

# Mask Mandates, Directives, Resolutions:



## Guidance for Nevada Public Boards, Councils, and Commissions.

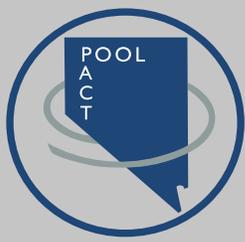
POOL/PACT has received numerous requests relating to the possible consequences of taking board action to defy state or federal emergency directives.

Several boards were able to obtain legal opinions from staff and outside counsel on this very important and complicated issue. We have summarized those opinions for those entities which did not have the benefit of such legal advice. *It is important to understand that POOL/PACT, like the authors of the legal opinions, is not taking a position on the politics of these issues, rather, presenting likely outcomes.*

### COMMON QUESTIONS

#### **Will POOL/PACT provide coverage if someone sues me and/or my entity for catching COVID-19?**

Many POOL/PACT members have asked if there is liability coverage should they receive a complaint alleging that a person contracted COVID-19 because of something that the Member did or failed to do. Questions as to whether liability coverage would apply for such a situation are sometimes difficult to answer because each claim/suit is fact specific and the coverage analysis considers those facts to determine how coverage may or may not apply. However, it is important to note that there is an exclusion for claims caused by the transmission of communicable diseases. This exclusion has been reinforced throughout insurance and reinsurance policies in nearly all jurisdictions. Similarly, intentional acts may preclude coverage depending upon an entity's actions or inaction and the allegations of the suit. This is why compliance with health directives is critical to successfully defending against such suits (see more below).



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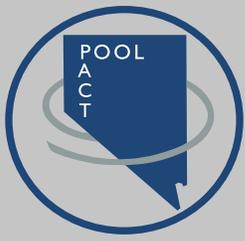
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### **Why are public boards required to follow State and/or Federal Directives?**

All public officials take an oath to support, protect, and defend the Constitution and Government of the United States, and the Constitution and government of the State of Nevada. Boards are without authority to ignore, reject, or fail to comply with Directives lawfully issued by the state or federal government, by policy, resolution, or other board action. NRS Chapter 414 requires political subdivisions of the state (including counties, cities, and school districts) to cooperate with the Governor in carrying out provisions of Emergency Directives. Examples would include: the Declaration of Emergency Directive 047 requires face coverings to be worn indoors by all persons in counties with substantial or high rates of transmission; and OSHA's Emergency Temporary Standard (ETS) under the President's COVID-19 Action Plan relating to vaccinations and/or testing. In addition to a board's obligation to protect the health of its citizens, employers also have an obligation to provide a safe work environment for its employees. Nevada OSHA has the power to impose penalties for OSHA violations ranging from \$13,494 to \$136,532 for willful or repeated violations. A board's vote to prohibit compliance and/or enforcement of such measures likely would be considered "willful" and result in large penalties.

### **I thought SB4 protected public entities (except School districts and hospitals) from COVID-19 related claims.**

It does. In fact, the legislation contains a robust and automatic defense to those entities which are in "substantial compliance with controlling health standards," and provides immunity from liability unless the plaintiff pleads sufficient facts to show: (1) the entity violated controlling health standards with gross negligence **and** (2) the gross negligence was the proximate cause of the plaintiff's personal injury or death. Further, the plaintiff has the legal obligation to make such a showing before his/her claim may proceed. This is a powerful defensive benefit for public entities. Even though school districts and hospitals do not have this protection, demonstrating that such entities were in substantial compliance with controlling health standards is nevertheless the best defense to such claims.



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**I was elected to represent my constituents. Aren't I entitled to a lawyer to defend me if I am sued for doing what I thought my constituent's wanted me to do?**

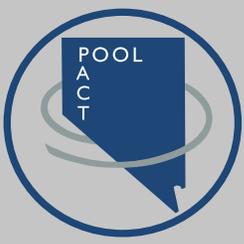
The official attorney (i.e., district attorney or city attorney) for the entity shall defend a public official when he/she has determined that the act or omission on which the action is based appears to be within the course and scope of public duty or employment and appears to have been performed or omitted in good faith. (NRS 41.0339(1)).

Although such determinations are fact specific, a vote to prohibit compliance with a State Directive would likely be found not to be in good faith and may preclude a defense to the public official. This would mean that the public official would be personally liable to pay defense costs.

**I was elected to represent my constituents. Won't the entity (county, city, district) pay the judgement if I lose the lawsuit?**

Where a judgment against a public official is entered, the public official shall be indemnified by the entity, unless: the act or omission which gives rise to the judgement was not within the course and scope of the person's officials duty or the act was wanton or malicious. (NRS 41.0349 (3-4))

For example, an enactment of an ordinance to prohibit compliance with or enforcement of such lawful measures (e.g., face-coverings, vaccination, testing) would appear to be outside of the scope of a public official's public duties. Indeed, such an action could be viewed as wanton. It is therefore reasonably foreseeable that an entity might not have either the duty or authority to indemnify the public official. Were this to happen, the public official would be personally liable for the paying the judgement.



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### Conclusion

Each of the legal opinions are summarized generally as follows:

...I strongly recommend against enacting an ordinance prohibiting compliance with and/or enforcement of Governor Sisolak's mask mandate. There are meaningful ways to challenge the Governor's directives through the courts...doing so may expose the public officials to personal liability.

...To summarize, public officials who vote in favor of actions that defy or reject the Governor's emergency directives and/or required health standards, when faced with lawsuits based on COVID-19 related injury risk: (1) loss of immunity from personal liability; (2) the loss of a defense by [the Entity] that could otherwise be required; (3) a loss of indemnification by [the Entity]; and (4) subject [the Entity] to the high likelihood of liability.

...Board members who vote in favor of actions that go against the Governor's emergency directives and/or required health standards, (1) will not be immune from personal liability; (2) will not be defended by [the Entity]; (3) will not be indemnified by [the Entity]. Conversely, board members who vote against such actions can reasonably expect to be immune, defended, and indemnified.

If you have additional questions, please contact your entity's legal counsel. You must consult with your entity's legal counsel before taking or refraining from taking any action based on the information provided in this Alert.