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Face Masks, Temperature Screenings and Privacy Rights: Re-Opening Public Agencies During COVID-19

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Part 2 in a *PublicCEO* Series

Previously, we discussed local governments' response to the novel coronavirus and [the tension between governmental authority for emergency response and individual liberty](#). How does that tension impact the process of reopening public facilities and services to the public?

There is a tug-of-war between the public's interest in protection from the spread of coronavirus (especially public employees' interests) and the individual rights of privacy, speech and freedom from unwarranted searches. For example, health authorities in South Korea are facing criticism for requiring reporting of cellphone data, credit card histories and surveillance cameras to trace infection routes. Even with the application of less intrusive tracking and screening, governmental agencies planning for reopening will need to consider these issues and the potential liability associated with their policy choices.

The two most common means to protect public employees from the spread of coronavirus are the use of face coverings and temperature screenings. While requiring face masks be worn by those entering a public building is fairly inconsequential (especially compared to home quarantining), mandating temperature screenings is decidedly more problematic.

Face Coverings

The Centers for Disease Control and Prevention and the California Department of Public Health both recommend face coverings by those entering public spaces, including public facilities. While most California counties follow the CDC and CDPH in simply recommending face coverings, some counties, including San Diego and Los Angeles, have mandated face coverings. Because each county's regulations differ, check your county's regulations prior to instituting rules for those entering public facilities. This is a moving target, depending on whether the State has approved an individual county's reopening plan.

Temperature Screenings

Unlike face coverings, mandatory temperature screenings are a more significant intrusion that implicate constitutional rights. They should be instituted only after careful consideration. While screening members of the public may be helpful in identifying sick individuals and preventing the spread of COVID-19, such screenings implicate privacy interests protected by the Fourth Amendment to the U.S. Constitution. The U.S. Supreme Court has held that physical examinations of aspects of persons' bodies that are normally hidden implicate protected privacy interests.

While there is no case law directly addressing temperature screenings, such screenings require the use of technology to conduct a physical examination, even if contactless thermometers are used. Accordingly, it is likely that such a screening would be considered a search under the Fourth Amendment, and a public agency would need to justify the screening under an exception to the warrant requirement.

While many will consent to a temperature screening (thus rendering the screening constitutionally permissible), for those that do not consent, the public agency will have to show that the screening falls under the "exigent circumstances" exception to the Fourth Amendment's warrant requirement. Here, the government could argue that screenings are aimed at preventing infected individuals from spreading COVID-19 to other public patrons. Due to the nature of COVID-19, it is likely that the "exigent circumstances" exception would apply. This, coupled with the broad deference California courts have afforded the government in dealing with the novel coronavirus, makes it likely that a court would side with a local agency if a challenge were brought.

However, mandating temperature screenings of all visitors carries legal risk. The Fourth Amendment cases permitting warrantless searches in exigent circumstances do not address temperature screenings, which means that this is an issue ripe for a judicial test. Thus, the choice to temperature screen visitors must take into consideration the possibility of a potential legal battle – including appeals – due to the novel nature of the issue. Additionally, the decision to mandate temperature screenings implicates privacy laws.

Temperature Screenings and the First Amendment

The above analysis applies generally to screenings to enter a public facility to transact business (e.g., for building plan check, payment of fees, etc.). The analysis is more complicated when screenings are required for admission to a Brown Act (open) meeting, like a city council meeting. Unlike city hall during business hours, which is treated as a non-public forum for First Amendment purposes, the location of a Brown Act meeting to which the public is invited is

treated as a limited public forum. Residents have limited First Amendment rights to attend such meetings and speak to their elected representatives. At a minimum, electronic or some other alternative means to participate should be provided for those not willing to submit to screenings.

Mandating temperature screenings for access to a public Brown Act meeting thus implicates both Fourth and First Amendment rights, thereby complicating the legal analysis, and providing greater exposure to liability. As above, agencies instituting any rules that could limit access to a public Brown Act meeting should carefully consider these constitutional issues.

If a public agency chooses to proceed with mandatory temperature screenings that could have the effect of limiting the public's access to public facilities and meetings, it is vital that alternative means of communication and access are provided. Ensuring that an individual barred from a building or meeting is provided equivalent access to decision-makers and staff as someone who is not barred is vital to overcoming a First Amendment challenge.

Conclusion

As with everything related to the novel coronavirus, these are uncharted waters. But there is case law that can provide guidance. As your local agency works through its plans to reopen its doors to the public, it is vital to consider these and related legal issues. As your local agency remains open to the public, it will be equally important to frequently reassess the rules of access against the exigency of the current emergency. As the acuity of the emergency wanes, so too should the strictness of any measures that implicate constitutional rights.

Watch for the next installment on this series that explores the continuing tension between how local government agencies respond to the emergency and individual rights and liberties.

Previously in this series: [Part 1: Tension between emergency powers and individual rights & liberties.](#)

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