



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

August 13, 2020

TRANSMITTED VIA EMAIL

The Honorable Ilana Rubel
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street, Room E329
Boise, ID 83702
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Re: Request for AG analysis – Our File No. 20-70562

Dear Representative Rubel:

I am responding to your questions concerning the impact of the 2019 novel coronavirus (COVID-19) pandemic on use of the Capitol Building. Within your inquiry, you have posed two questions, which are answered in turn below. The questions asked are:

1. Do public health orders of public health districts or cities apply within the Capitol Building; and
2. Can an elected Idaho State Representative request an accommodation under the ADA from the Idaho House of Representatives?

It appears that the adoption of Title 67, Chapter 16 operates to exempt the Capitol Building from ordinances and certain public health orders issued by the City of Boise. However, as explained in greater detail below, the State of Idaho has not exempted itself from public health orders issued by public health districts, therefore the public spaces within the Capitol Building are likely subject to these orders.¹ Public Health Districts and Cities are legally distinct political subdivisions of the State. But under Article III, § 9 of the Idaho Constitution, the Legislature retains plenary authority over its chambers, meetings rooms, and offices and is therefore free to make its own determination

¹ Under Article IV, § 5 and Idaho Code § 46-1008, the Governor has the authority to issue an executive order or proclamation that could supersede any orders issued by the Department of Health and Welfare, a public health district, or a city.

as to what safety protocols to implement, if any, for the course of its proceedings. Similarly, Constitutional Officers are vested with executive authority within their office spaces in the Capitol Building and maintain the discretion to determine what safety protocols, if any, are to be observed within their executive office spaces.

The application of the Americans With Disabilities Act (ADA) to the Idaho Legislature is uncertain. At the outset, it is difficult to determine whether the Idaho Legislature meets the definition of employer. Additionally, each legislator is independently elected, and does not have an identifiable employer. But there is also an argument that a legislator with a qualifying disability under the ADA may be able to seek an accommodation under other provisions of the ADA that apply to the general public. In the abstract, it is impossible to provide a legally certain answer because ADA inquiries are extremely fact intensive inquiries. The best legal answer this office can offer is that it is prepared to assist the Idaho Legislature in evaluating any ADA requests for accommodation if asked.

The Idaho Legislature Has Not Exempted the State or State Property From Certain Public Health Orders

The Governor's Orders and Director of the Department of Health & Welfare's Orders Are Applicable to the Capitol Building.

Within Idaho, public health responsibilities have been assigned at differing levels of Government. At the state level, both the Governor and the Director of the Department of Health and Welfare have authority to issue public health orders or proclamations under Idaho Code §§ 46-1008, and 56-1003(7) respectively. To date, Idaho has addressed the COVID-19 pandemic through orders issued by the Governor and the Director of the Department of Health and Welfare (IDHW). At this time, the Governor's Stay Healthy Order dated May 30, 2020 (the "May 30 Order") is in effect until August 21, 2020. *See* Executive Proclamation, August 7, 2020, & Stay Healthy Order, May 30, 2020. Neither State property nor the Capitol Building are exempted from this order.

Idaho Code Title 67, Chapter 16 Likely Operates To Preempt City Health Orders from Application to the Capitol Building.

Cities have authority to issue public health orders. Under Article XII, § 2 of the Idaho Constitution cities have the authority as follows:

Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws."

Although, this general power is not absolute when it involves regulation of State property, the Idaho Legislature has further expressly granted cities the authority over public health issues through Idaho Code §§ 50-304 and 50-606. *See* The Idaho Constitution and Local Governments

– Selected Topics, M. Moore, 31 Idaho Law Rev. 417, 429-434 (1995) (Local jurisdictions cannot regulate in conflict with state law or in areas preempted by state law). Notably, the Legislature has not exempted the State, State property, or the Capitol Building from application of these public health measures. But the Idaho Legislature may have preempted local regulations and ordinances in a more general fashion.

Municipal corporations which enjoy a direct grant of power from the Idaho Constitution are, however, limited in certain respects. The city cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern.

Caesar v. State, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980). In Caesar, the Idaho Supreme Court considered the Legislature’s intent to occupy the field of activity concerning the building and maintenance of State facilities. The court held:

Since the purpose of Title 67, Chapter 23, as expressly stated in I.C. s 67-2311 was “to render all public buildings now or hereafter owned or maintained by the state of Idaho, or any official, department, board, commission or agency thereof reasonably free from hazards to the general public,” we deem that the legislature intended to allocate this police power to the state in its concern for the safety of the general public . . . Taken as a whole, these statutes indicate that the area of state-owned buildings is completely covered by the general law and may not be subjected to an ordinance which is purely local in nature.

Id at 158-59, 520-21.

A similar intent to allocate power exists with respect to hazards arising from the activity of persons or natural hazards such as the COVID-19 pandemic. Control of the Capitol Building and its grounds is governed by Idaho Code title 67, chapter 16. The purpose of the chapter is “[t]o establish a statute to comprehensively govern all aspects of the use, control, security, operation, and maintenance of the capitol building and its grounds.” Idaho Code § 67-1601(2)(a). The Legislature intended to preempt local regulation of the Capitol Building. In addition to the specific allocation of control over use, security, maintenance and operation, the Legislature has established general laws governing public health. When implemented through a health order, these general laws also preempt the authority granted to local governments under Idaho Constitution article XII, section 2.

Although local city ordinances and orders may be inapplicable to the Capitol Building, the Legislature has not adopted any statutes exempting other State property from local public health orders.

Public Health District Orders Do Not Appear To Have Been Preempted Nor Exempted From Application To the Capitol Building.

Idaho Code title 39, chapter 4 enacts a general system of public health districts throughout the State. These districts are to “operate and be recognized not as state agencies or departments, but as governmental entities whose creation has been authorized by the state, much in the manner as other single purpose districts.” Idaho Code § 39-401. Each public health district’s jurisdiction includes multiple counties. Idaho Code § 39-408. The Capitol Building is located in District No. 4, commonly known as Central District Health.

Districts are granted “the same authority, responsibility, powers, and duties in relation to the right of quarantine within the public health district as does the state.” Idaho Code § 39-415. Additionally, the Districts are expressly authorized: “to do all things required for the preservation and protection of the public health and preventative health.” In accordance with its statutory powers and duties, on July 14, 2020 Central District Health imposed an order of quarantine. Central District Health updated the order on August 11, 2020 (the “CDH Order”).

The CDH Order prohibits gatherings of 50 persons or more², requires a six-foot physical distancing between persons not residing within the same household and provides that every person must wear a face covering over the person’s nose and mouth when a six foot physical distance cannot be maintained, with limited exceptions as specified in the CDH Order. Restrictions, ¶¶ 2, 3, 4 (exceptions in ¶ 4(B)). The CDH Order specifically includes government offices. ¶ 4. In addition to the statutory authority granted to the Legislature, the Governor and Director’s May 28 Order provides that “[t]o decrease the spread of COVID-19, the cities, counties and public health districts of the State of Idaho may enact more stringent public health orders than those set out in this Order.” Ex Order at ¶ 11.

The Governor or Director of the Department of Health & Welfare have the authority to issue an order exempting the public areas of the Capitol Building from the CDH order, or to impose their own order within the public spaces of the Capitol Building.

The Legislature and Constitutional Officers have plenary constitutional authority over their respective chambers, offices, meeting rooms, and personnel management.

Article II, § 1 limits the ability of separate branches of government to exercise authority over coordinate branches.

Section 1. DEPARTMENTS OF GOVERNMENT. The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

² The CDH Order restricts social gatherings to ten persons or fewer and other gatherings, including governmental activities to fifty persons or fewer. See Order of the District Board of Health Central District Health, State of Idaho (CDH Order), August 11, 2020.

This means that management decisions within each branch of government are left to the respective authority of that separate and coordinate branch of government. The Legislature cannot dictate the management of the Governor's office, nor can the Governor dictate the management of Legislative business. In terms of discretion over the conduct and management of their respective offices, each branch is afforded its distinct discretion within the boundaries of its Capitol Building office space. Idaho Code § 67-1602.

Article III, § 9 of the Idaho Constitution provides:

POWERS OF EACH HOUSE. Each house when assembled shall choose its own officers; judge of the election, qualifications and returns of its own members, determine its own rules of proceeding, and sit upon its own adjournments; but neither house shall, without the concurrence of the other, adjourn for more than three days, nor to any other place than that in which it may be sitting.

This provision gives the Idaho Legislature absolute authority over its workspaces and proceedings. In essence, each house has the discretion to identify and implement the safety protocols it deems necessary to conduct its proceedings within its respective chamber, offices, and committee rooms. 575 Mason's Manual of Legislative Procedure, § 805(5). Although the Legislature and the Constitutional Officers have authority over the management and safety of their respective offices, chambers, and meeting rooms, the public areas of the Capitol Building are likely subject to the CDH Order until that order is rescinded, superseded by the Governor or Director of the Department of Health and Welfare, or exempted by the Idaho Legislature.

Application of The Americans With Disabilities Act Is Uncertain.

The Legislature As An Employer Is Legally Uncertain.

The primary question under the ADA is whether elected legislators are employees, and if they are employees, who is their employer? Employment protections are contained in Title I. The Equal Employment Opportunity Commission (EEOC) authors a technical guide concerning enforcement of the ADA. With regard to elected officials, the technical guide takes the position that elected officials are *likely* considered employees under the ADA. (emphasis added). This conclusion is based on the fact that both Title VII and the ADEA (Age Discrimination in Employment Act) specifically exempt elected officials from the definition of employee, while the ADA does not exempt them. But this conclusion is legally uncertain.

Resolution of this question is more difficult because, if the elected House members are employees, then the question is; who is their employer? To implement the changes that you propose (requiring masks or remote participation) would require a change in existing House rules. But if one considers the House their employer, the House may not meet the requirements of an employer ("a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or proceeding calendar year").

42 U.S.C. § 12111(5). A typical legislative session lasts approximately 80 days, which using the ADA definition is approximately 11 weeks of work. Including the sporadic out of session work does not equate to “each working day in each of 20 or more calendar weeks.” It is likely that the House is not an employer.

This analysis is complicated based on the definitions because House members are each distinct elected officials. There is no supervisor, although the House uses a Speaker, the Speaker’s authority exists through the acquiescence of the House. Similarly, the Speaker does not pay members, and could not otherwise be considered their employer.

If a determination were made that legislators are employees, then the employer (assuming one could be identified) is required to engage in an interactive process to determine what reasonable accommodations can be made to allow them to perform the essential functions of their jobs. An employer is only entitled to deny a reasonable accommodation if it’s an undue hardship. The undue hardship analysis is complex and difficult to establish in the abstract and in actual application. The interactive process typically involves a discussion with the employee to determine what is being requested, and usually involves seeking further information from the employee’s medical provider if the employer wishes to verify or further understand the medical condition at issue and obtain input from the medical provider on what reasonable accommodations would assist the employee in performing the essential functions of their job. The employer then typically has an internal meeting to determine what it can provide and whether the requested accommodations are reasonable or constitute an undue hardship. The employee is not entitled to the specific accommodation requested if the employer can identify an equally (or more) effective accommodation that allows the employee to perform the essential functions of the position. Failure to engage in the interactive process is itself a violation of the ADA in the Ninth Circuit and can subject an employer to a damage claim, as well as injunctive relief.

However, to qualify for Title I protections, an individual must have an ADA-qualifying disability. In the context of COVID-19, that could be a variety of things – either physical conditions that make the individuals at high risk, or anxiety/depression related to COVID-19. If the person does not have a qualifying disability, they may have other remedies they can request but they are not entitled to a reasonable accommodation under the ADA. It should also be noted, however, that with the 2009 amendments to the ADA Congress made clear that employers should not spend an undue amount of time on determining whether someone has a “qualifying disability” but instead should focus on the ability to grant the requested accommodation(s).

ADA – Title II Access to Public Services.

Although Title I of the ADA may be uncertain, Title II of the ADA, which pertains to the public’s ability to access public services appears applicable. The EEOC takes the position in the above-referenced technical guide that even if elected officials are not considered employees, they would be entitled to request accommodations under Title II of the ADA.

Title II provides in 42 USCA § 12132:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

The Ninth Circuit held that facially neutral policies may violate Title II when such policies unduly burden disabled persons, even when the policies are consistently enforced. *See McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004). Examples given by the Court in *McGary* of facially neutral policies that unduly burdened disabled individuals were the PGA banning the use of golf carts in certain tournaments (unduly burdening golfers with mobility impairments); and Hawaii's policy of quarantining all incoming animals, including guide dogs, for 120 days (unduly burdening the visually impaired). In *McGary*, a man with AIDS sued the City of Portland after it cited him for nuisance abatement because he failed to clean up debris in his yard within 15 days after City officials notified him to do so. He had been in the hospital with meningitis and requested the City grant him additional time to clean up his yard, but the City denied his request. The Plaintiff raised several claims against the City, including a failure to reasonably accommodate him in violation of Title II of the ADA. The City argued he could not establish discrimination because the Plaintiff could not establish he was treated any differently than an able-bodied person, i.e. the City treated the disabled and able-bodied equally because it refused to grant anyone an extension. The Ninth Circuit did not find this a viable defense, and concluded the Plaintiff need not establish he was treated differently in order to establish a claim for failure to reasonably accommodate. The Ninth Circuit concluded that modifications to municipal code enforcement fell under Title II's provisions.

The U.S. Department of Justice (DOJ) administers Title II of the ADA. With regard to Title II accommodations, the DOJ's ADA Update: A Primer for State and Local Governments, states that the ADA allows and may require different treatment of a person with disabilities in situations where such treatment is necessary in order for a person with a disability to participate in a civic activity. A specific example given in the DOJ guidance is if a city council member has a disability that prevents her from attending city council meetings in person, then delivering papers to her home and allowing her to participate by telephone or videoconferencing would enable her to carry out her duties. The DOJ guide goes on to state that only "reasonable" modifications are required. Any modification that would result in a "fundamental alteration", meaning a change in the essential nature of the entity's programs or services, is not required.

The Respective Chamber Should Carefully Consider Requests for Accommodation Under the ADA.

With regard to both Title I and Title II of the ADA, if legislators provide evidence they have either a physical or mental disability and that their medical professionals advise them they cannot safely attend in person as currently planned because of that disability, then the applicable chamber should

examine the requested accommodations and determine whether the requested accommodation or any equally effective alternative accommodations would enable the legislator to perform the essential functions of her position (for purposes of Title I) or enable her to participate in the services, programs, or activities of the Legislature (for purposes of Title II). Under Title I, the requested accommodation can be denied if it is unreasonable or would constitute an undue hardship. Under Title II the Chamber only has to implement reasonable modifications. The question of whether a requested accommodation constitutes a “fundamental alteration” under Title II is going to be a fact-intensive inquiry. A claim brought under either section would likely be fact-intensive and therefore likely difficult to prevail upon in summary judgment.

Conclusion

Recognizing that this office cannot offer a definitive legal answer at this time with regard to the ADA questions, this office will be available should the need arise to evaluate a request for accommodation, whether it constitutes an undue hardship, its reasonableness and other legal issues at the request of the Legislature. With regard to compliance with the Governor, Director of Health and Welfare, and public health district orders, it is likely that they apply within the public spaces of the Capitol Building, while specific Constitutional Officers and each chamber of the Legislature has authority over their respective chambers, offices, meeting rooms, and other areas.

I hope that you find this analysis helpful.

Sincerely,



BRIAN KANE
Assistant Chief Deputy

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