

## DECISION MEMORANDUM

**TO:** COMMISSIONER KJELLANDER  
COMMISSIONER RAPER  
COMMISSIONER ANDERSON  
COMMISSION SECRETARY  
COMMISSION STAFF

**FROM:** KARL T. KLEIN  
DEPUTY ATTORNEY GENERAL

**DATE:** MAY 20, 2021

**SUBJECT:** IN RE COVID-19 RESPONSE – CASE NO. GNR-U-20-01.

What would the Commission like to do with its Covid-19 Response order, Order No. 34781, now that public health authorities have relaxed prior safety precautions designed to combat the Covid-19 pandemic?

### BACKGROUND

In early 2020, the Governor declared the Covid-19 pandemic to be an emergency. The Idaho Department of Health and Welfare (IDHW), Central District Health (CDH), and other public health authorities then adopted standards to help prevent COVID-19 from spreading. The Commission, in turn, initiated this docket and issued orders to foster safe practices at the Commission. The Commission's latest Covid-response order, Order No. 34781, took effect on September 17, 2020 and remains in effect today.

In summary, Order No. 34781 (1) encouraged persons to remotely attend the Commission's public proceedings; (2) required persons who physically attend public proceedings to wear masks and/or keep six feet away from others while adhering to CDH's public health directives; (3) suspended Rules 61 and 62 of the Commission's Rules of Procedure to the extent those rules required persons to physically file copies of pleadings; (4) provided most pleadings, orders, and notices would be filed and served electronically; and (5) contemplated the order would continue until it was rescinded, superseded, or amended by the Commission.

Recently, IDHW and CDH relaxed their COVID-19 guidelines.<sup>1</sup> The section below compares these updated guidelines to Order No. 34781.

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<sup>1</sup> See e.g., Central District Health Lifts Public Health Advisory, May 13, 2021 (<https://www.cdhd.idaho.gov/pdfs/News/2021/5-13-21-CDH-Lifts-Public-Health-Advisory.pdf>); Idaho Department

## ORDER NO. 34781 COMPARED TO UPDATED PUBLIC HEALTH GUIDANCE

**1. Remote attendance and electronic filing.** The Commission's order encourages persons to remotely attend meetings, hearings, and other proceedings, and to file and serve documents electronically. This seems consistent with the IDHW's Stage 4 Stay Healthy Guidelines, which say: "Gatherings of any size are permitted if they adhere to the Physical Distancing and Sanitation Requirements in Section 4." Section 4 of the Stage 4 Stay Health Guidelines specify: "Gathering and event organizers should . . . [h]ost events outdoors, if possible, and if indoors provide for adequate ventilation. . . ." This provision seems intended to encourage persons to limit situations involving indoor physical contact. And it seems consistent with the Commission's decision to allow persons to physically attend Commission proceedings while encouraging them to attend remotely and to file and serve documents electronically.<sup>2</sup> I recommend the Commission keep these precautions in place.

**2. Masks.** The Commission's order says: "Persons who physically attend . . . proceedings must, when possible, either: (a) maintain at least six-foot physical distancing from other persons; or (b) *wear a face covering that completely covers the person's nose and mouth* when others are present and a physical distance of six feet cannot be maintained. We encourage persons both to maintain six-foot physical distancing *and* wear a face covering." The Commission's mask requirements do not reference vaccination status. This contrasts with the new guidance from IDHW and CDH, which say *fully vaccinated* persons no longer need to wear masks in non-healthcare settings, while persons who aren't fully vaccinated should continue to wear masks. I recommend the Commission replace its mask mandate with an order that informs persons the Commission intends to follow applicable guidance from public health authorities and that persons also should follow those guidelines.

**3. Distancing.** As noted above, the Commission's order requires persons, when possible, to maintain six feet of distance from others or wear a mask and encourage persons to do both. The Commission's distancing requirement does not reference vaccination status. This is

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of Health and Welfare's Stage 4 Stay Healthy Guidelines, dated May 11, 2021 (<https://rebound.idaho.gov/wp-content/uploads/stage4-stay-healthy-guidelines-051121.pdf>); and CDC's Interim Public Health Recommendations for Fully Vaccinated People, dated May 13, 2021 (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>).

<sup>2</sup> I understand utilities and parties have appreciated the Commission's electronic filing options and hope to see those options continue.

consistent with IDHW's Stage 4 Stay Healthy Guidelines, which state: "Gatherings of any size are permitted if they adhere to the Physical Distancing and Sanitation Requirements in Section 4." Section 4 of the State's Guidelines state : "*Gathering and event organizers should . . . [p]rovide for six (6) feet of spacing between guests to the extent possible...*" The IDHW's distancing guidance, which is directed to "event organizers" rather than to attendees, suggests the Commission should continue to provide six feet of space between attendees at Commission proceedings if possible.

The new guidance from CDH differs from the Commission and IDHW statements because, as with masks, CDH now says *fully vaccinated* persons no longer need to maintain six feet of distance between each other.

Given IDHW's focus on "event organizers" and CDH's focus on persons by vaccine status, I recommend the Commission replace its distancing mandate with an order that informs persons the Commission intends to follow applicable guidance from public health authorities and that persons also should follow those guidelines. The Commission could continue to arrange its hearing room and other space to provide attendees with six feet of separation.

#### **COMMISSION DECISION**

Does the Commission wish to supersede Order No. 34781 with an order that accounts for the new guidance from IDHW and CDH? If so, I recommend the Commission's new order:

- (1) Continue to encourage remote attendance and electronic filing and service; and
- (2) Regarding masks, distancing, and other public health measures, generally note the Commission intends to conduct public proceedings under applicable public health guidelines in effect when a proceeding occurs, and that the Commission expects persons who attend those proceedings to follow those guidelines.

  
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Karl T. Klein  
Deputy Attorney General