At A Glance: Preemption and the Pandemic
Cities Step Up, but Confusion Reigns
July 1, 2020

At least 16 states have now paused or rolled back their reopening plans in response to a surge in new infections. Twenty states have statewide mandatory mask laws in place. But some states are still refusing to issue binding orders even though studies show that wearing masks can reduce transmission by as much as 85 percent. However, a growing number of governors who initially preempted local governments from taking action to protect their own residents, are giving cities, counties and school boards more control over public safety decisions.

But the rules are changing daily, there is confusion about what level of government is in charge, local officials and governors continue to bicker publicly about who will establish safety measures and calls for a federal masking mandate are getting louder. Here’s an updated look at the actions some local governments are taking.

Alabama
Gov. Kay Ivey announced on June 30, that she would extend a "Safer At Home" order to July 31, without imposing any new restrictions despite the monthlong rise in coronavirus cases in the state. Ivey’s decision is a break from with other states like Florida, Texas, and Arizona which are also experiencing increases in cases and have imposed new restrictions to combat them. So, in the absence of a statewide masking order, city governments have started taking action on their own. The mayors of Birmingham, Montgomery and Selma have issued executive orders making mask wearing mandatory. Jefferson County Health Officer Dr. Mark Wilson has issued an order covering that county. The Mobile and Tuscaloosa city councils approved a mandatory mask orders this week.

But the legality of orders issued by mayors — as opposed to city councils — could leave them vulnerable to legal challenges. Municipalities in Alabama are legally seen as creatures of the Legislature and subject to legislative regulation. Lori Lein, general counsel for the Alabama League of Municipalities, said cities do have powers to address issues including public health and safety, but that mask orders are generally “going to come from the legislative body,” like a city council.

Alaska
Alaska’s largest city is requiring face coverings in most indoor public settings, but Anchorage and the state of Alaska disagree on whether that mandate applies to state buildings. In a memo distributed to state employees, Alaska Attorney General Kevin Clarkson wrote that Anchorage’s new coronavirus masking mandate does not apply to state offices, the people who visit them, or employees in those offices. Anchorage municipal attorney Kate Vogel responded by saying Clarkson provided “inaccurate legal advice” and is “undermining a local health order.”

Arizona
When Governor Ducey first issued his stay-at-home order, in late March, he simultaneously preempted cities and counties in Arizona from acting on their own. The governor partially reversed course in mid-June, declaring that local officials would be allowed to require masks—but not restrict businesses—in their communities, removing a barrier to local control. “Today we’re seeing facts on the ground and differing circumstances around the state support flexibility and a localized approach,” Mr. Ducey said. The change is one that several mayors in the state had been requesting, with Tucson’s Regina Romero instructing the city to start making the change even before the governor’s announcement.

Cities and counties across the state have moved quickly to mandate the use of masks in public. Now debate is raging over whether Arizonans will comply, a sign of how deeply politicized the issue has become. At an emergency meeting to discuss the new mask rule in Arizona’s largest city, schoolteacher Gus Cha said members of the Phoenix City Council weren’t qualified to make such a decision. “You are not my doctor,” said Mr. Cha. “You are not my family’s doctor. I do not recognize your authority to mandate a medical treatment for my family.”

California
California Governor Gavin Newsome has mandated that Californians wear face masks in all indoor and outdoor public areas, placing him at odds with conservative counties and local elected officials. Nevada City Mayor Reinette Senum greeted the mandate with a message of defiance. “Our governor does NOT have that unilateral power to make such orders,” Senum said in a Facebook post, joining sheriffs in Orange, Riverside, Sacramento and Fresno counties who have said they will refuse to enforce Newsom’s decree.

Los Angeles County has ordered all beaches to close over the Fourth of July weekend after reporting its highest single-day number of new cases on Monday. But L.A. County Sheriff Alex Villanueva said he does not plan to enforce the order. After five California counties ignored a similar directive, Gov. Gavin Newsom (D) threatened to withhold state funds.

Florida
The record-setting pace of new coronavirus cases in Florida has been met with mixed signals from Republican leaders over how far to push Floridians to wear masks. On Monday, June 29, Jacksonville Mayor Lenny Curry, a Republican made it mandatory to wear a mask in indoor public spaces as the city looks to contain the outbreak ahead of the August Republican National Convention. On the same day, U.S. Sen. Rick Scott, also a Republican, condemned mask mandates during a Fox News interview and suggested leaders should “…stop telling us what to
do.” Gov. Ron DeSantis said he has no plans to issue a statewide mask requirement at this time, but also won’t preempt local regulations. Miami Mayor Francis Suarez, who last week ordered people in the city to wear masks in public amid a spike in cases, told ABC News that a statewide policy should be a “no-brainer.”

Other Florida Republicans are pushing back on masking orders. Leon County Republican Party Chairman Evan Power sued his county over a mask order earlier this month. State Rep. Anthony Sabatini, R-Howey in the Hills, joined Hillsborough County GOP chairman Jim Waurishuk in announcing a lawsuit against the county’s mask order. “We have real concerns of governments overreaching during these periods of time that can hurt us in the future,” Power said. “It should be handled by local businesses. The government’s job is to educate people on the right thing to do, not force mandates down.”

Here’s a roundup of masking regulations in the Sunshine State.

Georgia
Governor Brian Kemp has refused to impose new restrictions or require the use of masks to combat the spread of the coronavirus in Georgia, despite the spike in the state’s confirmed coronavirus cases and hospitalizations. Kemp said mandating masks is a “bridge too far for me right now.” But on Tuesday, June 30, Savannah became one of the first cities in the state to require people to wear a mask inside stores and other public places or face a fine. Kemp says he has not yet weighed whether the state will take legal action against local governments that try to impose mask requirements.

Kemp said. “But regardless of what legal action may or may not happen, we shouldn’t get to that ... We shouldn’t need a mask mandate for people to do the right thing.” Savannah Mayor Van Johnson saw things differently, saying “I do not believe that we have any other choice” while announcing an emergency order requiring a mask be worn by anyone entering a business in the city. That order could set up a battle between local officials and the state. A series of executive orders from Kemp have prohibited local governments from setting coronavirus restrictions that go beyond those imposed by the state.

Iowa
Iowa education officials released guidelines this week that will allow schools to reopen to normal activities without requirements that students and teachers wear face coverings, undergo temperature checks at the door, or observe social distancing in schools. Instead, the state will leave those decisions in the hands of local school boards, which could lead to a variety of approaches across Iowa’s 327 school districts and 119 accredited nonpublic schools.

Missouri
Governor Mike Parson does not have plans to mandate masks. He'll continue to leave that up to local governments. Starting on Friday, July 3 masks will be mandatory in St. Louis and St. Louis County. Jackson and Wyandotte Counties are also requiring people to wear masks. Kansas City Mayor Quinton Lucas who issued a mandatory mask order that went into effect on June 26,
posted a message he received to his Facebook page using a racial slur against him and saying he should “hang from a tree” after he required the wearing of masks in public, The Hill reports.

**Nebraska**

Governor Pete Ricketts has told counties that they won’t receive any of the $100 million in federal COVID-19 money if they make mask wearing mandatory. With millions of dollars at stake, local officials said they had little choice but to comply with the governor’s order. Otherwise, they’d have to find local options for replacing the federal money, such as higher property taxes.

In Lincoln, the state’s second-largest city, officials were preparing to require all visitors to wear masks when entering the City-County Building. But the draft rules were promptly dropped when officials were informed that Lancaster County wouldn’t receive CARES Act money if it instituted a mask requirement. Dakota County, home to a Tyson meatpacking plant, has been one of the hardest-hit counties in the nation for COVID-19. Visitors to the courthouse there were not only required to wear a mask when entering, but their temperatures also were checked and they were asked a series of questions about coronavirus exposure. Those health precautions have now been jettisoned.

**Texas**

Texas Governor Greg Abbott opposed attempts by county and city officials to require everyone in their cities to wear masks in public – until he didn’t. In his June 3 Executive Order, the governor banned local governments from imposing fines or criminal penalties on people who don’t wear masks in public. However, later in June, he began allowing local officials to penalize businesses that don’t require employees and customers wear masks. But county and city officials say the order is vague, puts the burden on businesses to enforce it and are asking for authority to implement mandatory mask wearing in public places, if the Governor refuses to issue the order statewide.

A number of Texas city and county leaders are asking the Governor to give them the authority to keep their residents safe. Houston Mayor Sylvester Turner has issued an impassioned plea for Abbott to let cities and counties make decisions for themselves. “We need more tools. If I had my ultimate ask to him, I would say restore to local governments, to mayors and County judges, all the tools that we had in March and April. Give us back our tools. Because the situation is more critical now than then, and we had more tools at our disposal then than now... I would like to have the ability to do what is in the best interest to the city of Houston to get on top of this virus.”

Dallas County Judge Clay Jenkins sent the Governor a letter asking him to take further action, and if he will not, to allow localities to implement the following recommendations:

- Reinstitute “Stay Home, Stay Safe” for 30 days
- Universal masking/physical distancing that is enforced with fines statewide or at least regionally.
- Limit events/situations where individuals congregate
- Businesses that can maintain work from home or physical distancing may remain open at 50% capacity (such as professional services that allow for an individual to work isolated in an office)
- Reduce indoor gatherings to a ten-person limit with mandatory masking and physical distancing
- Maintain outdoor events to a limit of 100 with mandatory masking and physical distancing
- Restaurants to be closed except for take-out or outdoor seating only with physical distancing
- Close bowling alleys, arcades, concerts, movie theaters, gyms (to include yoga and spin studios, etc.), group youth sports, public pools, day camps, and other social venues or activities that do not allow strict physical distancing or masks to be strictly worn (i.e., cigar bars)
- Maintain bar closures
- Daycare can remain open for essential workers only with CDC masking and safety rules

Jenkins concluded his letter with this appeal: “I recommend that you enact these requirements statewide, or at the very least, regionally. If not, please rescind your prior order restricting local control and allow Dallas County to implement the above recommendations in an effort to slow the spread of the rampant and devastating COVID-19 virus. Lives depend on swift actions.”

According to McAllen Mayor Jim Darling, interpreting and enforcing the endless barrage of orders thrown up to slow the pandemic has been no easy task. He gave the example of mandating mask wearing. The state’s policy currently allows local governments to require businesses to make their customers wear masks, but according to Darling, the only way a business could enforce that policy on customers who refuse to put on a mask while inside a business is to file a criminal trespassing charge against them. Darling said in his view enforcing mask wearing through code enforcement employees rather than putting that burden on business owners would be a more effective solution. “What we’re asking the governor is to give us the power to require masks in public places, and enforce it with civil remedies, not criminal remedies.”

Utah
State law says that local officials cannot impose coronavirus guidelines stricter than the state without the governor’s permission. And this week, Gov. Gary Herbert approved Mayor Jenny Wilson’s request to require the community to wear masks in public in Salt Lake County where the state’s coronavirus cases have seen a dramatic increase. Summit County was also given the same permission by the Governor.

After Herbert's approval of requests by Salt Lake and Summit Counties to make wearing a mask mandatory to help stop the spread of the coronavirus, Piute County Commissioner Darin Bushman tweeted: "Hang on friends, it won't be long before you are required to do the Seig Heil salute to Herbert. Welcome to Utah now extend your right arm straight at 45 degrees keeping your hand parallel to your arm and offer you 'Heil Herbert.'"