The Governor issued yet another order on June 24. This one imposing a statewide “face covering” requirement. In Executive Order 147, Cooper ordered the use of face coverings by most North Carolinians whether they are inside or outside, unless an exception applies.

While there is some debate about the efficacy of face coverings and government guidance on their use has changed, let’s just assume for the sake of discussion that face coverings work to stem the spread of coronavirus. Let’s also assume for the sake of argument that the Governor has the authority to impose upon individuals a statewide face covering mandate. Now let’s look at the enforcement of that mandate.

In EO 147, Cooper specifically directs: “Citations under this Section [imposing face covering requirement] shall be written only to businesses or organizations that fail to enforce the requirement to wear Face Coverings.” (emphasis added). Cooper also orders: “Law enforcement personnel are not authorized to criminally enforce the Face Covering requirements of this Executive Order against individual workers, customers, or patrons.”

In short, Cooper has commandeered private businesses to enforce his order against individual citizens. Cooper’s enforcement directives pose a few problems and raise a lot of questions. First, we will address some practical problems with the enforcement plan and then we will talk about the legal concerns.

**Practical Problems**

By directing that law enforcement are “not authorized to criminally enforce” his face covering order, he is inviting the public to disregard the order. What’s the point of issuing an order that supposedly has the force of law and then telling people it won’t be enforced by the law? That invites disregard for the rule of law.

More dangerously, Cooper is inviting clashes between businesses (and their employees)
and the public. Tensions are high. People are stressed. Although businesses are allowed to rely on a customer’s assertion that he or she is exempt from the face covering order, the mere act of an employee asking a customer about the absence of a face covering could ignite an altercation. Indeed, violent altercations have been reported elsewhere when employees confronted customers about face coverings or social distancing. If an employee and a customer without a face covering end up in a physical confrontation, will the business owner face litigation from either or both of them?

Discrimination laws actually prohibit businesses from demanding proof of a disabilities or medical conditions. Legal experts have written about the legal uncertainty surrounding businesses’ attempts to screen customers for COVID, risks they could run afoul of the Americans With Disabilities Act (ADA), and efforts to accommodate customers claiming they cannot wear a mask. That’s probably why Cooper’s order lets businesses rely on a customer’s statement that an exemption from the face covering requirement applies. Will businesses even ask a customer whether he or she is exempt?

Cooper specifically ordered that police are “not authorized to criminally enforce” his face covering order against customers or patrons. Businesses and their employees are the enforcers. By shifting law enforcement duties from law enforcement agencies to businesses, Cooper is hijacking private sector employees. What’s next? Will he require that businesses station employees in restrooms to enforce hand washing protocols? Be sure to count to 20 loudly enough for the bathroom monitor to hear you.

Many businesses have “reopened” but have done so at only half capacity. Operating at limited capacity requires cutting costs. With EO 147, Cooper has imposed an additional burden on businesses. Major retailers will presumably have the resources to station employees at the door to enforce the face covering requirement, but small business may not, especially those that are operating on a shoestring staff so they can keep expenses down while Cooper keeps them at only 50% capacity.

Legal Concerns
The EO cites several statutes but doesn’t pinpoint particular statutes at each mandate so it is unclear which statute Cooper is relying on for each directive. Some of the citations, like those to the price gauging statute, are not the basis for the face covering order. It appears most likely that the Governor is relying on G.S. §166A-19.30 “Additional powers of the Governor during a state of emergency.”

That statute contains four parts, (a) – (d):

(a) Gives the governor additional powers during a state of emergency;
(b) Gives the governor additional powers “with the concurrence of the Council of State” during a state of emergency;
(c) Gives the governor additional powers during a state of emergency “if the Governor determines that local control of the emergency is insufficient to assure adequate protection for lives and property;” and
(d) Provides that a violation of a declaration or emergency order is a misdemeanor.
The Governor did not get Council of State concurrence for the face covering mandate and doesn’t cite part (b) of the statute for authority. That means he must be relying on either (a) or (c) for his authority to issue a face covering requirement. But, neither of those speak to his authority to commandeer businesses to enforce an executive order.

G.S. §166A-19.30(a)(2) is the only part of the statute that might arguably gives the Governor power to compel businesses to enforce the face covering directive. It gives the Governor power “to take such action and give such directions to State and local law enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of this Article and with the orders, rules, and regulations made pursuant thereto.”

Maybe the Governor is reading it to empower him to take such action and give directions as may be reasonably necessary for the purpose of securing compliance, as if the reference to law enforcement and government agencies were not in the statute. Reading it as a whole, however, his authority to take action and give direction both relate to government officers and bodies.

Perhaps the Governor is relying on G.S. § 166A-19.30(c) which gives the Governor additional power when he determines local control is insufficient. NCICL previously addressed concerns about Cooper’s use of this part of the statute. In EO 147, he notes his authority “to prohibit and restrict the operation of offices, business establishments, and other places to and from which people may travel or at which they may congregate.” But, there is a difference between prohibiting or restricting, both of which suggest stopping an action, and affirming requiring something, which forces an action—in this case, enforcement of the face covering requirement.

The law allows the Governor to order state and local law enforcement to force compliance with his orders. Not only is he not relying on law enforcement, he is explicitly not authorizing them to enforce his order. Instead, he is ordering businesses to do that and ordering that business be cited if they fail to do so.

This is, of course, an issue distinct from whether the Governor can order businesses to follow face covering protocols themselves. The question of whether a business must require its workers to wear a mask is more akin to requiring compliance with other laws and regulations governing business operations. But, whether a business must enforce the mask requirement on third parties, i.e. customers and patrons, is more akin to drafting businesses into law enforcement.

If a customer isn’t wearing a mask, the business could be charged not for failing to wear a mask but rather for failing to enforce the order that the customer wear a mask. It’s essentially third-party liability but in a criminal context created by an executive order of dubious validity.

**Conclusion**

So, what will happen? We could see widespread refusal to submit to the face covering requirement. I doubt that will happen. I also doubt we will see universal compliance, especially as the summer becomes hotter and more humid. This is, after all, North Carolina.
We will probably see people claiming they are exempt when they don’t actually have a medical condition or other basis for exemption. EO 147 asks for voluntary compliance based on what EO 147 calls “the honor system.” Most North Carolinians will probably obey, many will not.

The “honor” in “honor system” means different things to different people. Those who follow the face covering order will see the honor in doing so. Those who resist will see honor in that too.

As stated above, if we assume for the sake of argument that face coverings are useful and that the Governor can mandate their use, we can focus on the enforcement mechanism Cooper created, a mechanism that forces businesses to become the enforcers.

**About the Author**

Jeanette Doran has served as President and General Counsel of the North Carolina Institute for Constitutional Law since returning to the Institute to reorganize and restart the organization in July 2019.

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NCICL envisions a North Carolina of individual liberty and a thriving, innovative economy, with state and local governments committed to following the state and federal constitutions.

**Our mission**

- To help the public hold policymakers accountable by providing resources to understand constitutional law issues as they develop.
- To educate the public, bar, and policymakers about constitutional principles—why they are important, when they are at risk, and how to preserve them
- To promote liberty by encouraging a limited and transparent government and promoting free enterprise

3509 Haworth Drive, Suite 304
Raleigh, NC 27609

984.242.4145

www.ncicl.org