

THE OFFICE OF THE GOVERNOR

**EXECUTIVE DEPARTMENT
STATE OF IDAHO
BOISE**

EXECUTIVE ORDER NO. 2021-07

TERMINATING MASK MANDATES BASED ON THE COVID-19 EMERGENCY

WHEREAS, on March 13, 2020, a Proclamation was issued and subsequently extended, declaring a state of emergency for the entire State of Idaho as a result of the 2019 novel coronavirus ("COVID-19"); and

WHEREAS, scientific studies show that COVID-19 restrictions on individuals and businesses such as social distancing, gathering limitations, and the use of face masks or face coverings of any design have done significant physical, mental, social, and economic harm and were ineffective mitigation measures; and

WHEREAS, serious concerns continue to be raised regarding both short-term and long-term negative effects caused by wearing masks.

WHEREAS, the remaining mask mandates issued by the health districts, public schools, school districts, and political subdivisions of this State due to the COVID-19 fail to serve a public health or safety purpose and unnecessarily restrict the rights and liberties of individuals and business in this State.

NOW, THEREFORE, I, JANICE MCGEACHIN, Governor of the State of Idaho, by virtue of the authority vested in me by the Constitution of the United States, the Constitution of the State of Idaho, and the laws of the State of Idaho, do hereby proclaim and declare as follows:

- 1. In order to protect the rights and liberties of the individuals and businesses in the State of Idaho and to accelerate the state's recovery from the COVID-19 emergency, and notwithstanding any local ordinance or emergency order to the contrary:
 - a. Neither the state nor a political subdivision may mandate that an individual in this state must use a face mask, face shield, or other face covering for the purpose of preventing or slowing the spread of a contagious or infectious disease.*
 - b. An official may not mandate that an individual in this state must use a face mask, face shield, or other face covering for the purpose of preventing or slowing the spread of a contagious or infectious disease;*
 - c. A face mask, face shield, or face covering shall not be required by the state, a political subdivision, or an official as a condition for entry, education, employment, or other services; and*
 - d. If the state, a political subdivision, or an official recommends using a face mask, face shield, or face covering to prevent or slow the spread of a contagious or infectious disease, such recommendation shall be accompanied by a notice that the recommendation is not mandatory.**
- 2. For purposes of this Executive Order:
 - a. "Official" means an officer or an employee of the state or a political subdivision.*
 - b. "Political subdivision" means a county, city, public health district, public college, public university, public community college, public technical college, public library, public school, school district, special purpose district, or other district or municipality organized under any general or special law of this state, except the term "political subdivision" does not include any federal building, hospital, or health care facility.**

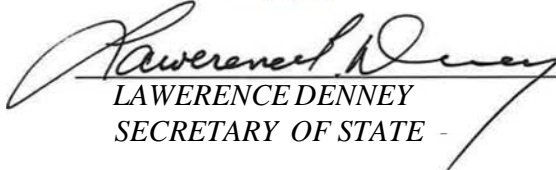
- c. "State" means the state of Idaho or any of its agencies, boards, commissions, departments, divisions, or institutions, including any state institution of higher education, except the term "state" does not include any federal building, hospital, or health care facility.
3. This Executive Order is effective beginning at 11:00 a.m. on May 27, 2021.



IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Idaho in Boise on this 27th day of May in the year of our Lord two thousand twenty-one.



JANICE MCGEACHIN
GOVERNOR



LAWRENCE DENNEY
SECRETARY OF STATE



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

May 28, 2021

Sent via Electronic Mail

The Honorable Melissa Wintrow
Idaho State Senate
STATEHOUSE
MWintrow@senate.idaho.gov

Re: Acting Governor's Authority

Dear Senator Wintrow:

This letter is in response to your recent inquiry regarding the executive order issued on May 27, 2021 by then-acting Governor Janice McGeachin. This analysis identifies and addresses three issues associated with the order.

Issue 1: Does the acting Governor's EO exceed the constitutional or statutory powers entrusted to the Governor?

The Governor's executive order authority is outlined in Idaho Code section 67-802 which states:

The supreme executive power of the state is vested by section 5, article IV, of the constitution of the state of Idaho, in the governor, who is expressly charged with the duty of seeing that the laws are faithfully executed. In order that he may exercise a portion of the authority so vested, the governor is authorized and empowered to implement and exercise those powers and perform those duties by issuing executive orders from time to time which shall have the force and effect of law when issued in accordance with this section and within the limits imposed by the constitution and laws of this state.

This statute makes clear that an executive order can only be issued to ensure "that the laws are faithfully executed."

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The executive order at hand has been issued to prohibit the state and its political subdivisions from having a mask mandate. As there is no law prohibiting such mandates, acting Governor McGeachin has exceeded the executive order authority granted her under Idaho Code section 67-802. This executive order does not seek to ensure laws are faithfully executed. Oddly, it seems to have been issued in an effort to undermine the existing authorities of the state and its political subdivisions to issue mask mandates. This executive order appears to run counter to both the Idaho Constitution and the Governor's statutory executive order authority.

There are other provisions of Code that grant the Governor executive order authority in specific circumstances. One such provision, and the only one that may be applicable to this situation, is found in Idaho Code section 46-1008, which grants the Governor authority to issue executive orders to proclaim a disaster emergency. Executive orders issued under this authority, however, must "indicate the nature of the disaster, the area or areas threatened, the area subject to the proclamation, and the conditions which are causing the disaster." This has not been done with this executive order. Furthermore, there is no mention of an emergency other than to reference the proclamation that was issued in March or 2020. Thus, it seems clear this emergency order was not intended to be issued as an emergency proclamation.

Issue 2: Does the acting Governor's EO impermissibly interfere or encroach upon the Legislature's powers to legislate and make policy for the state of Idaho?

While the Constitution vests the Governor with supreme executive power within the state, Article III, section 1 of the Idaho Constitution vests the legislative power of the State to the senate and a house of representatives. As noted above, there is no existing law prohibiting mask mandates. Thus, rather than ensuring that an existing law is faithfully executed, the acting Governor's EO prohibiting mask mandates has the effect of creating a law through executive order. This likely encroaches on the lawmaking power of the legislature and violates the separation of powers between the executive and legislative branch. See Article II, § 1, Idaho Constitution.

Issue 3: Does the acting Governor's EO violate or conflict with any statutory or constitutional provisions entrusting public health decisions to cities, counties, public health districts, school districts or other local governmental entities?

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The public health districts have the power to "do all things required" to protect the public health. Specifically:

The district board of health shall have and may exercise the following powers and duties:

(1) To administer and enforce all state and district health laws, regulations, and standards.

(2) To do all things required for the preservation and protection of the public health and preventive health, and such other things delegated by the director of the state department of health and welfare or the director of the department of environmental quality and this shall be authority for the director(s) to so delegate.

Idaho Code § 39-414. Under this authority, the public health districts have issued mask mandates. Similarly, school districts have the express statutory authority to protect the morals and health of their pupils. Idaho Code § 33-512(5) & (7). And cities are specifically authorized to preserve public health and prevent the introduction of contagious diseases into the city. Idaho Code §§ 50-304 & 50-606. In sum, the Idaho Legislature has specifically legislated authority for these local governmental entities to take the necessary precautions to protect the public health of their respective constituencies. Under the executive order, it does not appear that any circumstances or authority has been cited for the substitution of an executive order to displace these specifically legislated allocations of local authority.

As stated above, the Governor has the power to issue executive orders to exercise a portion of his constitutional authority to see "that the laws [of Idaho] are faithfully executed." Idaho Code § 67-802. The acting Governor's action to prohibit mask mandates, potentially contrary to existing orders of local government entities encroaches upon the express statutory authority of local government entities and likely exceeds the Governor's authority in statute and Idaho's constitution.

I hope you find this helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,



BRIAN KANE
Chief Deputy Attorney General

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APPROPRIATE