



STATE OF NEW YORK
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May 11, 2020

Honorable Andrew M. Cuomo
Governor of New York State
The Executive Chamber, Capitol
Albany NY, 12224

Honorable Andrea Stewart-Cousins
Temporary President and Senate Majority Leader
Legislative Office Building
198 State Street, Room 907
Albany, NY 12247

Honorable Carl Heastie
Speaker of the Assembly
Legislative Office Building
198 State Street, Room 932
Albany, NY 12247

Dear Governor Cuomo, Leader Stewart-Cousins, and Speaker Heastie:

I write today to respectfully urge you to resolve a potential conflict of law created by recent Executive Orders requiring the use of masks and face-coverings in public. While I strongly support these measures, they are incompatible with a pre-existing provision of the penal law making it unlawful for groups of people to wear masks in public.

On April 15th, Governor Cuomo issued Executive Order Number 202.17 which required New Yorkers over the age of two to “cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance,” unless they are “[un]able to medically tolerate a face-covering.” That order went into effect 8:00 PM on April 17th.

Although the Governor has made clear that non-compliance will not result in arrest, and there are currently no civil penalties, instituting fines in the future has not been ruled out and enforcement is delegated to the discretion of local law enforcement. Additionally, Executive Order 202.16, issued April 12th and effective April 15th, requires essential workers interacting with the public to wear facemasks provided and paid for by their employers. That provision is enforceable as an order under the Public Health Law and violations can carry a fine of up to \$10,000 and a sentence of up to a year in prison.

Both Orders are commonsense and responsible public health measures that will help protect the safety and welfare of New Yorkers in the midst of a pandemic. However, the requirements of both Orders are also in direct conflict with a nearly two-century-old provision of New York’s loitering statute criminalizing public gatherings of masked individuals. In its current form, that law, N.Y. Penal Law 240.35(4), makes it a criminal violation, subject to a possible fifteen-day sentence of imprisonment, if an individual “being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place.” The only statutory exemption is for permitted masquerade parties officially regulated by a locality.

Consequently, every individual currently complying with EO 202.17 and every employer now abiding by EO 202.16 is in unambiguous violation of the plain language of 240.35(4) and potentially subject to criminal sanction. In fact, it would be reasonable to argue that an employer in an essential occupation faces potential criminal liability no matter what they do, either as someone aiding masked group congregation or willfully violating a public health directive.

Today, it may be difficult to imagine a police department enforcing, a prosecutor charging, or a judge upholding this provision of the loitering law in the midst of the COVID-19 crisis, it is unfair and unreasonable to force individuals, employers, and law enforcement into a situation where following the law is impossible, dangerous, or both. Additionally, even if the all-but-certain public outrage and media attention that would follow such a charge should curb any remaining potential for abuse, we should not tolerate a situation where it is possible to arbitrarily or selectively punish people for obeying a necessary public health directive. Most importantly, we should not set up a situation where an unnecessary police-civilian encounter over a low-level offense could lead to a bad outcome that exasperates police-community relations.

While I believe that this conflict must be resolved, I defer to your collective judgment as to the best vehicle for that resolution. I would support the outright repeal of 240.35(4), legislation exempting masked congregation in a public health emergency or for the purpose of protecting the health of one's self or others, an executive order suspending that provision of the loitering law running in tandem with 202.16-17, or a combination thereof. I am also happy provide any help or support that would prove useful to your efforts.

Thank you so much for your consideration of this important matter and for your collective leadership in these trying times.

Sincerely,

A handwritten signature in blue ink that reads "Letitia James". The signature is written in a cursive, flowing style.

Letitia James