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Masks Mandates and Public Transportation: How Does One Judge Have The Power to End The Mask Mandate?

By Christopher Dolan and Kim Levy

This week's question comes from Bill S. from San Francisco who asks:

I'm taking my family to Hawaii in a few weeks and just learned that a Florida judge struck down the mask mandate for airlines. I'm confused about how this will impact our trip. Does this mean that no one will have to wear masks on the airplane? How can one judge in Florida end the mask mandate for the whole country? The end of the airline mask mandate is concerning since I have one child too young to be vaccinated.

Hi Bill,

I certainly appreciate your concern and will hopefully answer your question. Before I start, I would like to give you some background on the Federal Transportation Mask Mandate. In January of 2021, after being sworn in, President Biden signed an executive order making it a violation of federal law to ride public transportation without a mask.

US health officials scheduled the mask mandate to expire on April 18, 2022. However, on April 13, 2022, they extended the federal transportation mask mandate by 15 days in order to assess the recent rise in COVID-19 cases.

Why was the mask mandate struck down?

On April 18, 2022, US District Judge Kathryn Kimball Mizelle, a Tampa-based federal court judge, ruled that the federal transportation mask mandate was unlawful. Judge Mizelle struck down the mandate on two grounds: (1) she found that the CDC exceeded the authority provided by Congress; and (2) the enactment of the mandate violated administrative law, which prescribes a process that executive branch agencies must follow to make new policies.

First, Judge Mizelle ruled that the CDC lacked the authority to require masking on public transportation. She took a very narrow view of the Public Health Service Act, a 1944 law allowing the CDC to take certain measures to fight the spread of communicable diseases; the language of the statute refers to "sanitation" as a measure that may be required to be undertaken. Judge Mizelle took this to mean that the statute permitted the establishment of rules/regulations "that clean something, not ones that keep something clean" and mandatory masking was not a "sanitation" measure. Judge Mizelle concluded that requiring masking, regardless of infection status, was an overbroad application of the "detention" and "quarantine" protocols allowed by the Act. In other words, requiring masking of travelers who had not been determined to be infected exceeded the authority that Congress intended to be provided by the Public Health Service Act.



Mizelle stated that the CDC didn't have a valid excuse for bypassing the masking rule's public notice and comment requirements. The CDC did not provide an adequate explanation for why they implemented the masking requirement in the first place. Judge Mizelle referred to the fact that the pandemic was already a year old when the mandate was put in place; accordingly, the mandate was not put in place under emergency circumstances.

Of note, Judge Mizelle, a President Trump appointee, was rated by the American Bar Association as "not qualified" for appointment to the Federal bench due to lack of experience. Nonetheless, she was confirmed for life at the age of 33.

How does this ruling affect travel?

Judge Mizelle's ruling put the authority to enact and enforce masking mandates back with individual airlines, ride-share companies, and other modes of public transportation.

Because of the ruling, the Transportation Security Administration (TSA), a federal agency, ended its enforcement of the mask mandate.

Some jurisdictions like New York and Chicago elected to keep in place mask mandates on public transit, all major airlines, Amtrak, Caltrain, SFMTA, and ride-share companies. Others have chosen to drop their mask mandates and instead recommend the use of masks while riding public transportation.



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There are no longer any uniform rules surrounding masking on public transportation. It is best to have a mask should you be required to wear one.

How does one judge have the power to end the mandate?

Judge Mizelle struck down the mandate in a “nationwide” injunction (a national court order requiring an action or halting an action). However, she referred to her ruling as vacatur (eliminating an unlawful rule). The judge’s reasoning for her broad elimination of the mask mandate was that it would be too difficult to apply the injunction only to those that brought the lawsuit in the first place. A nationwide injunction applies to all jurisdictions everywhere within the United States.

The judge’s decision does not carry precedential weight. Other federal courts across the country are not obligated to follow her reasoning in handling similar future challenges to administrative regulations. However, if the ruling is appealed and upheld by the federal appellate court (which covers the Southeastern United States), it would set precedent for all

other federal courts within the circuit. If the appeal reached the United States Supreme Court, a ruling upholding Judge Mizelle’s order would be binding nationwide.

What will happen now that the decision has been appealed?

On April 21, 2022, the Biden Administration asked the Department of Justice to file an appeal in the case. The appeal, if successful, would make clear that the CDC holds the power to make broad mandates in the interest of safeguarding public health. If unsuccessful, the opposite is true—a ruling that would hamper the authority of the CDC to act to protect the people from new and/or evolving public health threats.

State and local government would still maintain authority to issue rules and regulations to protect public health. However, regulations across the country would be inconsistent and piecemeal—arguably this lack of uniformity allowed the COVID-19 pandemic to claim so many US lives in the first year of the pandemic.

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The COVID-19 (Coronavirus) outbreak is an ongoing, rapidly developing situation, and the local, state, and federal responses are regularly changing. The Dolan Law Firm makes efforts to keep the information on this page updated. However, it is necessary to confirm with publicly available federal, state, and local health organization guidance and government mandates to guarantee up-to-date information.

Accidents involving pedestrians are on the rise

By Christopher Dolan and Jeremy Jessup



This week’s question comes from Jordan from Emeryville:

As people have started to get out more, I keep hearing about pedestrians being struck by cars. I know this is nothing new but seems to be coming up a lot more lately. Do you know what the trend is, I hope I am just paranoid, and whether or not anyone is doing anything to address the issue, if there is one?

With the holiday season upon us, and despite the cold weather, people are out shopping and just being out more. With the current status of COVID, ridership on public transportation is still down, so those without vehicles, have taken to walking. But unfortunately, you are correct, though not a new problem, accidents involving pedestrians are on the rise. Earlier this year, the Governors Highway Safety Association (GHSA) projected that 2020 had the largest ever annual increase in the rate at which drivers struck and killed pedestrians, and they were correct.

According to the GHSA the likely culprits are speeding, drunk driving, drugged driving, and distraction, which were rampant on U.S. roads during the COVID-19 pandemic. In addition, the March GHSA report also examined the 2019 FARS data to provide insights on trends regarding these issues. Some of the findings include the following:

- Pedestrians accounted for 17% of all traffic deaths in 2019, compared to 13% in 2010. While pedestrian deaths have risen by 46% over the past decade, the number of all other traffic deaths has increased by only 5%.
- Drivers struck and killed a larger proportion of pedestrians that were minorities, including Black, Indigenous and People of Color, than expected based on the population. On the other hand, white/non-Hispanic pedestrians accounted for a considerably smaller proportion based on population.

- Most pedestrians are killed on local roads, in the dark and away from intersections. During the past 10 years, the number of pedestrians struck and killed after dark increased by 54%, compared to a 16% rise in pedestrian fatalities in daylight.

- Alcohol impairment by the driver and/or pedestrian was reported in nearly half of traffic crashes that resulted in a pedestrian fatality.

- Although passenger cars make up the largest categories of vehicles involved in fatal pedestrian crashes, over the past decade the number of pedestrian deaths in crashes involving SUVs has increased at a faster rate – 69% – than deaths in crashes involving passenger cars, which increased by 46%.

“Last year was filled with so much death and loss as COVID swept across the country. As America gets vaccinated and returns to normal, we need to treat pedestrian safety like the public health emergency that it is,” said GHSA Executive Director Jonathan Adkins. “We must strengthen our efforts to protect those on foot from traffic violence by implementing equitable and proven countermeasures that protect people walking and address those driving behaviors that pose the greatest risk.”

However, given the wide-open roads that existed following the stay in place order, many drivers have failed to adjust to more people being out and about. “The wrecks that are occurring are at higher speeds,” said Dr. James Augustine, the medical director for emergency medical services in Atlanta, as well as a spokesman for the American College of Emergency Physicians.

To help with this issue, AB43 was introduced by State



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Assemblymember Laura Friedman out of Glendale, to assist cities struggling to combat pedestrian fatalities. Beginning in 2022, cities will be able to force drivers to slow down on accident-prone streets. AB43 gives cities new authority to reduce limits in increments of 5 mph by factoring the safety of pedestrians and cyclists in traffic surveys. The state's existing standards set limits based upon certain findings determined by an engineering and traffic survey and on the speed drivers feel comfortable driving at, rather than what's actually safe.

Unfortunately, while it should be the ultimate duty of drivers to

pay attention and follow the rules of the road, pedestrians should be mindful of the hazards and follow a few basic tips:

- Increase your visibility at night by carrying a flashlight when walking and wearing reflective clothing, such as reflective vests.
- Cross streets at a designated crosswalk or intersection whenever possible.
- Walk on a sidewalk or path instead of the road. Walk on the shoulder and facing traffic if a sidewalk or path is not available.

- Avoid using electronic devices like earbuds or walking if you have been using alcohol or drugs. They can cause distractions and impair judgement and coordination.

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Will Bicycle Accidents Increase as E-bikes Get Popular?

By Christopher Dolan and Nancy Villatoro

This week's question comes from Anonymous who asks: As gas prices continue to soar, I am thinking of getting an e-bike to get around and commute to work. I have noticed more cyclists on the roads, many of them riding e-bikes. Some of them seem to be going faster than their pedaling indicates and as they overtake other cyclists. Some riders don't even seem to be pedaling, yet they are moving faster than other cyclists around them. I am still on the fence on getting an e-bike since I do not know which bike to get. Do you think bicycle accidents will increase as more e-bikes join the traditional pedal bikes?

Hi Anonymous,

Thanks for your question. In the United States, AAA¹ reported that the average national price for a gallon of regular gasoline hit \$4.33, in March of 2022, which is the highest national average ever, not accounting for inflation. Similarly, in California, the highest recorded gasoline price for a gallon of regular unleaded hit \$5.91 on March 29, 2022. By the time you read this, it is likely that prices will be higher. With gas prices rising, people across the state and country are turning to alternative wallet-friendly ways to get around town through carpooling, public transportation, electric vehicles, electric bicycles.

Electric bicycles, or e-bikes, are selling faster than expected for the first quarter of the year, above the already high expectations set by the pandemic boom. While many factors may be affecting the boom, such as eased pandemic restricts and workers returning to the office, many merchants point to fuel prices as a contributing factor.²

In California, an e-bike is a conventional bicycle with operable pedals and an electric motor that does not exceed 750 watts. It must also not exceed 28 mph on leveled ground. The e-bike motor must cease to function when brakes are applied. The e-bike law prohibits users from modifying electric bicycles to change the speed limit. The law defines electric bikes into three-tier classifications: Class 1, 2, and 3.

Slow-Speed Rechargeable Bicycles Are Comparable to Regular Bikes—Class 1 and 2 e-bikes (with maximum supported speeds of 20 miles per hour) are typically allowed any place regular bicycles are permitted unless there is a posted sign that specifically bans e-bikes. The difference between Class 1 and Class 2 is that Class



2 e-bikes come with a motor controlled by a throttle, which allows the e-bike to be powered without pedaling.

The Exception of High-Speed Vehicles – Class 3 bicycles have top supported speeds of 28 miles per hour. They cannot be utilized on bike paths or trails unless it is permissible by local municipalities. (California Vehicle Code §21207.5.) These types of e-bikes could be used on bike lanes and/or detached bikeways next to a road unless otherwise regulated by local municipalities. Additionally, these also require the use of helmets and cannot be used by riders under the age of 16.

Severe injury accidents increase with higher driving speeds and more people on the road. As detailed in our previous article on March 25, 2021, "Have fun and stay safe on an electric bike," riders can stay safe on the road by obeying all applicable traffic

laws designed to keep those on the road safe. Riders should maintain a safe speed, which means not always reaching the maximum speed allowed by the particular e-bike they ride. E-bikers should always be vigilant of their surroundings, including weather conditions, road conditions, pedestrians, vehicles on the road, and other cyclists. E-bikers should err on the side of caution and wear helmets, even though that might not be required. They should consider wearing brightly colored clothing, making them more visible to others on the road. Riders should use a bell when passing other cyclists or pedestrians to ensure that their presence is known. Riders should familiarize themselves with their e-bikes before jumping onto the road confidently. Users should take their time, perhaps practicing in an empty parking lot before venturing onto a busy road at high speed. Riders should become familiar with the different pedal-assist settings that many e-bikes have. E-bikes can accelerate rapidly, which can be dangerous for riders not used to sudden momentum changes. A lower pedal-assist setting could help users adjust to the e-bike's increased acceleration. E-bikers should practice braking from high and low speeds, which may also be a new experience for those accustomed to traditional bicycles. And finally, if riders plan to ride where others are present don't forget to use your helmets and have fun. For more bike safety tips see our Dolan Law Firm bike safety guide tips.

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1. <https://gasprices.aaa.com/?state=CA>

2. <https://www.bloomberg.com/news/articles/2022-03-18/electric-bikes-are-booming-again>



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New Era: The End of Forced Arbitration Agreements for Sexual Harassment and Assault Victims?

By Christopher Dolan and Venessa Deniston



This week's question comes from Jessica R., who asks:

I've been working at a big tech giant company in the South Bay for about three years now as a software developer. At the outset of my employment, I signed several documents contained in a hiring packet, one of which was an arbitration agreement. I didn't understand what it was at the time. I just signed it because I thought that's what I had to do to start work. I now understand that by signing, I gave up my right to file a case, and any claim arising from my employment will be handled confidentially out of court. A few weeks ago, one of the newly hired managers began making inappropriate sexual remarks to one of my co-workers and me. The behavior has only gotten worse. I'm starting to regret ever having signed that arbitration agreement. Do I have any options, or am I going to be stuck with it?

Hi Jessica,

Thank you for your question. We have some excellent news for you. Last month, on March 3, 2022, President Biden signed H.R. 4445 into law, ending forced arbitration of all claims of sexual assault and sexual harassment arising under federal and state law. The law is effective immediately nationwide. It applies to all past and future agreements, including arbitration agreements signed before the new law went into effect.

It is important to note that the new law applies to any "dispute or claim that accrues on or after the date of the enactment of this Act." Does a claim "arise" or "accrue" when the actionable conduct occurs or when you file the case? The former is based on how similar language has been interpreted in the past. This means any act of sexual assault or sexual harassment that occurred before March 3, 2022 may still potentially be compelled to arbitration by the employer if the victim was aware of it before that date. Nonetheless, there is likely to be a wave of test cases over the next six months seeking to further clarify the applicability of this new law to acts of sexual harassment and assault that occurred before March 3, 2022, and how cases involving sexual harassment and sexual assault occurring both before, on, and after March 3, 2022, are to be treated.

What does this mean for you and your circumstances? First, the arbitration agreement you signed when you were hired by the company three years ago is covered under this new law. Second, the new law will apply to your claims because the sexual harassment your supervisor subjected you to appears recent – post-dating March 3, 2022 – and ongoing. Should you decide to pursue legal action, you may, at your election, choose which forum you prefer, whether it be arbitration or civil court. If you choose to file sexual harassment claims in civil court against your employer and your supervisor, your employer will not be successful in compelling you to arbitration, despite your former agreement to do so.

Does this completely prohibit the arbitration of such claims? No. Depending on the circumstances, an employee that previously signed an arbitration agreement may still wish to avail themselves of the arbitration process. The confidential nature of arbitration may appeal to some employees who don't wish to have their names publicly associated with embarrassing or explicit sexual harassment or assault details. This law places the power in the hands of the victim to choose which forum they prefer.

Now, for the curveball. As the law is brand new in its application, it is less clear at present how cases will be handled that involve a mix of different claims, one or more of which involve sexual assault or harassment. Suppose for instance, you wish to bring a sexual harassment claim and claims for wage and hour violations, for instance, the law is silent on whether or not the wage and

hour violations will be compelled to arbitration. Forcing a victim to pursue two related claims arising out of their employment in two separate forums is neither practical nor cost-efficient to addressing those claims. Time will bear out how such cases will be handled.

One final note for those of you out there who may not be covered by this new law, if you do end up in arbitration, there are some further protections for you as a Californian. On January 1, 2019, Senate Bill 820 known as the Stand Together Against Non-Disclosure (STAND) Act became law, prohibiting settlement agreements designed to silence employees from sharing factual information about their experiences of sexual harassment or sexual assault in the workplace. This law also applies to settlement agreements that contain a non-disparagement provision. Thus, despite the confidential forum of arbitration, if a settlement is reached prior to the hearing, your employer cannot prevent you from speaking out about what happened to you. Since 2019, the California legislature has taken it a step further. On January 1, 2022, Senate Bill 331 known as the Silenced No More Act was signed into law, expanding the prohibition to all claims of harassment, discrimination and retaliation under the Fair Employment and Housing Act (FEHA), including claims based on race, sexual orientation, disability and many others.

If you or someone you know has signed an arbitration agreement and experienced harassment, discrimination, or retaliation in the workplace based on their membership in a protected class under FEHA, contact an attorney such as the Dolan Law Firm to analyze your particular circumstances.

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