

## **Governor Wolf Issues November 23<sup>rd</sup> Targeted Mitigation Measures Order**

*By Brian P. Gabriel and Paul N. Lalley – Campbell Durrant, P.C.*

With the significant increase in COVID-19 infections and hospitalizations, Pennsylvania Governor Tom Wolf issued an Order on November 23, 2020 for “Mitigation, Enforcement, and Immunity Protections” (“Mitigation Order”) that contains new provisions regarding enforcement of COVID-19 mitigation requirements and that provides for immunity from civil liability. Some of the Mitigation Order’s provisions apply to local governments. For other provisions, it is not clear whether they apply, and we will need further guidance from the Governor’s Office.

One part of the Mitigation Order that clearly applies to local governments is Section 14, which provides immunity from civil liability when action is taken to enforce the Secretary of Health’s November 17, 2020 Mask Order. This immunity applies to: (1) personnel of local health departments; (2) state and local law enforcement; and, (3) “personnel of other authorized agencies.” It also applies to business owners who take action to enforce the requirements of the Mask Order. The Mitigation Order treats those involved in enforcing the Mask Order as engaged in “essential emergency services activities and disaster services activities” when doing so, and justifies the grant of limited civil liability immunity on the Governor’s statutory disaster declaration powers. The immunity from civil liability does not apply, however, in cases of “willful misconduct, gross negligence, recklessness, or bad faith.” This grant of civil liability immunity will be welcomed by local governments, particularly where the Governor’s and the Secretary of Health’s public pronouncements regarding the Mitigation and the Mask Orders make it clear that local law enforcement agencies are authorized to enforce them, including the issuance of fines.

What is not clear is whether the Mitigation Order’s telework or other requirements for a “business” apply to local governments. Section 1 of the Order provides: “Unless impossible, all businesses must conduct their operations remotely, through individual teleworking of their employees in the jurisdiction or jurisdictions in which they do businesses. Where telework is impossible, employees may conduct in-person business operations, provided that the business fully complies with this Order, and all existing and future applicable guidance issued by the Wolf Administration, the Department of Health, and Centers for Disease Control and Prevention (CDC).” Other provisions in the Mitigation Order require businesses to engage in special cleaning and mitigation measures; to cooperate in contact tracing; and to not allow sick or COVID-positive employees to continue working at an in-person location.

When the Governor and the Secretary of Health issued orders in July related to mask wearing and telework requirements, the Secretary of Health had issued an FAQ that stated that a local government was not a “business” for purposes of compliance with the Secretary’s orders, and the guidance from our firm was that the Governor’s orders that referenced a “business” likely did not apply to a local government, pending further guidance from the Governor. That was consistent with the guidance issued by the Department of Community and Economic Development during the initial non-essential business closure orders in March, when DCED advised that local governments were not subject to the closure order. When the Secretary of Health issued the November 17<sup>th</sup> Mask Order, however, one of the FAQs stated that the mask mandate applied to persons inside local government buildings. Although this recent FAQ did not specifically address

whether a local government qualifies as a “business” for compliance purposes, the fact that the Mask Order applies to persons inside government buildings and that the Department of Health has removed its July FAQs from its website raise a question as to whether the Administration intends to have these orders – including the Mitigation Order – apply to local governments. Our firm’s initial contact with DCED, however, indicates that DCED may be issuing guidance soon that is expected to be consistent with its prior guidance regarding the applicability of the Mitigation Order to local governments. As of November 24<sup>th</sup>, the Governor’s Office website indicates that the “Targeted Mitigation Order” FAQs is being updated, but has not yet been issued, so public employers are strongly advised to check on the status of the Mitigation Order and any guidance issued by the Governor’s Office or DCED. Campbell Durrant attorneys will provide updates and are available to assist your municipality with any questions you may have.

---

### **Takeaways:**

- The Governor’s November 23<sup>rd</sup> Mitigation Order provides immunity from civil liability (with some exceptions) for local law enforcement agencies that enforce the Mask Order. Public statements from the Governor and the Secretary of Health have noted that both Orders are enforceable by local law enforcement.
- There remains some question about the Mitigation Order’s applicability to local governments. Guidance from the Governor’s Office and/or DCED is expected to be forthcoming.

### **Bottom line:**

Municipalities should review the Governor’s November 23<sup>rd</sup> Mitigation Order and continue to look for forthcoming guidance from the Administration as to its impact on local governments. Campbell Durrant attorneys will provide updates and are available to assist your municipality with any questions you may have.