Another Lockdown Lifted: Are These Government Bans Constitutional?

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Restauranteurs across Pennsylvania breathed a collective sigh of relief this week as the three-week ban on indoor dining ordered by Governor Tom Wolf and Secretary of Health Rachel Levine came to an end. A struggling industry once again must pick up the pieces left behind after this abrupt change in their business model; rehiring waitstaff, replenishing inventory, and reevaluating menus.

Despite strong mitigation measures, the COVID-19 crisis is not showing signs of slowing. Business owners are left with the haunting question as they budget and plan: could the government impose similar restrictions again?

Federal and State courts in Pennsylvania in the last month have answered "Yes." [1] Here's why and what that means as further lockdowns loom.

On December 17, 2020, two family-owned restaurants and the Hershey Independent Restaurant Association filed a lawsuit in the U.S. District Courts of the Middle District of Pennsylvania, challenging Governor Wolf's and Secretary Levine's Order.[2] The case was assigned to U.S. District Judge Christopher C. Conner.

The lawsuit, under Section 1983 of Title 42 of the United States Code, alleged that the Order violated the substantive due process clause, procedural due process clause, and the equal protection clause of the U.S. Constitution. The Plaintiffs also requested an injunction to stop enforcement of the Order.

The Court denied the restaurant group's request for an injunction because it found that they were not likely to succeed on the merits of their claims and the restaurant group could not show how the Order would cause them irreparable harm.

Likelihood of Success on the Merits

The restaurant group in M. Rae, Inc. alleged that retail food establishments and other retail establishments were treated differently by the Order. Plaintiffs argued that the distinction in the Order between indoor dining establishments and other in-person, indoor business establishments was "arbitrary and irrational."

The Court shot down Plaintiffs' arguments by noting that the main distinction between retail food and other retail establishments "should be obvious: you can wear a mask while bagging produce or selecting a paint, but you cannot wear a mask to eat or drink." Also, "interactions at 'other in person, indoor business establishments' are often physically distanced and transient, whereas dining, by its nature, involves physically close and sustained interaction."

The Court observed that due to the rise in positive COVID-19 cases and two government studies that classified indoor dining as a "high-risk" activity, the Commonwealth of Pennsylvania had a compelling reason to issue the Order.

Plaintiffs alleged that the State had the burden of proving with direct medical evidence that indoor dining was a "significant mode of possible infection" in the Commonwealth. The Court disagreed, noting that under a rational-basis test, mathematical precision is not required. Quoting U.S. Supreme Court Chief Justice Roberts, the Court noted that public

officials should be afforded great latitude when deciding issues fraught with medical and scientific uncertainties. S. Bay United Pentecostal Church v. Newson, 590 U.S. ——, 140 S. Ct. 1613, 1613-14 (2020) (mem.) (Roberts, C.J., concurring).

The Court also rejected the restaurant group's argument that the State was selectively enforcing the Order since Plaintiffs admitted that the State had cited Plaintiffs and many other retail food establishments that decided to remain open in defiance of the Order.

Irreparable Harm

The restaurant group in M. Rae, Inc. also argued that the State Order would cause them and the industry irreparable harm—a necessary requirement for an injunction—because many businesses in the industry could be forced to close permanently due to lost revenues over the holidays. Plaintiffs also explained how the State Order resulted in employee layoffs and lost wages that were especially egregious during the holiday season.

The Court sympathized with laid-off workers, however, it did not agree that the restaurant group had shown how the State Order would cause them irreparable harm. The Court emphasized that the Order was set to expire within eleven days from the date of the Court's opinion, and noted that "the harms claimed by Plaintiffs are, at this point, speculative: Plaintiffs hypothesize, based on past extensions of mitigation orders, that the 'Defendants could extend the [limited-time mitigation orders] as they have done with past COVID-19-related Orders.'"

State Court Opinion

In Another Bar, LLC et al. v. Gov. Wolf et al.,660 MD 2020, (Comm. Ct. 2020) Judge Andrew Crompton decided a similar request for an injunction as the case above. This complaint was filed by a coalition of 20 restaurants from Northeast and Southeast Pennsylvania. The Court decided that "because bars and restaurants are not identical to other businesses in so far as the activities of eating and drinking require the removal of masks, under rational basis scrutiny, bars and restaurants are not disproportionately discriminated against as a class as compared to other similarly situated businesses under the order."

"Further, as the restrictions implemented by the order are of a temporary nature, extending for a limited three-week period and expiring within five days of the filing of this opinion, their duration is not indefinite so as to require a more limited level of deference by this court," he added.

Judge Crompton did say that the coalition could file an application for an emergency injunction if Wolf were to extend the deadline beyond 8 a.m. on Monday, January 4, 2021.

Now what?

The prospect of mandated closures is something most restaurants never anticipated in their business plans and cash flow projections. When faced with the reality of today's climate for restaurants, it is vital for business owners to understand the options available to them.

1.) *Maximize takeout and delivery capabilities*. All retail food businesses should offer customers the ability to place orders online. Restaurants may consider developing an online portal or application to purchase food. Restaurants may also consider registering with at least one mobile delivery service (e.g., Ubereats, Grubhub, Doordash, etc.). These delivery services will list your business's menu online and allow your customers to place orders on their platform. Note that using a delivery service could mean raising your prices to compensate for commissions the restaurant shares with the delivery

service company.

2.) *Look into business interruption insurance*. As noted in this article, legislation in the Pennsylvania Legislature seeks to clarify an insurance company's contractual obligation to pay for losses a restaurant experiences during a government shutdown. In the summer of 2020, multiple class-action lawsuits against insurance companies were filed throughout the country. Retail food businesses should consider joining a class-action lawsuit in their area.

3.) *Renegotiate your lease with your landlord*. This is a tricky one because it will depend on a landlord's ability (or willingness) to cooperate. Nevertheless, a restaurant's ability to pay half rent during times when its revenues have fall 50% or more compared to last year, could make a huge difference on its survival and that of workers it employees. There are positive reports that landlords are willing to offer restaurant tenants creative lease modifications to help restaurants get through these difficult times.

4.) *Talk with your lenders*. When profits are down, a business owner should minimize its expenses. Restaurant owners should not default on paying their loans because that could lead to bigger problems, but they should ask lenders for a forbearance or no-interest period. Also, consider talking to your lender and attorney about your options to refinance your current loan obligation(s).

5.) *Scale down operations*. Restaurant owners can operate a take-out-only business with low overhead in a "ghost kitchen " or food truck.

6.) *Get an extension of premises for your liquor license*. Restaurants should consider offering outdoor dining in a heated patio (or tent) that is adjacent to their licensed premises. This new arrangement will likely require the business owner to licenses the new space with the Pennsylvania Liquor Control Board to sell and serve alcohol in the new seating area.

7.) *Apply for a transporter-for-hire liquor license*. Retail food businesses may consider licensing a company vehicle to deliver alcoholic beverages from the restaurant to its customers. A restaurant liquor licensee can deliver mixed cocktails and up to 192 ounces of beer to customers with a transporter-for-hire license. Other licensees have similar options. Delivery service companies cannot deliver alcohol because they do not own a liquor license.

If you need help sorting through any of the options listed above, you can contact Daniel Conlon or Evan Pappas.

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[1] See M. Rae, Inc. v. Wolf, CIVIL ACTION NO. 1:20-CV-2366 (M.D. Pa. Dec. 23, 2020); Another Bar, LLC et al. v. Gov. Wolf et al., 660 MD 2020 (Comm. Ct. 2020).

[2] M. Rae, Inc. v. Wolf, CIVIL ACTION NO. 1:20-CV-2366 (M.D. Pa. Dec. 23, 2020).