

The Honorable Laura Kelly
Governor
State of Kansas
300 S.W. 10th Ave.
Topeka, Kansas 66612

RE: BUSINESS COMMUNITY CONCERNS REGARDING EXECUTIVE ORDER NO. 20-52

Dear Governor Kelly,

The business community in Kansas appreciates your commitment to the health of Kansans during these challenging times. However, the business sector has significant concerns with Executive Order No. 20-52 (EO) mandating masks. Many of the undersigned associations have fielded calls where their member businesses are facing legal and operational challenges stemming from the EO. We believe the order raises more questions than it answers for the business community. The order also has triggered several local jurisdictions to adopt their own mask mandate with similar language, which has led to similar legal issues and questions from the business community.

The EO expressly states that businesses must require “all employees, customers, visitors, members, or members of the public” to wear a mask under certain circumstances. The business community believes that this creates constitutional issues by delegating the enforcement of a law to private business rather than public officers. The order is overtly vague on how far a business must go to enforce the mask requirement. The order also assumes one size fits all for Kansas businesses that are vastly diverse in location and structure. Aside from the constitutional question, there are several operational questions like those listed below:

1. If an employee refuses to wear a mask, is the business required to take disciplinary action against such employee or risk violating the EO?
2. If an employee claims a medical exemption from the EO, is an employer required to verify the medical exemption, or simply accept the employee's claim?
3. Is attempting to verify the medical exemption of an employee a violation of the Americans with Disabilities Act (ADA) or other relevant law?
4. If a business terminates an employee for failing to comply with the business-enforced mask requirement, is that employee eligible for unemployment benefits?
5. Could such termination or disciplinary action be a violation of the ADA or other relevant law?
6. Will a business be liable if the business fails to discipline an employee who is not wearing a mask and that employee infects others at the place of business?
7. Are businesses required to bar access to a customer who refuses to wear a mask?
8. If a customer claims a medical exemption from the EO, is the business required to verify the medical exemption, or simply accept the customers claim?
9. If a business does refuse service to a customer, is it then liable under the ADA if such person has a valid medical disability that prevents them from wearing a mask?

10. Will a business be liable if the business does not refuse service to a customer who is not wearing a mask and that customer infects other customers at the place of business?

These are just a few examples of the many questions the order fails to answer, yet the business community is required to navigate, or it will face liability for failure to comply or liability for improper compliance.

We understand that local governmental entities charged with ensuring businesses are enforcing this EO have wide discretion on issuing civil penalties. However, this does not help with civil cases brought against a business by private citizens, nor does it guarantee equal treatment among separate judicial jurisdictions. It increases the chances of private lawsuits by potentially establishing an express duty of care to the general public that is not easily followed, and in some cases, adverse to the interests of private citizens exempted from the EO. We are also concerned the duty of care may create additional causes of action if a business improperly applies the EO requirements within its premise.

In addition, a majority of Kansas counties have chosen to opt out of the EO, leaving businesses that operate in multiple counties scrambling to determine an appropriate workplace policy. With the operational questions, constitutional questions, and the potential for legal liability, the below signed organizations strongly encourage you to repeal the existing order. Instead of reissuing an order we believe the state's resources would be better spent on a public information campaign on the value of wearing masks, including when and where wearing a mask would be most beneficial to public health.

Should you instead try to amend the EO, which we do not believe is appropriate, any replacement order should be carefully crafted to ensure that businesses are not the entity charged with requiring masks on their premises. Such an amended order should be limited to government controlled public areas and not applicable to private businesses. Should you decide to extend the EO beyond government-controlled areas, which we do not believe is appropriate, it must be limited to individuals, and clearly indicate that government has sole enforcement responsibility. It should not commandeer private businesses and should avoid creating civil liability for private businesses.

While the health and wellbeing of Kansans is preeminently important to Kansas businesses, of equal importance is the continuity of goods and services being delivered to Kansans. A mandate that businesses mandate masks simply creates too much uncertainty that could be solved by working with businesses to develop voluntary, location appropriate guidance. Thank you for your consideration of this request.

Sincerely,

Kansas Livestock Association
Kansas Chamber of Commerce
Kansas Grain and Feed Association

Kansas Agribusiness Retailers Association
Renew Kansas Biofuels Association
National Federation of Independent Business
Kansas Petroleum Council
Kansas Society for Human Resource Management

cc. Kansas Association of Counties for dissemination to county governments
Kansas League of Municipalities for dissemination to city governments
Speaker of the House, Ron Ryckman
Speaker Pro Tem, Blaine Finch
House Majority Leader, Daniel Hawkins
House Minority Leader, Tom Sawyer
President of the Senate, Susan Wagle
Vice President of the Senate, Jeff Longbine
Senate Majority Leader, Jim Denning
Senate Minority Leader, Anthony Hensley