



Episode 8: “Answering All of Your Questions About the New York Mask Mandate”

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[Ari Kwiatkowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[AK]: Hey, everyone, welcome to answering all of your questions about the New York mask mandate. This is our next episode in our series of episodes where we tell you everything you need to know about navigating COVID 19 and issues in the workplace. If you listen to our first few episodes, it may seem like all of our episodes thus far have been devoted to the pandemic, and you would be 100% correct in that. You know, things are changing so rapidly, and we listen to our first episodes. You heard that we had to update the episodes. We will eventually get to topics that are not related to the pandemic in this podcast, but given how everything’s changing so quickly, we want to make sure we’re keeping you up to date.

Speaking of ... a few days before this episode was set to air, a Nassau County Supreme Court judge ruled that the New York state mask mandate was unconstitutional. As we discussed in this episode, the rules promulgated by the New York State Commissioner of Health and promoted by Governor Hochul, the court took the position that essentially the Commissioner of Health and the Department of Health did not have the authority to enact such a broad, sweeping mandate under New York law.

The state filed an immediate appeal and also sought an emergency stay of the underlying order at the New York State Appellate Division. The next day the appellate division granted that motion for an emergency stay. So as of right now, the New York mask mandate is still in place ... but we expect further litigation on this issue and we’ll be sure to keep you updated.

Before we dive in, I wanted to give you my fun and interesting fact for this week, this is my second solo episode, so I wanted to share—I was thinking about it last night, a professionally interesting fact about myself, which is the following: I ... before I attended law school, so in between undergrad and law school, you know, some of our listeners might know I went to UB for undergrad and I went to Albany Law School for law school. But before I went to law school or made the decision to go to law school, I actually worked as a licensed insurance agent in Buffalo. I worked for GEICO. I think those of us who were in the Buffalo area, know GEICO has a huge presence in the area. They’re a great company to work for. Gained a lot of experience working there, you can gain a lot of valuable experience in communicating with people. Obviously, the substantive areas of insurance, you know, met some friends that I still keep in touch with today. So, you know, I think that experience has really helped me, especially on the litigation side of things. So I just wanted to share that. Before we dive in, just something a little interesting about me and my prior experience before I was an attorney.

So, guys, today we’re talking about the New York state mask mandate. You know, if you listened to our episode last week we went through, you know, if you’re an employer in New York and you’re not mandated by OSHA or CMS or the New York vaccine rule to have a mandatory vaccination policy, you know, what you should do. This episode fits perfectly with that. So let’s dig right in.

The New York state mask mandate is the result of the commissioner of health determination of necessity for medical masks. That determination was issued on December 10 of 2021 and was set to go into effect December 13 of 2021.

So this was announced by Governor Hochul on the 10 with, as I mentioned, the effective date of I believe it was Monday, December 13. So this determination of necessity or mandate supersedes the August 27, 2021 determination that provided for masking in certain settings, such as health care settings and in schools. You know, what I wanted to talk a little bit about before we delve into the substance is exactly the rationale for the mask mandate or what the commissioner's findings of necessity determine. The commissioner's determination also noted the winter surge of the Delta variant and the risk of continued spread of COVID-19 as a result of people gathering for the holidays, along with the threat of the Omicron variant and the prevalence of that variant. Essentially, the ... the commissioner of health's determination said that given all of these risks and the associated with the spread of the pandemic, coupled with the propensity of people to gather during the holidays, that this mask determination or excuse me, this mask mandate was really necessary. And part of that in the determination, it noted that since Thanksgiving, from the time of that determination, the statewide seven-day average case rate had increased by 43 percent, 43 percent, excuse me. And hospitalizations had increased by 29 percent. Based on all of these factors and other factors, concern of spread over the holidays, the commissioner of health determined that the mask mandate was necessary. We're going to delve into specifics about certain industries a little later in this episode, but I just wanted to give you guys a general rundown of what the mask mandate says.

The mask mandate applies to any indoor public space, and we'll talk about that in a second and basically says that individuals two and over who are medically able to tolerate a face covering must do so. Meaning must wear a face mask when in that indoor public space, unless the business or facility requires proof of vaccination as a condition of entry to that facility.

So let's talk a little bit more about what those terms mean in the context of the mandate. New York state has issued guidance as it relates to the mask mandate to try to give us a little bit more detail or a little bit more information. And that guidance defines "indoor public space" as any indoor space that is not a private residence. So, you know, if you're listening to this episode, you're probably thinking, Wow. Any public space that is not a private residence sounds very, very broad. And the reality is: it is. You know, the guidance has also defined what face covering means under the mask mandate. Cloth masks, surgical masks, N95 respirators completely worn over a person's nose and mouth. So basically, what the mandate says is that you have to ... there is a mask mandate in place unless a business decides that they are going to require proof of vaccination for someone to enter the business. And this, I should note, which is important, applies to employees, personnel and staff, and patrons of that business.

So basically, we talked about the mask mandate, you know, generally face coverings, what they are, what it applies to. If a business chooses to require proof of vaccination, it must ensure that any person who is trying to enter that business or facility who is 12 years or older is fully vaccinated. So like in a few of our other episodes, we've ... we've talked about what fully vaccinated means in the context of our vaccination mandates. The answer is very similar under this: vaccination means fully vax excuse me, fully vaccinated means it's been 14 days after a Pfizer or Moderna vaccine, or 14 days after the Johnson & Johnson vaccine if the patron or employee has received that vaccine.

And I wanted to note that at this point, you know, it's kind of up in the air. But the guidance, as it is right now, says that boosters are not included in the definition of "fully vaccinated." So if you're a business or a facility and you have chosen to go the route that you are requiring proof of vaccination as a condition for entry to your facility, you do not have to check to make sure that people have received boosters. Right now, it's just the two doses of the Pfizer and Moderna vaccine or the one dose of the J&J vaccine, so I did want to point that out.

And just like we've discussed in other episodes and similar to the New York vaccine rule, the OSHA mandate and the CMS mandate, proof of vaccination in this case is your typical proof your ... your Department of Health issued vaccination card, Excelsior Pass, Excelsior Pass Plus a smart health card if the vaccine or the card was issued outside of New York, those all qualify as proof of vaccination under the mask mandate.

So you might be wondering, you know, what about kids? Because there's, you know, there are some issues and it's been a bit of a hot button topic as it relates to whether children are required to be vaccinated. And of course, this isn't as much of a concern on the employer side of things. But I wanted to point it out because the guidance does say that proof of vaccination or proof that a patron is fully vaccinated applies to 12 and older.

The New York state has said for patrons who are aged five to 11, a business that requires proof of vaccination as a condition to entry only needs to verify that that child from the age of five to 11 has received one dose of the appropriate vaccine, as opposed to two. Children two to five remain ineligible for vaccinations, so essentially the guidance says that if you have patrons coming that our children in the ages of two to five, those children need to wear a proper fitting mask while they are in the facility.

One thing that I think is really important to mention because we've gotten a lot of questions about this particular issue is whether under the New York mask mandate, an employer or a business can mix and match meaning can ... can the mask mandate apply to some employees or patrons and not others? Can there be a mix of the mask mandate and requiring proof of vaccination as a condition to entry? And you know, we'll talk about it a little bit more when we get into the industry-specifics piece of it, but the general answer is no, you cannot mix and match. A business either has to stick with the mask mandate and require that employees and patrons wear the mask or the business can require proof of vaccination as a condition of entry, and that requirement applies to employees and patrons across the board.

OK, guys, so we covered the general mandate, the general rules contained therein. Let's talk a little bit about industry specifics as it relates to the mask mandate and what New York state has said about certain industries. So we spent a lot of time talking about the New York vaccine rule and the CMS mandate in prior episodes.

It's important to note that the mask mandate applies to patrons and employees in health care settings, regardless of vaccination status. So essentially, you know, if you are an employee or a patron in a health care setting, a hospital, doctor's office, et cetera, you have to wear a mask regardless of your vaccination status. As it relates to schools pre-K through 12 the masking of teachers, staff, students, and visitors over the age of two again who are medically able to tolerate a face mask must do so regardless of vaccination status. The state has said that for correctional facilities, and detention centers, detained persons and staff have to wear a mask where socially distancing cannot be maintained. The state has also said that as it relates to public transportation, all persons have to wear masks regardless of vaccination status, and I think that is consistent with the prior August 27 determination that we talked about earlier that this determination or mandate supersedes.

So a lot of our clients are in the food service business. This is a little bit trickier to navigate, so let's let's talk about food service businesses. What the state has said about food service businesses can be a little bit more trickier to navigate.

So, you know, essentially if you have the mask requirement in place and you're the owner of a food service business or, you know, you're the owner of a restaurant if you're not requiring proof of vaccination as a condition of entry, masks have to be worn all times regardless of vaccination status, except when necessary to eat or drink. So basically, when people are eating or drinking, they can take off their masks. So for those businesses, if you do require proof of vaccination as a condition for entry, then it's not something ... you don't have to require that patron to wear masks. One thing that's the state

has said that's interesting about restaurant and food service businesses is that if you have an, if you're a restaurant and you have an outdoor dining space that has a temporary or fixed cover, and the guidance says such as an awning or a roof and at least two open sides, that area of the restaurant, that outdoor area for lack of a better word, does not have to follow the same requirements as the indoor space of the restaurant. So I know we talked earlier about mixing and matching, and I said there are some caveats to that. This is one of them. So if you're a restaurant and you have an outdoor dining space that has a temporary cover and at least two open sides, you can apply different rules to that area as opposed to the indoor restaurant.

But still, the guidance has said if you have one of those outdoor facilities or portions of the space, that mask wearing for patrons is nonetheless strongly recommended but not required. And the restaurant also excuse me, and the state also recommends social distancing under those circumstances. The state's guidance has also addressed larger venue areas, such as venues where weddings are taking place and basically the same or similar rules apply under those circumstances. If you require vaccination as proof of condition of entry, you're good to go. The wedding can proceed fairly normally if you do not choose to go that route as the owner of the venue, then similar rules apply and guests have to wear masks unless they're eating or drinking. So, you know, for me, I actually have my cousin's wedding in a few days, and I know that the venue ... her venue has chosen to require proof of vaccination before anybody can be, anybody can be admitted to the venue. So, you know, for me, this rings a little bit truer ... rings home, especially over the next few days.

You know, one other industry that I think is important to mention, not only because we have a lot of clients in the space, but I think, you know, these are some pretty common questions is salons and other personal care businesses. So you know what I'm talking about in this context for a salon or other spa, other business that has chosen not to require proof of vaccination to enter the business. So, you know, the business is covered by the mask mandate. You know, the state has basically ... the guidance is pretty clear that if you choose to go the route of not requiring proof of vaccination, that all patrons have to wear their masks at all times, that includes while hair being washed, while hair being cut. The only exception, you know under the guidance is for people who are having services that require them to remove mask. So, you know, if you're having any facial waxing done, things of that nature, you are permitted as the patron to take your mask off. But the guidance is clear that while that service is being performed, the employee of the business actually has to continue to wear their face mask and that as soon as the service is over and the patron is able to, the patron must put their mask back on. So I wanted to mention that because I think it's a little bit unclear. You know, I actually got my hair cut a few days ago. I was talking with the person who does my hair, you know, about ... generally just about this mandate and what it really means for people in the salon setting, so, you know, as I mentioned, a few of our clients have given up have posed this question. I just thought it it was important to mention.

So guys, I think we covered the industry-specific rules I wanted to go over as it relates to the New York state guidance. One thing I also wanted to mention is that you may be, especially if you listened to our first few episodes, you may be wondering, you know, if you're in a business or an employer and you have chosen to go the route of requiring proof of vaccination for employees and patrons, you know, you may be wondering whether there are any exemptions to the vaccine, you know, proof of vaccination requirement, much like we discussed in our prior episodes, the short answer is yes. The guidance is not very explicit. At least the guidance issued by New York state is not very explicit in this regard, but we take the position that, yes, there are exemptions for employees for sincerely held religious beliefs and under the ADA for disability or medical reasons. And you know, we discuss those at length in our prior episodes, but I definitely wanted to point that out.

In terms of enforcement, the state has said that enforcement will be accomplished by local health departments. The guidance also says that there's a maximum fine of \$1,000 for each violation by individuals or businesses, so that's important to note for the guidance if you are found to be in violation of the mandate, the business can be fined, but individuals, it looks like, can also be fined under the

guidance as well. And what's interesting is that a number of counties throughout the state have come out and basically said—or local health departments have come out and said—that they are not going to enforce the mask mandate. As of the date of this recording, we have not seen any formal challenges to the mandate in state or federal court, but we will be sure to keep you updated as usual if any such challenge arises.

I also wanted to mention to our listeners that New York state has published sample posters for businesses and employers for both options, for the mask mandate and for requiring proof of vaccination to enter the premises. So, you know, I did want to mention there are some resources on the state's coronavirus website. If you decide, excuse me, if you choose to go either route, you can go on the website, you can print those off.

So we know that the mask mandate presents a number of challenges for employers, and it can be difficult to navigate. You know, we ... we are thinking of creative solutions or creative ways to comply with the mandate. For example, we have clients who, you know, basically have said if you are not vaccinated, you cannot be in the office on these days. You can be in the office or on the premises on this one day. And if you're there on that one day since you're not vaccinated, everyone has to wear masks in the facility. So, you know, I know we said no mixing and matching; there are some ways that you can be creative, you know, with ... without making a bright line rule. But you know, at this point, the guidance has been our guide. And you know, this is an evolving situation, so we will be sure to keep you updated.

Thanks so much for tuning in today, guys. I hope this was helpful in outlining the New York state mask mandate and what New York state's guidance has said about the mandate. Next week, we'll tell you what you need to know about the New York City vaccine mandate. If you're downstate, if you have employees downstate, you'll definitely want to tune in. Thanks so much for listening. See you next week!

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