



Considerations for Police Departments Enforcing the New IDPH Rule for Enforcement Efforts against Businesses

On August 11, 2020, the Illinois General Assembly's Joint Committee on Administrative Rules (JCAR) approved the recent emergency rulemaking of the Illinois Department of Public Health ("IDPH") to provide for local enforcement against any business that fails to ensure its patrons comply with: a) the Governor's face covering executive order; and b) the Governor's executive order that limits public gatherings to the lesser of 50 persons or one-half the applicable occupancy standard. Here is the [new rule](#).

During testimony before the JCAR, the Governor's office clarified that it intends for penalties to be applied only to "rogue" businesses that ignore the mandates. Those businesses that are taking reasonable efforts at compliance should not be cited. In determining whether a business is taking reasonable efforts to comply, consideration should be given to the "totality of the circumstances and include, but are not limited to: posting signage requiring face coverings to be worn on the premises; providing face coverings to customers; giving verbal warnings to customers to wear a face covering when on the premises; and requesting that customers leave the premises if not wearing a face covering."

The new emergency rule allows for penalties only against businesses, not individuals, and provides multiple "warnings" before any penalty is issued. The advance warnings are intended to assure greater leniency, and to afford IDPH, local health departments, and local law enforcement agencies more leeway, in compelling compliance with "face covering" and "limited gatherings" mandates. The rule indicates that IDPH will post a sample notice of non-compliance and a sample written order to disperse on its website. The process is as follows:

- first, businesses will be given a warning in the form of written notice and encouraged to voluntarily comply with the applicable public health guidance;
- second, businesses that do not voluntarily comply will be given an order to have some or all of their patrons leave the premises as needed to comply with the applicable public health guidance; and
- third, if the business continues non-compliance, it can be charged with a Class A misdemeanor and subject only to a fine ranging from \$75-\$2,500.

The Coronavirus Pandemic is a public health issue; it is not a law enforcement issue. There is still not an explicit criminal provision that is applicable for a situation where the rule is violated. ([See prior memorandum regarding Potential Liability Concerns](#)) The new rule references section 8.1 of the Department of Public Health Act for penalties, which provides "whoever violates or refuses to obey any rule or regulation of the Department of Public Health shall be deemed guilty of a Class A misdemeanor." There is no reference to what the Class A misdemeanor is called, but it is a public health rule violation. What is important is that this section states that the Director of Public Health may designate "a local board of health or local health officer to institute prosecutions or proceedings for violation[s]." It says nothing about local law enforcement. However, the new rule references section 2(a) of the Act for the enforcement by police officers. Reading the two statutory sections together, I believe that any police officer who engages in enforcement actions should refer the matter to the local health officer to institute a prosecution with the local state's attorney.

The question arises as to whether local police departments have the obligation to enforce the new rule. The rule states “all local boards of health, health authorities and officers, police officers, sheriffs and all other officers and employees of the State or any locality, **shall** enforce the rules and regulations so adopted and orders issued by the Department.” (emphasis added). There is no ramification if a local police officer exercises his/her discretion to not enforce. Similarly, as stated above, it is the local health official that has the explicit authority to institute a prosecution. Local police do not have the authority, or obligation, to institute a prosecution.

From a liability perspective, it should be noted that there are several defenses available in the Illinois Tort Immunity Act. Here are some relevant provisions:

Sec. 2-103. A local public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

Sec. 2-105. A local public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its own, to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

Sec. 2-201. Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

Sec. 2-202. A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct.

Sec. 2-203. If a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for any injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable.

Sec. 2-205. A public employee is not liable for an injury caused by his adoption of, or failure to adopt, an enactment, or by his failure to enforce any law.

Sec. 2-209. A public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law.

Sec. 2-213. Notwithstanding any other provision of law, a public employee is not liable to pay punitive or exemplary damages in actions brought against the employee based on an injury allegedly arising out of an act or omission occurring within the scope of employment of such an employee serving in a position involving the determination of policy or the exercise of discretion when the injury is the result of an act or omission occurring in the performance of any legislative, quasi-legislative or quasi-judicial function, even though abused.

Based on these available defenses, in conjunction with the target being only businesses that do not comply after several notices to do so and the prosecution being instituted by local health officials, liability concerns if IRMA Departments choose to engage in enforcement actions are low. Likewise, I have no liability concerns if IRMA Departments choose to not engage in enforcement actions. For those Departments that choose to engage in enforcement actions, we advise that you follow the process outlined in the rule, document all actions and observations, make sure your local health officials and state's attorneys are supportive of your actions. Based on the process outlined in the rule, only those businesses that are intentionally violating the requirements will be subjected to prosecution. In addition, the only possible penalty is a fine. Businesses will not be shut down. As such, potential damages if there was a lawsuit filed for the enforcement action are low.

IRMA will be scheduling conference calls with our Police Departments to further discuss this issue. 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.