

Stay at Home or Go Back to Work? Who Will Make the Decision?

April 16th, 2020

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Last week Governor Holcomb extended his COVID-19 stay-at-home order until April 20. On Monday, the governors of seven East Coast states and three West Coast states entered into two “compacts,” agreeing to proceed jointly in re-opening the economies of their states. On the same day, President Trump declared he has “total” authority over lifting the pandemic restrictions and reopening the economy. So, who *does* have the legal power to make these potentially life or death decisions? As public health and health care law experts, we know the short answer is: the states. The long answer is more complicated.

First, and for the next month or so, the answer will lie in the hands of the federal and state public health experts. In large part thanks to people following the stay-at-home order, Indiana is believed to be close to its peak use of healthcare resources, the worst-case scenario around the supply and demand of medical beds, ICUs, and ventilators. Soon, concern about overwhelming our health care system should begin to drop even while, sadly, the number of deaths will continue to run very high for several more weeks. However, because we also know no one has natural immunity to this virus, and that there are no widely-available, proven treatments or vaccines available to protect the public, there will be no throwing the switch from “off” to “on.” Abandoning social distancing and fully reopening the economy over the next month or so, would put us back where we were when Governor Holcomb issued his first stay-at-home order in late March. Only a very foolish leader would overrule his public health experts in the near term.

At some point, public health experts will agree on metrics for manageable risk, and the governors will use that data- and science-driven determination to guide implementation of the next phase of reopening. The structure works this way because our constitutional system puts states at the helm of our public health response system. Under the Tenth Amendment, states are given the power to protect the public's health, welfare and safety. In the case of a pandemic there is also logic in having more devolved decision-making; different states, even different regions of states, may exhibit different risk factors. At this point, governors will have a number of difficult policy decisions to make: Do they relax stay-at-home orders, allowing for family gatherings? Do they increase the number of “essential

This article was originally published on the *Inside Indiana Business* website.

Silverman, R., & Terry, N. (2020, April 16). Stay at Home or Go Back to Work? Who Will Make the Decision? *Inside Indiana Business*. <https://www.insideindianabusiness.com/story/42016290/stay-at-home-or-go-back-to-work-who-will-make-the-decision>

services,” essentially reopening those parts of the economy? Do they allow for more intrastate or even interstate travel, while urging caution?

What we know is that the road goes forward into a new world. There will be no return to “normal.” It’s not clear when large gatherings, such as for sporting events, education, or perhaps even in shopping malls or hotels will be possible. Certainly not until widespread, accurate testing is available, and maybe not until we not only have an effective vaccine approved, but also manufactured, distributed, and delivered. We will still need our masks in some situations, social distancing will remain important, and employers likely will be imposing all sorts of new rules from sharing food in break rooms to protocols for reporting illnesses. Flare ups are likely to occur, as are shutdowns (although with more testing, these will be able to be more targeted geographically and in time). Overall, we must all reduce our expectation as to exactly what a re-opened economy will look like.

If the states have most of the legal power, where does that leave the President? Although he does not have much direct power to command people either stay home or go to work, he can still wield considerable influence over the states’ decision-making. First and foremost, given his position and his Twitter following, the President has an enormous soapbox to stand upon and deliver information. For example: the day he walked back his proposal to “reopen the economy” on Easter Sunday was a significant moment in our public health response. It was a high-profile acknowledgment of the seriousness of the outbreak. And, within hours of that re-calibration by the President, the governors of Georgia, Texas, and Florida all put Executive Stay-at-Home-type Orders in place. His team of experts on the task force, including Drs. Fauci and Birx and those from the Centers for Disease Control not only retain considerable public confidence, but their advice will be trusted by the states’ public health directors and governors.

The President also has the power to persuade states through incentives. There is an opportunity for some old-fashioned political arm twisting and persuasion. Further, as the saying goes, “How do you herd cats? Move their food.” The President is already using the spending power on things like medical equipment and PPE, as well as funding support for states and hospitals. We can envision a scenario where the President, recognizing that states that re-open their economies on a shorter timeline will be taking on some increased risk, might look to prioritize sending the early movers funding and supplies, as a kind of reward. Other creative ideas such as “immunity certificates” like drivers’ licenses for persons who have recovered from COVID-19 and mobile phone-based tracking are being floated. These are areas where the federal government is better placed to lead. It is very possible that the President will try and take a more aggressive approach and use emergency powers. Any such challenges to our constitutional sense of federalism likely would find them challenged before the federal courts.

The Governors leading the West Coast collaboration have indicated that, together, they will be guided by three principles: (1) Our residents’ health comes first; (2) Health outcomes and science – not politics – will guide these decisions; (3) Our states will only be effective by working together, as one. Those seem like eminently sensible considerations. But, most importantly, reopening the economy must be done in a way that is grounded in science.

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