14 West Mifflin Street, Suite 206
Madison, WI 53703

Phone: (888) 367-8198, Ext. 704
Fax: (608) 268-8607
www.leattys.com

**Brent G. Eisberner**
Attorney
brent@leattys.com

Dr. Patrick Flynn

Re: Governor Evers' Executive Order Declaring a Public Health Emergency on July 30, 2020 and Emergency Order on Face Coverings
Date: 04 August 2020

**SENT VIA E-MAIL**

## Introduction

This memo will discuss Governor Evers' Executive Order on July 30, 2020 declaring a public health emergency and the following Emergency Order on Face Coverings requirement. Governor Evers declared the new public health emergency in his Executive Order # 82, after his initial one expired in May. Soon after, a statewide mask order went into effect on August 1, 2020 as the first emergency order under the new public emergency state. The governor's office also released a set of frequently asked questions, addressing order enforcement and application issues.

The implementation of the statewide face covering order remains unclear as it remains to be seen whether the order will be challenged in state court. Given the Wisconsin Supreme Court's decision earlier this year that invalidated the Wisconsin Safer at Home Order, such a challenge is likely. At least one state legislator has called for a legislative session to block the order. Before this new event is litigated and its legality determined, the enforcement of the order and remedies remain unpredictable.

## Overview of Wisconsin Statewide Face Covering Order

The Emergency Order #1 issued by Governor Evers entered into effect at 12:01 am on Saturday, August 1, 2020 and shall expire on September 28, 2020, or by a subsequent

superseding emergency order. It starts by addressing Governor Evers' Executive Order on July 30, 2020 declaring a public health emergency, which paved the way for this face covering order. It continues to lay out the reason behind the face coverings requirement: the Centers for Disease Control (CDC) has called on Americans to wear face coverings, with the CDC director stating, "[c]loth face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus – particularly when used universally within a community setting. All Americans have a responsibility to protect themselves, their families, and their communities." The order quotes a selection of published scientific research, modeling by the University of Washington's Institute for Health Metrics and Evaluation and 31 states that implemented requirements for face coverings in different settings. The authority, according to the order, is vested in Governor Evers by the Constitution and the laws of this state, and specifically Section 323.12 of the Wisconsin Statutes. People who don't follow the mandate could be fined up to $200.

The new order requires every individual, age five and older, in Wisconsin shall wear a face covering if both of the following apply: (1) The individual is indoors or in an enclosed space, other than at a private residence; and; (2) Another person or persons who are not members of individual's household or living unit are present in the same room or enclosed space. Face coverings are strongly recommended in all other settings, including outdoors when it is not possible to maintain physical distancing. It defines "enclosed space" as "a confined space open to the public where individuals congregate, including but not limited to outdoor bars, outdoor restaurants, taxis, public transit, ride-share vehicles, and outdoor park structures."

In accordance with the U.S. Centers for Disease Control and Prevention's guidelines, the order exempts certain individuals from the face covering requirement, such as (1) Children under five years old; (2) Individuals who have trouble breathing; (3) Individuals who are unconscious, incapacitated, or otherwise unable to remove the face covering without assistance; (4) Individuals with medical conditions, intellectual or developmental disabilities, mental health conditions, or other sensory sensitivities that prevent the individual from wearing a face covering; (5) Incarcerated individuals. Further, individuals in specific circumstances may remove their face coverings, such as when: (1) Obtaining a service, such as a dental exam, requiring the temporary removal of the face covering; (2) Eating or drinking; (3) Communicating with an individual who is deaf or hard of hearing and communication cannot be achieved through other means; (4) Sleeping; (5) Swimming or performing duty as a lifeguard; (6) Giving a religious, political, media, educational, artistic, cultural, musical, or theatrical presentation for an audience;

(7) Engaging in work where wearing a face covering would create a risk to the individual, as determined by government safety guidelines; (8) Confirming identity, such as upon entering a bank, credit union, or other financial institution; or (9) When federal or state law or regulations prohibit wearing face coverings.

## Issues

### I. Authority to Issue the New Public Health Emergency

There are grounds to challenge Governor Evers' authority to issue the new public health emergency declaration and the subsequent statewide face coverings order. The Governor's authority to declare a public health emergency rests in Wisconsin Statute § 323.10, which states that "if the governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health for the state or any portion of the state." However, this state of emergency is not infinite: "A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature." Wis. Stat. 323.10.

The governor's individual executive powers are in question, since he is now operating outside a 60-day window of power established in his March emergency declaration in response to the pandemic. One might recall that this is the second time in five months that Governor Evers has declared a public health emergency over the Coronavirus outbreak. The first declaration of a health emergency was the Executive Order #72 on March 12th. That executive order paved the way for the subsequent "Safer at Home" Emergency Order #28 that locked down much of Wisconsin until the State Supreme Court overturned it on May 13, 2020 in *Wis. Legislature v. Palm*. In *Wis. Legislature*, Supreme Court of Wisconsin recognizes Governor Evers's use of his special emergency declaration power in their decision: "Wis. Stat. 323.10 authorizes the Governor to invoke special emergency powers for 60 days when the Governor declares an emergency, which Governor Evers did here." The Court commented on this special emergency declaration power of the Governor: "in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely." *Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

The purpose of a 60-day limit on states of emergency is to rein in the otherwise unchecked power of Wisconsin's Executive Branch. Once an emergency has been declared, executive powers expand to include authority normally reserved for legislatures. The 60-days

limit under Wis. Stat. § 323.10 has an important role in making sure these powers are not abused or undermine the separation of powers vital to our democratic system of government.

There is some question about whether it violates Wisconsin Statute § 323.10.to issue two related emergency declarations. A legal challenge to the emergency declaration and mask order would ultimately be decided by the state Supreme Court. There is also a change that the legislature could hold an emergency session to overrule the Governors emergency declaration.

## II. Vague and Unenforceable

There are undefined terms used throughout the order. Most importantly, it does not limit or even define the term "indoors" and does not include a social distancing exception for six feet of space between individuals. Unless an individual is alone in an office or an enclosed workstation, he or she must wear a face covering at all times, with certain exceptions. That is arguably unconstitutionally vague, unpractical, and unnecessary.

According to the governor's office's explanation on enforcement of the order, the hope is that all Wisconsinites will step up, do the right thing, and voluntarily comply. For intentional violations of the face covering order, enforcement will depend on the factual setting and the local government officers. Intentional violations are enforceable through a civil fine up to $200. Wis. Stat. § 323.28. Such a violation may be reported to a local public health official for follow-up or to a district attorney, who has statutory authority under Wis. Stat. § 978.05(2) to prosecute state forfeiture actions. Then the order appears to contradict itself by saying the public should do nothing when seeing someone not wearing a mask, even though they should be because "some people have conditions or circumstances that would make wearing a cloth face covering difficult or dangerous." These vague and illogical statements leave both the public and law enforcement baffled and confused.

"The void for vagueness doctrine rests on the basic principle of due process that a law is unconstitutional if its prohibitions are not clearly defined." *Sherman v. Koch*, 623 F.3d 501, 519 (7th Cir. 2010). The analysis in a vagueness challenge examines whether the regulation is so vaguely worded that enforcement officials are given overly broad discretion to apply the law in a discriminatory or arbitrary manner. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). A regulation may be vague for either of two reasons: it may fail to provide the type of notice which enables ordinary people to understand what conduct is prohibited, or it may authorize arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

"[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law" as "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *City of Chicago v. Morales*, 527 U.S. 41, 58 (citation omitted). Id. at 58. A statute must not violate "the requirement that a legislature establish minimal guidelines to govern law enforcement." Id. (citation omitted.)

Beyond guaranteeing members of the public clear direction as to what they may do and may not do, the vagueness doctrine also ensures that police will have clear guidance as to whom a law may be enforced against. As has been reiterated by the Supreme Court since 1875: the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358, n.7, citing *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974) and *United States v. Reese*, 92 U.S. 214, 221 (1875). Simply put, "[w]here inherently vague statutory language permits such selective law enforcement, there is a denial of due process." *Smith v. Goguen*, 415 U.S. at 576.

As of August 2, 2020, of the 72 counties in Wisconsin, only 21 have either not issued a statement on the order or say they will enforce the mask order, the rest of the counties all issued statements saying they will not be investigating, nor responding to, reports of violations of individuals not wearing masks. Most county police forces do not have resources or time to investigate this type of complaint and the order itself does not offer a clear guideline for them to follow.

## III. Americans with Disabilities Act (ADA)

The order states that a person who has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove the face mask without assistance should not wear a face mask or cloth face covering.

### a. Reasonable Accommodations

The state mandate on face coverings do not override the consideration of reasonable modifications required by the Americans with Disabilities Act (ADA). The ADA does not have any rules that address the required use of face masks by state and local governments or private business owners. The ADA does not have any rules that address the required use of face masks by state and local governments or private business owners.

If a person with a disability is not able to wear a face mask, state and local government agencies and private businesses must consider reasonable modifications to a face mask policy so that the person with the disability can participate in, or benefit from, the programs offered or goods and services that are provided. A reasonable modification means changing policies, practices, and procedures, if needed, to provide goods, services, facilities, privileges, advantages, or accommodations to an individual with a disability.[1] It is important to focus on how to provide goods or services to a customer with a disability in an equal manner. This can be done by reasonably modifying your policies, practices, or procedures. The requirement to modify a policy, practice, or procedure does not include individuals without disabilities, as they are not protected under the ADA.

Examples of reasonable modifications to a face mask policy include: (1) Allow a person to wear a scarf, loose face covering, or full face shield instead of a face mask; (2) Allow customers to order online with curbside pick-up or no contact delivery in a timely manner; (3)Allow customers to order by phone with curb-side pick-up or no contact delivery in a timely manner; (4)Allow a person to wait in a car for an appointment and enter the building when called or texted; or (5) Offer appointments by telephone or video calls.

b. Exemptions of Reasonable Accommodations

Under the ADA, there are three reasons that a state or local government agency or private business may not have to provide a reasonable modification.

The first one is fundamental alteration. A state or local government agency or private business may not have to provide a reasonable modification if the modification would change the nature of the service, program, activity, goods, services, or facilities. [2]A fundamental alteration is a change to such a degree that the original program, service, or activity is no longer the same.[3] For example, if a customer requests that Menards deliver her items to her home as a reasonable modification so that she does not have to enter the store, but Menards does not offer a home delivery. The store would not have to grant the request for home delivery since it would be a fundamental alteration of their services.

Second, undue burden. A state and local government agency or private business is not required to take any action that it can demonstrate would result in an undue financial or

[1] ADA National Network. Health Care and the Americans with Disabilities Act. (n.d.).
[2] U.S. Department of Justice. Americans with Disabilities Act Title III Regulations: nondiscrimination on the basis of disability in public accommodations and commercial facilities (2017).
[3] U.S. Department of Justice. (2008, October 9). ADA Best Practices Tool Kit for State and Local Governments - Chapter 1 ADA Basics: Statute and Regulations.

administrative burden. An undue burden is a significant difficulty or expense.[4] For example, a person would like to visit Madison Public Library 30 minutes before the building opens to avoid other customers. While this might work for certain grocery stores, it might be an undue burden for the library due to limited staffing.

Last but not least, direct threat. A state or local government agency or private business may not have to provide a reasonable modification to the face mask policy if the individual with a disability poses a direct threat to the health or safety of others. A direct threat is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.[5] The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individual assessment that considers the particular activity and the actual abilities and disabilities of the individual.[6]

During a pandemic, state and local government agencies and businesses should use the most up to date information from the Centers for Disease Control and Prevention (CDC), the U.S. Department of Labor Occupational Safety and Health Administration (OSHA), and the state public health agencies. To limit a direct threat from the COVID-19 pandemic, a state or local government agency or private business may impose legitimate safety requirements necessary for safe operation. However, these groups must ensure that their safety requirements are based on real, specific risks, not on speculation, stereotypes, or generalizations about individuals with disabilities.[7] These safety requirements must be consistent with the ADA regulations about direct threat and legitimate safety requirements, and consistent with advice from the CDC and public health authorities.

In order to limit a direct threat and have safety requirements in place to address the COVID-19 pandemic, state and local government agencies and businesses may: (1) Develop policies and procedures for prompt identification and isolation of people with symptoms of COVID-19, including employees and customers; (2) Offer face masks to employees and

[4] U.S. Department of Justice. Americans with Disabilities Act Title III Regulations: nondiscrimination on the basis of disability in public accommodations and commercial facilities (2017).
[5] U.S. Department of Justice. Americans with Disabilities Act Title III Regulations: nondiscrimination on the basis of disability in public accommodations and commercial facilities (2017).
[6] U.S. Department of Justice. (1993). Americans with Disabilities Act Title III Technical Assistance Manual - Covering Public Accommodations and Commercial Facilities.
[7] .S. Department of Justice. Americans with Disabilities Act Title III Regulations: nondiscrimination on the basis of disability in public accommodations and commercial facilities (2017).

customers; (3) Inform customers about symptoms of COVID-19 and ask sick customers to minimize contact with workers and other customers until they are healthy again; (4) Post signs with COVID-19 information in places that sick customers may visit (e.g., pharmacies, hospitals, public health agencies, grocery stores); (5) Include COVID-19 information in automated messages sent when messages are sent to customers via phone messages, text, or email; and/or (6) Limit customers in-person access to the buildings operated by a state or local government agency or private business, as appropriate.

c. Proof for Accommodations

The U.S. Department of Justice (DOJ) or other federal agencies with enforcement authority have not provided guidance about whether a store can or cannot ask for medical documentation about a person's inability to wear a mask due to a disability. Generally, guidance from the U.S. Department of Justice has not allowed asking for documentation for accommodations at businesses where you would have a brief interaction, such as grocery stores or pharmacies. It is an assumption that a person with a disability typically does not carry disability documentation with them every place they visit. There are some places such as medical offices or hospitals that may need the medical documentation because there is a higher chance of contamination.

When it comes to workplace, if you have an obvious disability, most employers will accommodate your needs without requiring further documentation. The only time you may need to bring in medical documentation to support your disability is if you are requesting reasonable accommodations and if the employer does not think your disabilities are obvious. If you have a disability that prevents you from wearing a face covering and this disability does not show any physical signs, you may need to show proof when requesting workplace accommodations to not wear a face covering, therefore, may result in your employer requesting medical documentation of your condition. However, you are under no obligation to provide any information or documentation beyond what is necessary to prove you need such accommodation.

Sincerely,

Levine Eisberner LLC

By: Brent G. Eisberner

Attorney