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Senate Judiciary Committee

SUBJ: Emergency Management Act Governor's Orders and Criminal Sanctions

Chairman Wilborn and Committee Members:

Based on the discussion during the meeting of the Finance Council Wednesday afternoon, we are submitting the following information relating to the proposed bill to address concerns with the existing Emergency Management Act. Understand these are not the total list of our concerns, however these are the ones that we urge you to consider for immediate action as you put your bill together.

First and foremost, we are concerned not only with minimizing exposure of our officers to the COVID-19 virus, but also with limiting the exposure of those our officers contact. An area where we have great concern is the reluctance of health officials to share location data of people who are quarantined or in isolation due to COVID exposure, or positive test results. There is clear guidance from federal authorities that sharing of that information is not a HIPAA violation. However, many local jurisdictions refuse to allow access to that information that could alert first responders to take extra steps to reduce exposure. Some jurisdictions have allowed this access while others do not. We believe statutory authority or direction to share that information with 911 centers who can relay that information to first responders when appropriate is necessary. A statute addressing this would provide the assurance to those holding the information they can do so. Of course, there should also be restrictions to the release of that information beyond its intended purpose. **We propose language that would direct local and state health agencies to establish a mechanism for sharing location information with first responders of persons found to be quarantined or confirmed to test positive for an infectious disease designated in an Emergency Proclamation.**

It also appears from the comments at the Finance Council meeting you might desire to take up some limitations on criminal charges relating to various health related state and local orders including Governor's Executive Orders, KDHE orders, and local health orders. We also continue to be very concerned with the lack of clarity on the expectations for how such orders are enforced. There is also lack of clarity if an Executive Order is even valid if the base Emergency Proclamation or individual Executive Order has not been distributed as required by law. The vast majority of our agencies have focused on educating violators and seeking voluntary compliance without unnecessarily burdening an already COVID challenged criminal justice system. Just last week there was a television news report where a local health officer eluded to the potential need to arrest an infectious person not following quarantine orders to be arrested even though placing a person in jail is not the preferred solution. You don't need to look any further than the state prison system COVID concerns to see what an unrealistic concept putting a known infectious person in a jail is. It would certainly place an infectious person in an environment rich for exposure of many people to the COVID virus.

To address these issues, we are sharing some of our thoughts.

1. Criminalized health related orders are challenging for law enforcement on many levels. First, a criminal statute almost always contains the precise elements of the crime. But in these cases, the elements of the crime are contained in the order itself not the statute.
  - a. Those orders often lack clarity in exactly what the person is expected to do to avoid violation, which businesses or event they apply to, and are unclear to officers of what they are to enforce.
  - b. Various orders have different severity levels and penalties based not on the type of violation or level of risk, but instead on who issues the orders.
  - c. The two conditions above mean state and local health officers, and executive leaders are determining the elements of criminal violations.
2. The severity level of criminal violations and the possible penalties are fixed with a single cookie cutter solution to all types of emergency events (civil disorder, security of disaster scenes, and health related events). Each of these events have different needs for the ability for immediate arrest or delayed entry into the criminal justice system through warrants or summons. Each also requires different levels of law enforcement and prosecutorial discretion. Each of these events also deserve varying degrees of penalties, some without the potential of incarceration.
3. Violators of health-related quarantines and isolation imposed on known infected people should have different sanctions and solutions than those who violate social distancing among presumably healthy people or who violate business practices. Consideration should be given to treating those with infectious disease who pose a risk of life to themselves or others as civil matters the same as those with mental illness or drug addiction are treated. We need a medical setting to place those persons, not jails.
4. We will still need a sanction for those who disobey protective measures after being warned and educated. However, those sanctions must be reasonable for the given type of event and the risk level of the violation. A single solution will be too weak in some situations and too strong in others. We want to avoid some of the absurd events we have seen develop in other states.

We believe the statutes should provide different sanctions for various levels of violation. This is not different than we generally find in criminal law. Differences should be considered for the type of emergency (infectious disease vs. an emergency proclamation not related to an infectious disease) as well as the types of violations only resulting from an infectious disease emergency proclamation. Assault and battery statutes are good examples, although we would hope these proposed statutes would not have to be that complex. Businesses opening in defiance of orders to remain closed is one area where a crime can be any level of misdemeanor and still provide penalties limited to monetary fines or court orders to comply with the order in question. This would provide the opportunity for a court challenge to the constitutionality of those restrictions and eliminate putting people in jail for minor violations when discussions are being held to release felons. Likewise, a business allowed to be open with social distancing and sanitary restrictions could be handled by a warning then an order to close if they fail to comply with the restrictions, all without facing criminal penalty.

We respectfully request your full consideration to the above concerns. We have others, but we believe they do not reach the urgency level of expecting consideration during this shortened end of session. We can address those another day.

Thank you for your consideration.

Ed Klumpp, Legislative Liaison