

Seven Myths of Mask Exemptions

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Myth 1: Mask exemptions do not exist for customers or employees

Fact: Mask exemptions exist within all known Ontario bylaws ^[1] and for both patrons and employees under disability, creed, and all other protected grounds as defined within the *Ontario Human Rights Code* ^[2]. Most mask exemptions will fall under the 'disability' provision, and within the *Reopening Ontario Act*, exempted under the provisions of "a medical condition that inhibits their ability to wear a mask or face covering" and "is being reasonably accommodated in accordance with the Human Rights Code" ^[3].

Myth 2: Mask exemptions must be proven with documentation

Fact: Under all Ontario mask mandate by-laws and the Reopening Ontario Act, there is no requirement for proof present, with many by-laws and health orders **prohibiting** requiring proof. Under the *Human Rights Code*, the mask exempt failing to provide proof when requesting accommodation must cause a business such excessive difficulty, risk, or expense that it qualifies as **undue hardship**.

*"To claim the **undue hardship** defence, the organization responsible for making the accommodation has the onus of proof. It is not up to the person with a disability to prove that the accommodation can be accomplished without **undue hardship**."* ^[4]

Businesses such as the LCBO, many grocery store chains, retail outlets, and the service industry provide equal service to the mask exempt without requiring documentation. Similar businesses are thus highly unlikely to substantiate claims that providing equivalent accommodation causes **undue hardship**.

Myth 3: Mask exempt customers or employees can be charged with trespassing

Fact: The *Trespass to Property Act* **only** applies to "Every person who is not acting under a right or authority conferred by law"^[5]. As mask exemptions are a right conferred by relevant bylaws and the *Reopening Ontario Act* along with the *OHRC*, mask exempt people cannot be charged with trespassing on this basis. They are within their rights to claim reasonable accommodation under the *OHRC* or other exemption criteria. This is much in the same way that a store can have a "No Pets" policy, but is prohibited from denying service because of the presence of a customer's emotional support animal.

Myth 4: There is no such thing as a creed or religious exemption

Fact: Creed is a designated class under the Human Rights Code and can be grounds for an exemption.^[6] While a belief in the inefficacy of masks mandates or the legitimacy of a pandemic are not considered to be a creed in and of themselves, wider-reaching belief systems and practices are. For example, sincere belief in the Buddhist practice of Vipassana is reasonably considered a creed and as such is valid grounds for a mask exemption because of its focus on unrestricted, mindful breathing. Creed/religion claims do not need to adhere to popular or strict religious doctrine, and so personal belief systems that incorporate this would still fall under creed, even if not explicitly Buddhist.

Myth 5: Masking requirements are not medical in nature unless they are ‘medical masks’ or used in a healthcare setting

Fact: All existing mask mandates and policies are based on the presumption that medical and ‘non-medical’ (cloth) masks prevent the spread of a pathogen (SARS-COV-2), and are being used for the purposes of disease prevention, which qualifies them as medical treatment as per the Healthcare Consent Act:

“treatment” means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose ^[7]

Medical treatment must be freely consented to, and so the use of coercive mandates and policies for force their use on those who do not freely consent is a consent violation, and thus, very arguably constitutes battery and/or assault ^[8].

Myth 6: We are in a pandemic, so employee comfort and safety have been placed above the rights of the mask exempt

Fact: No. The Human Rights Code enjoys a ‘quasi-constitutional’ status and is second only to the *Charter of Rights and Freedoms*. A business cannot justify refusals of service due to customer preference or employee morale. While employees have the right to refuse what they view as unsafe work under the *Employment Standards Act*, a business itself does not have the right to either refuse service to customers or deny work to employees who have mask exemptions because of speculative risk of harm to health and safety alone. Under health and safety, businesses must evaluate the risk’s “*nature (consequence), severity (seriousness), probability (likelihood), scope (who it affects), and reality (incidence)*” ^[9].

Unless the risk of harm is proven to be serious or significant through objective evidence and analysis and accommodation has been objectively and fairly determined to require excessive burden, a defence of **undue hardship** will not be supported, even if some hardship or inconvenience is present. ^[4]

Myth 7: Takeout and curbside pickup are enough to accommodate mask exemptions

Fact: While curbside pickup and online ordering may be utilized by certain individuals with mask exemptions, they are not automatic grounds to deny in-person service. In-person shopping and indoor dining are substantively different experiences from their take-away counterparts, and businesses have the duty to appropriately accommodate those with mask exemptions in a way that respects their individualized needs, dignity, and most importantly allows for their integration and full participation when being provided services, in both equal access and kind as the general public. The *OHRC* specifically warns against segregated/‘separate-but-equal’ policies and practices as being unacceptable:

“it should be kept in mind that segregated treatment in services, employment or housing for people with disabilities is less dignified and is unacceptable, unless it can be shown that integrated treatment would pose undue hardship or that segregation is the only way to achieve equality.” ^[10]

Sources

1. City of Windsor - BY-LAW NUMBER 123-2020 s. 3 | <https://t.co/d8avhTEf7B>
2. Ontario Human Rights Commission - Protected Grounds | <https://t.co/emCXwpwhjT>
3. Reopening Ontario Act s. 2 (4) | <https://t.co/hTcckzljI8>
4. Ontario Human Rights Commission - 14. Undue Hardship | <https://t.co/4O0tr2zziO>
5. Trespass to Property Act s. 2 (1) | <https://t.co/SKbr8cOAE4>
6. Ontario Human Rights Commission - 4.1 What is Creed | <https://t.co/IsDPiTnV8G?amp=1>
7. Health Care Consent Act, 1996, S.O. 1996, c. 2, Sched. A, s 2 (1d) | <https://t.co/4ezPicpe52>
8. Consent: A guide for Canadian physicians - Assault and battery | <https://t.co/eZDW3L4OsM>
9. Ontario Human Rights Commission - 14.3 Undue Hardship/Health and Safety | <https://t.co/4O0tr2zziO>
10. Ontario Human Rights Commission - 8. Appropriate Accommodation | <https://t.co/8kcpKDy9J2>