



May 18, 2020

Via Electronic Mail and Federal Express

Pima County Board of Supervisors
Administrative Division
130 W. Congress St., 11th Floor
Tucson, AZ 85701

Dear Board of Supervisors,

We have been contacted by several business owners in the County who have expressed concern about the Board's "Proclamation" adopted May 13, 2020, imposing certain regulations on restaurants and other businesses in Pima County. This proclamation violates Governor Ducey's Executive Order No. 2020-36, and is superseded by A.R.S. § 26-307. It is therefore unlawful. We are writing to request that you take action immediately to repeal this Proclamation and come into compliance with state law.

Of course, safety in light of this unprecedented crisis should be a top priority for all Arizonans. Government officials, however, must promote and protect that safety within the boundaries of existing law. Arizona's Emergency Management Act gives the Governor authority to issue orders, rules, and regulations to preserve public safety, and specifies that local officials may not take actions inconsistent with the Governor's orders. A.R.S. § 26-307(A).

On May 12, 2020, Gov. Ducey issued Executive Order 2020-36, which requires "any business, whether for-profit or non-profit, institution, profession or entity that physically operates in this state" to "establish and implement policies" to protect against the risk of transmission of the novel coronavirus. Such steps must be "based on guidance" from state and federal health agencies.

Executive Order 2020-36 also expressly prohibits any county from making or issuing "any order, rule or regulation, that conflicts with or is in addition to the policy, directives, or intent of this Executive Order."

In short, the Executive Order requires that private entities develop their own policies and practices to ensure sanitation and to reduce the risk of spreading disease—and prohibits local governments from adopting their own mandatory measures and imposing such measures on private entities.

The Board's May 13 Proclamation, however, disregards this rule and imposes a lengthy series of highly specific mandatory "health and wellness measures." Some of these are impracticable and unenforceable, such as Section 4(A)(1), which purports to require businesses to conduct "wellness/symptom checks" on "delivery service workers." It is not rational to require a business to

conduct medical tests on, say, FedEx or UPS deliverymen who do not work for them. Nor does the Proclamation say what shall be done if a deliveryman tests positive.

Private businesses have every incentive to ensure the safety of their customers and are more likely to be able to tailor their safety rules to the unique needs of their own facilities and business practices. The requirements of Executive Order 2020-36 were drafted with this in mind, and already require businesses to comply with the guidance of the federal Centers for Disease Control, Department of Labor, and Occupational Safety and Health Administration, as well as the Arizona Department of Health Services.

Although well-intended, the requirements of the May 13 Proclamation are “in addition to” and “conflicts with” the “policy, directives, and intent” of that Order and are therefore unlawful. We ask therefore that you immediately repeal that Proclamation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy Sandefur', with a horizontal line extending to the right.

Timothy Sandefur
Vice President for Litigation
Scharf-Norton Center for Constitutional Litigation