



Potential Liability Considerations for Police Departments Enforcing the Governor's Executive Order

On March 20, the Governor signed [Executive Order No. 8](#), which imposes a stay at home order, social distancing and defines essential businesses and operations that can stay open. Section 17 is the Enforcement Section, which reads: "This Executive Order may be enforced by State and local law enforcement pursuant to, *inter alia*, Section 7, Section 18 and Section 19 of the Illinois Emergency Management Agency Act, 20 ILCS 3305." I was hoping to find an immunity provision in those sections of the Act, but there are none. In addition, the State, in asking local law enforcement to assist, has not agreed to defend and indemnify for any enforcement actions taken in this regard. For these reasons, IRMA is providing some guidance to IRMA Police Departments as they encounter enforcement issues.

Public Health v. Criminal Enforcement

The Coronavirus Pandemic is a public health issue. There is not an explicit criminal provision that is applicable for a situation where the Governor's Executive Order is violated. The Governor has emphasized his expectation that people voluntarily comply and that arrests should be a last resort. He has suggested a criminal charge could be reckless conduct. The definition of reckless conduct is found at 720 ILCS 5/12-5 and provides: A person commits reckless conduct when he or she, by any means lawful or unlawful, recklessly performs an act or acts that: (1) cause bodily harm to or endanger the safety of another person; or (2) cause great bodily harm or permanent disability or disfigurement to another person. Subsection (1) is a Class A misdemeanor and subsection (2) is a Class 4 felony. The offense contemplates a victim, a specific person – not the general public.

Liability Considerations for Arrests

When a police officer makes an arrest, the prosecution of the charge is in the discretion of the State's Attorney. When a State's Attorney dismisses a charge, the police officer is subject to a lawsuit for false arrest and malicious prosecution. These cases are very rarely dismissed and frequently require discovery and then a motion for summary judgment. The cases are almost always federal cases, which bring the potential for having to pay Plaintiff's attorney's fees. The affirmative defense to these cases is to prove the existence of probable cause. While it is certainly frustrating, the law imposes potential liability on the police officer and provides the State's Attorney with absolute immunity, even though the State's Attorney controls the prosecution.

During this time, police officers may be called upon to enforce the Governor's order and respond to complaints of people violating the social distance requirements, or the stay at home order. If people refuse to comply, the police officer has discretion to arrest or to simply make no arrest. The failure to arrest could result in a lawsuit, but it is much less likely than a lawsuit after an arrest where the charges are dismissed, or the defendant is found not guilty. The "failure to arrest" lawsuit would require the Plaintiff to prove that the police officer's failure to arrest was the proximate cause of some harm – perhaps exposure to the Coronavirus, which would be very difficult to prove. The Plaintiff's contributory negligence in violating the Governor's order would certainly be important.

A police officer's decision to charge/arrest also exposes the police officer to risk of coronavirus. Additional considerations in exercising this discretion include: the likelihood that the State's

Attorney will prosecute the charge and the likelihood that judges or juries will be willing to convict. For these reasons, we are recommending that IRMA Police Departments take these factors, including potential liability, into consideration when exercising discretion in law enforcement actions.

Liability Considerations for Using the Cease and Desist Notice and Closing Businesses

First and foremost, the Cease and Desist Notice is not an order. It is a Notice. Nothing in the Executive Order, or state statutes, explicitly give police authority to close businesses. Closure of businesses can be accomplished by revoking permits, or filing civil actions, but must comply with due process. The question of whether a business is an "essential business" can be a difficult determination and not one that police officers should dictate. If a business closes when it receives a Cease and Desist notice, it is a voluntary closure. If a business refuses to close, the matter should be referred to the State, the local health department or the State's Attorney as a civil matter.

The State of Illinois has issued the Executive Order and it has been revised as issues arise. For example, golf courses were originally allowed to be open, but then closed shortly thereafter. This shows that the definition of essential businesses is difficult, and subject to revisions and interpretations. A police-mandated business closure could result in a lawsuit for tortious interference with business, a taking, a due process violation or malicious prosecution. The damages for wrongfully closing a business are real – lost profits, lost income, lost employment. For these reasons, IRMA is asking Departments to exercise caution, consult with legal counsel, and remember that IRMA's early intervention program is available for consultations. We are here to assist.

The State has provided a hotline (1-800-252-2923) and email (CEO.support@illinois.gov) to direct questions regarding whether a business is "essential." Departments can refer complaints to the State. Similarly, those complaints from employees who are concerned about their work conditions should be referred to the Workplace Rights Bureau of the Illinois Attorney General's Office at 844-740-5076 or workplacerrights@atg.state.il.us.

The draft Cease and Desist Notice from the Illinois State Police identifies 3 potential ramifications for failure to close a business. First, the rescission of licenses necessary to operate the business, such as liquor licenses. The power to suspend or revoke local liquor licenses belongs to the local Liquor Commissioner, which is usually the mayor. I believe that police departments should consult with the Liquor Commissioner before issuing a notice that includes a threat to exercise this power. If the Liquor Commissioner is not interested in exercising this power (which requires due process, including notice of charges and a hearing), then this ramification can be deleted from the Notice. The second potential ramification is an order of closure issued by the state or local health department, which is appropriate. The third ramification is "civil and/or criminal liability." When a police officer provides this Notice, threatening "criminal liability" to a business for failure to close, it is a threat of criminal prosecution. Prosecuting a business for reckless conduct, or another crime, is difficult. This is really a civil matter. Similar to the analysis above, this threat of criminal prosecution brings with it the potential liability for false arrest or malicious prosecution. If your State's Attorney is not willing to prosecute a local business for a criminal violation, then this part of the Notice should be deleted as well. Here is [IRMA's recommended Cease and Desist Notice for Police Departments](#) to utilize, which deletes the first ramification and also the threat of criminal liability.

IRMA will be scheduling conference calls with our Police Departments to further discuss these recommendations. If you are interested in participating in a conference call, please contact Margo Ely at margoe@irmarisk.org or on her cell at (847) 826-7110.