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Violations of the Governor's Order to Close Physical Locations of All Non-Life Sustaining Businesses – Updated Enforcement Guidance

On March 19, 2020, the Governor issued an Order entitled “Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses That Are Not Life-Sustaining.” Section 1 of this Order, entitled “Prohibition on Operations that are not Life Sustaining,” permits prohibition enforcement by law enforcement beginning at 12:01 AM on Saturday, March 21, 2020. Section 2 of this Order, entitled “Prohibition on Dine-In Facilities including Restaurants and Bars,” permits prohibition enforcement by law enforcement beginning on 8:00 PM on Thursday, March 19, 2020.

Also on March 19, 2020, the Secretary of the Pennsylvania Department of Health issued an Order entitled “Order of the Secretary of the Pennsylvania Department of Health Regarding the Closure of All Businesses That Are Not Life Sustaining.” Section 1 of this Order regarding the prohibition of business operations that are not life sustaining, permits prohibition enforcement by law enforcement beginning at 12:01 AM on Saturday, March 21, 2020. Section 2 of this Order regarding the prohibition on dine-in facilities including restaurants and bars, permits prohibition enforcement by law enforcement beginning on 8:00 PM on Thursday, March 19, 2020.

Based upon the original orders that were issued by the Governor and the Secretary of the Department of Health, we provided the following guidance regarding how summary citations may be issued:

“Law enforcement agencies are empowered to enforce these Orders by issuing a non-traffic summary citation for non-compliance in violation of the Pennsylvania Disease Control and Prevention Act of 1955, 35 Pa. Stat. § 521.20(a), and the Pennsylvania Administrative Code of 1929, 71 Pa. Stat. § 1409. These summary offenses provide for a penalty of a fine ranging from \$25.00 to \$300.00 under the Disease Control and Prevention Act, and a fine ranging from \$10.00 to \$50.00 under the Administrative Code, with up to 30 days imprisonment for willful non-payment of the fine and court costs under both Acts.

We recommend law enforcement agencies use the following verbiage in describing the Nature of Offense:

‘Pursuant to the Disease Control and Prevention Act of 1955, 35 Pa. Stat. § 521.20(a), the defendant failed to abide by the March 19, 2020 Order of the Governor and the Secretary of Health, issued to control the spread of a communicable disease, requiring the closure of all non-life sustaining businesses as of 1201 hours on March 21, 2020. To wit, the defendant caused or allowed (name business), a non-life sustaining business, to remain open after the date and time the order went into effect.’

‘Pursuant to the Administrative Code of 1929, 71 Pa. Stat. § 1409, the defendant failed to abide by the March 19, 2020 Order of the Governor and the Secretary of Health, issued to control the spread of a communicable disease, requiring the closure of all non-life sustaining businesses as of 1201 hours on March 21, 2020. To wit, the defendant caused or allowed (name business), a non-life sustaining business, to remain open after the date and time the order went into effect.’

In the “Remarks” section, officers should list the date/time and person(s) to whom prior notification and warning was given, if any.

As noted above, the penalty for non-compliance could result in the issuance of a non-traffic summary citation and payment of court costs and a fine, and non-compliant persons are not subject to arrest absent a separate violation of the Pennsylvania Crimes Code.”

Originally, however, we also noted that citing businesses for non-compliance **should not** be a matter of first resort. Instead, we strongly advised that engagement and education, not citation, was the recommended course of action.

Since we first issued this directive, ongoing changes rapidly occurred within a short timeframe regarding key elements of the aforementioned orders. These include: (1) definitions of “life sustaining” versus “non-life sustaining” businesses; (2) the basis for granting exemptions for businesses to remain in operation; and (3) the geographic locations within the Commonwealth wherein businesses face varying degrees of ongoing restrictions. Most recently, the Governor and the Secretary of the Department of Health issued orders on May 7, 2020, which extended their prior orders to June 4, 2020. Additionally, today, May 8, 2020, amendments were announced regarding which counties could ease regulations on businesses versus other counties that would not receive the same considerations. Further, it is clear additional business classification and operational changes will occur on an ongoing and frequent basis.

The original March 19, 2020, and subsequent amended orders and regulations are penal in nature to the extent that they allow criminal citations and penalties. In order to properly enforce them,

citizens must clearly be aware of the differentiation between criminal and non-criminal conduct. The language of such penal regulations can neither be vague nor overbroad.

Additionally, citizens cannot be subjected at risk of criminal penalty to restrictions whose terms continuously change. Rapid changes in the definition of what constitutes criminal conduct renders the application of criminal law as arbitrary and impossible to follow or defend against.

In analyzing the ever changing scope and application of these orders, we find that their enforcement as **criminal** penalties is not possible on the consistent basis required of prosecutors and law enforcement. Accordingly, this office will not prosecute any criminal citations for alleged violations of the aforementioned orders and regulations, as amended, issued by the Governor and Secretary of the Department of Health concerning the operation of non-life sustaining businesses. Additionally, we are hereby directing law enforcement to not issue any such citations.

We expressly note that our directive to law enforcement solely applies to the penal application of these orders and regulations. We are expressly remaining silent on any issues concerning potential civil or administrative penalties that may be imposed. Civil or administrative matters are beyond the scope and standing of this office and it would be inappropriate for us to offer any legal opinions or guidance on that topic. Furthermore, we expressly decline to offer any legal opinion or guidance on the constitutionality of the orders and regulations issued by the Governor and the Secretary of the Department of Health.

Concerning any potential calls to law enforcement regarding perceived violations of the aforementioned orders and regulations, this office stands by its recommendations to law enforcement concerning engagement and education with potential non-compliant individuals on the needs to ensure public safety. Law enforcement may file charges for other applicable criminal violations surrounding these callouts, such as those found in the Crimes Code, Vehicle Code, or drug laws.

Lastly, we thank our partners in law enforcement for your dedicated support of our community in this time of crisis. Now, more than ever, our community needs us to ensure that our citizens are governed by the fair and just enforcement of the rule of law. We look forward to our continued partnership in carrying out this most vital duty.

Dave Sunday
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