July 10, 2020

TO: MAYORS, CITY MANAGERS, CITY ADMINISTRATORS, CITY CLERKS/RECORDERS/TREASURERS, AND CITY ATTORNEYS

FROM: MUNICIPAL LEGAL DEFENSE PROGRAM

RE: MASK ORDINANCE

At the request of many municipalities in Arkansas, the Arkansas Municipal League, in conjunction with Governor Hutchinson’s office, drafted the attached ordinance for cities and towns wanting to pass an ordinance regarding the wearing of facial coverings to maintain our hard-won progress in the fight against COVID-19 form a health and economic standpoint. The purpose of this memorandum is to provide a detailed explanation of the ordinance and to educate cities and towns on the model ordinance.

First and foremost, it is imperative that we support our local businesses who wish to mandate the use of facial coverings upon their premises. Municipalities can foster a show of support for our local businesses by passing an ordinance WHICH REQUIRES facial coverings in these types of establishments. The existence of such an ordinance sends a powerful message to the public at large, that we acknowledge that the use of facial coverings is absolutely necessary to successfully fight the pandemic that we are facing. Furthermore, it shows we acknowledge that the scientific evidence from sources such as the World Health Organization (WHO) and the Centers for Disease Control and Prevention (CDC) clearly and overwhelmingly demonstrate the efficacy of facial coverings in curbing the spread of COVID-19.

Additionally, our implementation of an ordinance requiring the use of facial coverings demonstrates that we stand ready to support, in solidarity with, local businesses in an effort to keep employees and patrons safe, as well as to ensure that businesses are able to remain open during this pivotal time. Of course, there are questions about what the effects of such an ordinance might be. So, let’s walk through them one at a time:

1) **ADH Guidance**- Businesses wishing to mandate the use of facial masks upon their premises are guided by ADH recommendations, including the display of appropriate signage. The use of an ordinance requiring facial masks sends a clear message that the City supports our businesses as they attempt to protect themselves and their patrons through the use of ADH guidance.

2) **No Penalty**: The model ordinance, approved in form by Governor Asa Hutchinson, does not attempt to promote a penalty of any type for the failure to wear a mask. For numerous reasons enforcement of a penalty is not feasible. The burden on law enforcement, as it relates to the pandemic response, is already a heavy one. Additionally, the end goal is not the criminalization of failure to wear a facial covering, but the support of our local businesses, the safeguarding of public health, and the preservation of the progress made thus far in the fight against Covid-19. In other words, the goal is **not to penalize, but to keep people safe and to keep businesses and our economy open**. Consider the following examples:

- Jim enters a diner and is not wearing a mask. An employee asks Jim to please wear a mask. Jim complies, **a win for everyone**.
- Sam walks into a diner and is not wearing a mask. An employee asks Sam to please wear a mask. Sam refuses and won’t leave. The employee may call local law enforcement for assistance. Law enforcement will educate and encourage Sam to wear a mask, explaining that he may comply or leave the premises. Sam complies, **a win for everyone**. Or possibly Sam declines and leaves the premises, **a win for everyone**.
- David walks into a diner and is not wearing a mask. An employee asks David to please wear a mask. David refuses and won’t leave. The employee may call local law enforcement for assistance. Law enforcement will educate and encourage David to wear a mask, explaining that he may comply or leave the premises. David refuses to comply and refuses to leave the premises. Law enforcement may cite David for trespass. David might also be cited for disorderly conduct based upon certain factors. Law enforcement may physically remove any trespasser if the trespasser has failed to comply with the requirements of the property owner to remain on the premises. **It is important to note, the removal of an individual by law enforcement is based upon that individual’s refusal to comply or leave, not the actual facial covering.**

3) **Support of Business**: Keeping businesses open is vital to our Covid-19 recovery. However, we can’t reasonably expect business owners to weather the storm alone. Our relationship with local business is symbiotic, one relies on the other. **Businesses need to feel secure that they have the City’s support in their effort to stay open amid the pandemic.**
ORDINANCE NO.____

A ORDINANCE BY THE CITY OF _______________ REGARDING THE USE OF MASKS IN RELATION TO THE COVID-19 PANDEMIC.

WHEREAS, An outbreak of COVID-19 (coronavirus) has resulted in an ongoing global pandemic; and

WHEREAS, On June 18, 2020, Executive Order 20-37 declared that the emergency declared pursuant to Executive Order 20-03 and its amendments was terminated and that the public health and disaster emergency and declaration of the State of Arkansas as a disaster area resulting from the state-wide impact of Covid-19 was declared anew and would be effective for sixty (60) days unless renewed; and

WHEREAS, On June 19, 2020, the Arkansas Department of Health (ADH), released guidance regarding the use of face masks/coverings by the general public which asserts that ample evidence exists to support the efficacy of wearing face masks to prevent the transmission of Covid-19 including a World Health Organization (WHO) funded study; and

WHEREAS, the afore-mentioned ADH guidance on masks recommends that the general public should wear face coverings in ALL indoor environments where they are exposed to non-household members and distancing of 6 feet or more cannot be assured. This includes, but is not limited to, workplaces, retail stores, businesses, places of worship, courtrooms, jails/prisons, schools, healthcare facilities, and other people’s homes; and

WHEREAS, the afore-mentioned ADH guidance recommends that the general public should also wear face coverings in ALL outdoor settings where there is exposure to non-household members, unless there exists ample space of 6 feet or more to practice physical distancing; and

WHEREAS, Arkansas Governor Asa Hutchinson supports and encourages the usage of facial coverings in an effort to curb the spread of Covid-19; and

WHEREAS, the United States Supreme Court has long recognized state and local control over the spread of infection diseases and gave broad leeway in responding to these threats in Jacobson v. Massachusetts, 197 U.S. 11 (1905); and

WHEREAS, the Centers for Disease Control and Prevention (CDC) encourages the use of cloth face coverings to curb the spread of Covid-19; and

WHEREAS, individuals infected with Covid-19 are often asymptomatic and may transmit the virus; and

WHEREAS, the health of employees and patrons of reopened businesses is directly threatened by individuals who enter such establishments without a facial covering.

NOW, THEREFORE BE IT ORDAINED BY THE CITY OF ______________, ARKANSAS:
Section 1: Upon consultation with the ADH and the Governor’s Office, the City of __________________ requires the usage of facial coverings according to ADH guidance in an effort to help curb the spread of Covid-19, in particular to protect the most vulnerable members of our community, as well as to ensure that the hard won progress made by the citizens of Arkansas in reopening our shared economy is preserved.

Section 2: The City of __________________ has hereby determined that local law enforcement and other city officials will act in a support capacity to local businesses that wish to enforce the use of masks upon their premises. Law enforcement, acting in such a support capacity, shall educate and encourage members of the public who decline to wear facial coverings regarding the efficacy of wearing such coverings according to the ADH guidance on facial coverings released on June 19, 2020. Law enforcement may additionally act in a support capacity to local businesses by educating individuals who decline to comply with the facial covering requirement of any local business that the individual must abide by that requirement or leave the premises.

Section 3: The [City Clerk][Recorder] is hereby directed to print and mail this ordinance to all businesses within the municipal limits as soon as practical, for display in a prominent area of the business or on the primary entrance way.

Section 4: An emergency is declared to exist, and because of the need for immediate response to the COVID-19 pandemic, this ordinance shall go into effect immediately upon passage. The emergency factors considered in declaring an emergency is the infectious rate of COVID-19, the rapid use of protective equipment across all sectors, the fatality rate, and the fatality rate if the virus is left unchecked. Therefore, an emergency is declared.

PASSED AND APPROVED ON ____________________________.