



## **Can Voters Be Required to Wear Face Coverings at Polling Places?**

August 31, 2020

We have received many inquiries from local officials about whether they may, or must, require voters to wear face coverings at the polls on election day. This memorandum addresses that issue in several contexts.

### **Face coverings may be required in the polling place.**

In a [memorandum](#) dated August 19, 2020, from the New Hampshire Secretary of State and the New Hampshire Attorney General, and in a [supplemental memorandum](#) dated August 20, 2020, from the attorney general, those officials stated that local officials may require voters to wear face coverings to enter the polling place.

The moderator has authority to manage the polling place, and, as stated in the August 19 memo, “that includes the authority to choose whether to . . . require a face covering/mask at their respective polling places.”

In addition, if a municipality’s governing body requires face coverings in town-owned buildings and the polling place is in the town hall or another town-owned building, that requirement would apply, and the moderator should enforce it unless the governing body is willing to waive the requirement for the election. Similarly, if the polling place is in a school, church, or other building where the property owner requires face coverings, that requirement would apply and should be enforced unless the property owner is willing to waive it.

The governor’s Emergency Order #63, requiring face coverings for scheduled gatherings of 100 individuals or more, does not apply to elections.

### **But voters without face coverings must be permitted to vote.**

While the moderator may require face coverings in the polling place, voters without face coverings must still be permitted to vote.

The attorney general’s August 20 memorandum states, “Moderators may not deny the right to vote based on a voter’s inability or unwillingness to wear a face mask/covering.” Therefore, if masks are required in the polling place, “moderators must establish alternative means of

registration and voting for in-person voters who are unable or unwilling to wear face coverings/masks.”

### **Options for non-masked voters.**

The attorney general’s August 20 memorandum suggests three alternative processes that may be used for voters who are unable or unwilling to wear face coverings. This list “is not intended to include all possible options”:

- 1) Separate space within the polling place. The moderator may establish separate check-in, registration, and voting areas for voters without face coverings. If possible, separate entrances and exits may also be used.

This may require one or more ballot clerks to shuttle back and forth from the voter to the check-in table to verify the voter, mark the checklist, and bring a ballot to the voter.

If a separate ballot box is used, completed ballots may be transferred to the main voting area, provided that the transfer is announced at the polling place and the public is allowed to observe the transfer.

- 2) Outdoor space. Conditions permitting, the moderator may create an outdoor space for non-masked voters to register and vote. The outdoor space must comply with the requirements for the polling place, including the use of a guardrail. Processes would be similar to those for a separate space within the polling place. A separate ballot box or ballot-counting machine will be necessary; and again, the transfer of completed ballots to the main voting area must be announced and must allow for public observation.
- 3) Accessible voting. RSA 659:20-a allows a voter to have absentee voting materials delivered outside the guardrail on election day if the voter declares under oath that he or she is “unable to access a polling place due to disability.” This is sometimes referred to as “curbside voting”—the absentee voting materials are delivered to the voter, frequently at his or her car, and the voter fills out the affidavit and an absentee ballot.

HB 1266, which made changes to certain election laws only for 2020, allows this process to be used by “any voter who, due to extenuating circumstances under Covid-19[,] is attempting but unable to access the polling place on the day of an election.”

One concern with this option is that because it uses the absentee voting process, the voter must sign an affidavit stating that he or she is “disabled.” It is questionable whether a voter who refuses to wear a face covering will be willing to sign an affidavit stating the he or she is disabled. If the voter does not sign the affidavit, the ballot cannot be accepted.

The secretary of state’s office has provided clerks with sticky notes to attach to absentee ballot envelopes indicating that concern for Covid-19 constitutes a disability. That may help, but it remains possible that some voters will refuse to sign the affidavit.

**What to do if a voter refuses alternative voting options.** The attorney general’s August 20 memorandum states that if a non-masked voter declines to use one of the alternative voting options described above, and if “all reasonable means” fail to persuade the voter, “current law would likely support a moderator’s decision to inform the voter that he or she cannot enter the polling place.”

We agree that if the voter is given the option of a separate voting space either inside or outside the polling place and refuses to use it, the moderator may refuse to allow the voter in the polling place. That voter has been offered the option to vote in the same manner as any other voter, just in a different space, and has refused it. However, if the only alternative offered is option 3, accessible voting, we are less confident that a voter who refuses the option may legally be turned away from the polls.

If moderators are going to use accessible voting under RSA 659:20-a as the principal alternative for voters who decline to wear face coverings, we strongly encourage them to have a back-up plan in case the voter refuses. That back-up plan may consist of allowing the voter to vote in a separate area inside or outside the polling place as described above, or simply waiving the mask requirement and allowing the voter to vote in the same space as everyone else, while ensuring that he or she maintains a safe distance from other voters and departs as quickly as possible. If those options are not offered, the moderator should call the attorney general’s office for guidance before turning a voter away.