>2</sup>
- Must cover their mouth and nose with a mask or cloth cover;<sup>3</sup>

*Except if unable to wear one due to a medical condition.* [Note: The person is not required to produce documentation verifying their medical condition.]<sup>4</sup>

- In 3 situations:
  - ✓ At **all** times inside a grocery store, pharmacy, or other retail store (regardless of size or occupancy level);
  - ✓ At **all** times inside a taxi, livery, or ride-sharing vehicle; or mass transit vehicle, station, or semi-enclosed waiting area (including operators and any other people present); or
  - ✓ In any other **indoor or outdoor place** open to the public **if the person is unable to, or does not maintain, a distance of approximately 6 feet from every other person.** [Note: This applies to all workers and customers of businesses and organizations open to the public.]

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<sup>1</sup> Section 8A states that any violation of a local regulation before the Governor’s order may still be punished. For example, if an officer issued a ticket in Essex for a local face cover violation before today, the fine is still due.

<sup>2</sup> The Department of Public Health (DPH) is directed to issue guidance about face covers for children between the ages of 2 and 5.

<sup>3</sup> Interestingly, the order “discourages” wearing “medical-grade masks [which] should be reserved for healthcare workers and first responders.”

<sup>4</sup> The order authorizes DPH to create other exceptions to wearing a mask or cover, which the agency will publish as guidelines.

**Issue 4 — Enforcement:**

- **Achieving voluntary compliance — in this high stress time — is our paramount goal.**
- **At the same, a violation may draw a local ordinance or bylaw ticket for \$300.** This is the familiar “21D process” used for marijuana and other violations (e.g., leash law, littering). See 40, §21D.
- **Agents of the local BOH “are authorized to enforce this Order and if necessary may do so with the assistance of State or municipal police.”** This phrase, which appears in this and other COVID-19 orders, places your local BOH in the leadership role, which is consistent with the administration’s perspective that public health officials should calibrate a community’s response to COVID-19 with support from law enforcement.
- **With this understanding, police commanders are advised to consult their local BOH and reach an understanding about law enforcement’s preferred role.** For instance, your BOH agents may be very comfortable exercising enforcement authority and writing tickets. They may request that police involvement be limited to highly confrontational situations.

At the other end of the spectrum, your local BOH, unaccustomed to dealing with enforcement matters, may request that police take a more active role and respond whenever a ticket needs to be written and delivered to a citizen. Either approach is legal and sensible. My strong recommendation: Be understanding and work out a strategy that makes sense given your relative workload, staff, history, and expertise.

- **Whatever your role — as a last resort — consider disorderly conduct.** Disorderly conduct remains a police option for those encounters that escalate into fighting, threatening, or hazardous behavior which causes *or* recklessly risks public alarm, annoyance, or inconvenience. 272, § 53 and § 54 (in-presence arrest). *Comm. v. A Juvenile*, 368 Mass. 580 (1975).

**Issue 5 — Under the Governor’s Order, a business may refuse entry to “a customer [who] refuses to wear a mask or cloth face covering for non-medical reasons.”** Police undoubtedly will be called to confrontational situations where an unmasked customer refuses to leave. I recommend that officers:

1. **Establish (subtly) whether the individual has a medical condition.** Don’t ask: “Hey, do have a health condition that prevents you from wearing a mask?” Instead ask: “Why are you refusing to wear a mask?” If the person does not spontaneously describe, in reasonable detail, a medical condition, then that justification is off the table.
2. **Consider any allegation of discrimination — not social or political opinions.** Remember the Starbucks case in Philadelphia? Be sensitive to the patron who says something like, “Two other people entered without a mask, but now a black guy like me shows up and, all of sudden, they kick me out and call police.” The public accommodation law does not allow private businesses, open to the public, to discriminate.<sup>5</sup>

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<sup>5</sup> See 272, §§ 92A and 98. For a full discussion of trespass and its relationship to the public accommodation law, see *2020 LED Criminal Law, Chapter 32* at pgs. 32-5 to 32-6. Also see *Chapter 16* at pg. 16-5.

On the other hand, statements like, “Hey, it’s my right” or “COVID is so overrated” or “I got tested last week,” are not defenses to the face covering rule or, more importantly, to the law of trespass.

3. **Ask the person to cover their face or leave.** Your persuasive and calm communication can make all the difference at this stage. It’s a simple choice — cover or go.
4. **If the person does not put on a face cover or leave the premises, an arrest for trespass becomes an option.** 266, § 120 (“remaining without right” on property — after being told to leave by the owner or other person in charge — triggers an officer’s in-presence right of arrest for trespass). See generally *Comm. v. Lapon*, 28 Mass. App. Ct. 681 (1990) (defendant refused to leave supermarket after being told he was not going to get a free bottle of laundry detergent).

[Note: There is no need to consult with your local BOH or issue a 21D ticket in this situation. Simply use the trespass law. It is clear cut. If people in control of property want visitors to wear masks as a reasonable health condition under the Governor’s order, and they ask someone to leave their property who refuses to do so, the police may eject or arrest under the trespass law.]