

# VLCT MODEL FACE COVERING RULE GUIDANCE

## INTRODUCTION

The VLCT Model Face Covering Rule has been developed as a result of a temporary law (Act 1, “an act relating to temporary municipal rules in response to COVID-19”). The Act allows selectboards to adopt a temporary rule that requires individuals within the town to wear face coverings while indoors at locations that are open to the public. As with other grants of rulemaking authority, the Act is permissive meaning that municipalities can – but are not required by law to – enact face covering rules. When the selectboard votes to adopt such a rule, it initially will remain in effect for 45 days unless repealed before that time. The selectboard must meet during the initial 45-day period to reconsider any rule and vote to affirmatively extend the rule an additional 30 days or rescind the rule or it will expire automatically at the end of the initial 45-day period. Thereafter, the selectboard must meet at a minimum once every 30 days to reconsider the rule, at which meeting the selectboard must vote either to rescind the rule, adopt an amended rule, or extend the rule for an additional 30-day period. If the selectboard does not meet before the initial 45-day period or the subsequent 30-day period(s), the rule automatically expires. The temporary law granting this rulemaking authority will sunset (i.e. be repealed by operation of law) on April 30, 2022, when any local mask rules still in effect will also automatically expire.

## HOW TO CUSTOMIZE THIS MODEL

**This model rule should be customized to suit the particular needs of your municipality, giving careful consideration to each element in light of your community’s resources and expectations. Opportunities for editing this rule are marked with *italicized* text. The selectboard should consult with law enforcement to ensure that the provisions of the rule are relevant and realistic in terms of the resources needed for enforcement.**

## LOCAL RESTRICTIONS

The right to impose local face covering rules are bestowed by state law and may not exceed the limited grant of authority it provides. Any local rule regulating face coverings must be consistent with state law or risk being deemed void by a court of law.

## DEFINITIONS

The law does not define the phrase “location open to the public” and there’s no requirement that any facial covering rule contain a definitions section. Without a definitions section in a facial covering rule, the phrase likely would be interpreted broadly to mean any indoor space or area that is open to the public, but wouldn’t include private residences or private offices/workspaces that are not open to customers or the public. However, the legislative body may choose to further define public locations or other relevant terms such as “face coverings” and how they should be worn in its rule if it helps clarify the rule’s requirements. This model rule was developed to provide the broadest application possible which necessarily meant not further defining any phrases or terms. VLCT MAC’s opinion is that selectboards have the authority to limit the scope of its face covering rule to certain indoor public locations so long as

it does not infringe upon a fundamental right. Selectboards seeking to craft a more targeted rule should contact their town attorney for additional assistance.

## **EXCEPTIONS**

The law has no stated exceptions to whom the rule applies; however, since municipalities have not only those powers and functions specifically authorized by the legislature but also any additional powers that are incidental, subordinate, or necessary to the exercise of such express authority, it is fairly safe to assume that they may also carve out exceptions to any rule they create so long as they are reasonable, do not implicate a suspect class, and are rationally related to the rule's objectives. *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484 (1977). Examples of exceptions to the requirement to wear facial coverings that the legislative body may choose to add to its rule may include, but are not limited to: children under 2 years; a person with a disability who cannot wear a face covering or cannot safely wear a face covering for reasons related to the disability; a person for whom wearing a face covering would create a risk to workplace health, safety, or job duty as determined by the workplace risk assessment; individuals who are officiating or participating in a religious service or practice where the temporary removal of a face covering is necessary to complete or participate in the religious service or practice; and/or a person while eating or drinking inside any establishment that serves food or beverage. The imposition of exceptions may inadvertently raise constitutional issues. A municipality that carves out exceptions to its face covering rules must ensure that it is not treating secular institutions more favorably than religious ones. In comparing the two, the U.S. Supreme Court has instructed that the government must look to the risk factors associated with the activity, not the reasons why people gather. If temporary exceptions are made for wearing a face covering for a secular activity, then the same exception must be made for its comparable religious counterpart. This model rule allows for the temporary removal to participate in religious services as a precautionary measure to forestall any challenges under the Free Exercise Clause of the First Amendment.

## **RULE ENFORCEMENT**

If your municipality adopts a local face covering rule, the town's first and primary method of enforcement should be educating the public of the rule's requirements and requesting voluntary compliance. Furthermore, there is no requirement that such a rule if adopted must be enforced or even include an enforcement provision. For those rules that do include enforcement provisions, there are two options: civil and criminal enforcement. The vast majority of all municipal ordinances and rules are civilly enforced. Tickets for violation of a town's civil rule are issued by enforcement officers on the State's pre-printed "Uniform Traffic Complaints" which are available in booklets from the Vermont Judicial Bureau, P.O. Box 607, White River Junction, VT 05001-0607. When the issuing officer wishes to enforce a local rule, they will fill out a ticket, provide two copies to the alleged violator, and retain two copies, one of which is sent to the Judicial Bureau. A ticket may be served in person or by mail. Although not required by law, we recommend using certified mail, return receipt requested.

A violator can respond to a ticket/complaint in one of four ways:

- Admit to the offense and pay the waiver fee.
- Not contest the charge and pay the waiver fee.
- Deny the charge and request a hearing.
- Fails to respond within the requisite 20 days, resulting in a default judgment. In such case, the violator is ordered to pay the full amount of the fine (rather than the waiver fee).

If the violator pays the waiver fee, the money collected by the Judicial Bureau is sent to the town, minus an administrative fee which is retained by the Bureau for administrative expenses.

If the violator asks for a hearing, it will be held by a hearing officer assigned by the Judicial Bureau. The Bureau is designed to be used without attorneys. Therefore, if there is a hearing in the Judicial Bureau, the law enforcement officer who issued the ticket must appear to represent the town. The burden of proof is on the town and the violation must be proven by "clear and convincing evidence." If the defendant or town is unhappy with the outcome of the hearing at the Bureau, an appeal may be taken to Superior Court. **Due to the rarity by which municipal rules and ordinances are criminally enforced, this model rule only provides for civil enforcement.**

#### **PENALTIES**

The selectboard does not have to include a penalty provision if it does not intend to enforce this rule. However, one would need to be included if the selectboard sought to impose a fine for a violation. In that event, fines must be set by the selectboard in amounts not to exceed \$800. The selectboard must also set a "waiver fee" for each offense. This is the fee that defendants pay to avoid contesting a municipal ticket in the Judicial Bureau. When setting the penalty and waiver fee amounts, the selectboard must determine what amounts are sufficient to deter violations of the rule. Fines are punitive in nature, and, therefore, the amount of the penalty does not have to correspond to the costs incurred by the town in enforcing the rule. Waiver fees should be set to discourage contested actions. Subsequent violations of the same rule should lead to an increased penalty and waiver fee.

#### **RULE ADOPTION PROCESS**

The adoption of rules is governed by Title 24, Chapter 59. The process starts with the drafting of the rule, and its review by the selectboard. The selectboard then adopts the rule formally, by a majority vote of its members at a duly-warned selectboard meeting ensuring that the action and a copy of the proposed rule are entered in the minutes of the meeting. The rule must be posted in at least five conspicuous places in town and must be published in a newspaper of general circulation on a day not more than 14 days after the selectboard's vote to adopt the rule. The information included in the newspaper must include the following: the name of the municipality; the name of the municipality's website, if the municipality actively updates its website on a regular basis; the title or subject of the rule or rule; the name, telephone number, and mailing address of a municipal official designated to answer questions and receive comments on the proposal; and where the full text of the rule may be examined. The Act explicitly states that the permissive referendum process that otherwise governs the adoption of

ordinances and rules (i.e. 24 V.S.A. § 1973) does not apply in the adoption or renewal of this particular rule; the rule, therefore, will take effect immediately upon passage.

**This model rule has been developed for illustrative purposes only. VLCT makes no express or implied endorsement or recommendation of any rule, nor does it make any express or implied guarantee of legal enforceability or legal compliance, or that any rule is appropriate for any particular municipality. Each municipality is advised to seek legal counsel to review any proposed rule before adoption and / or use. VLCT PACIF members are advised to seek input from their municipality's loss control specialist regarding insurance considerations and risk avoidance.**