



KANSAS JUSTICE INSTITUTE

August 5, 2020

Sent via Electronic Mail Only (choleman@rileycountyks.gov)

Clancy Holeman, Esq.
Riley County Counselor
115 North 4th Street
Manhattan, Kansas 66502

Re: Riley County, Kansas, Local Health Order #16

Dear Mr. Holeman,

Kansas Justice Institute¹ sends this letter in good faith. Our hope is that you view this correspondence as such. In our view, Riley County Health Order #16 raises serious statutory and constitutional issues requiring immediate remedial action. If, after reviewing this correspondence you wish to discuss this matter, please call me. I would be more than happy to have a conversation. In fact, I would much rather discuss things than trade letters and emails. I am even willing to meet with you at your office if that is more convenient.

Riley County Health Order #16 (Order) compels “restaurants and bars” to “screen each employee prior to each shift. This shall include asking about symptoms, travel, contact, and checking temperatures. Please use Appendix A for record keeping. These records and other attendance records shall be available to Riley County Health Department staff upon request.”

There is no doubt COVID-19 is serious and cause for public concern. It also warrants action by local health officers. Employee screening, done correctly and voluntarily, is an appropriate measure to stem the tide of infections. However, the collection of data from employers and employees potentially used for contact tracing and tracking cannot be *mandated*, for several reasons.²

First, in our view, the restaurant and bar tracking program violates the COVID-19 contact tracing privacy act.

¹ Kansas Justice Institute is a non-profit, public-interest litigation firm committed to protected individual liberty and the constitutional rights of all Kansans.

² This list is not exhaustive.

The purpose of the COVID-19 Contact Tracing Privacy Act (Act) is to protect the privacy of persons whose information is collected and to protect the confidentiality of contact data. KSA Ch. 1, § 16, (b) (Laws 2020, Sp. Sess.).

Participation in contact tracing “shall be voluntary.” Ch. 1, § 16, (f)(1). And, “[n]o third party shall be required to collect or maintain data regarding infected persons or contacts for the purpose of contact tracing.” Ch. 1, § 16, (h)(1). “Third party” means any of the following: an individual, other than a contact tracer, an organization, a business, or similar entity. KAR § 28-1-40(d). Violations of the Act may be enjoined. Ch. 1, § 16, (i)(1).

Instead of making the program voluntary, Riley County is mandating that third parties collect and disclose information about potentially infected persons, or a potentially infected person’s contact, without the consent of the business, the potentially infected person, or the potentially infected person’s contact. The collection and dissemination of data that may be used to conduct contact tracing cannot be mandated under the Act.

Relatedly, “[t]hese records and other attendance records shall be [made] available to Riley County Health Department staff upon request” violates the Fourth Amendment to the United States Constitution.³

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fourth Amendment protects people, not places, and its purpose is to safeguard the privacy of individuals from government intrusions (*Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018)) “to protect against all general searches,” (*Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)) and applies to commercial premises. *See v. City of Seattle*, 387 U.S. 541 (1967). The Fourth Amendment also protects against invasions of a person’s property rights. *United States v. Jones*, 565 U.S. 400 (2012); *Florida v. Jardines*, 569 U.S. 1 (2013).

Mandating businesses compile and disclose employee health screening logs and “other attendance records” is a warrantless “search” under the Fourth Amendment. *See City of Los Angeles, Calif. v. Patel*, 576 U.S. 409 (2015). The Supreme Court has repeatedly held that “searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are per se unreasonable[.]” *Id.*

There can be no reasonable dispute that the Order’s warrantless regime is unconstitutional on its face, and as applied, to businesses and their employees. There is no pandemic exception to

³ Again, this is not exhaustive. Further, the Order violates other constitutional and statutory provisions not discussed here.

the Fourth Amendment and Riley County cannot compel the disclosure of records without a warrant or other constitutionally adequate process and procedure.

In conclusion, Kanas Justice Institute respectfully urges Riley County to make the restaurant and bar tracking program entirely voluntarily and explicitly state that it is voluntary in the Order.

Thank you again for your time and consideration. As I stated earlier, if you wish to discuss this matter, I will make myself available to you at any time, including this evening. If you call my direct line listed in the below signature block, it will automatically forward to my mobile phone. If for some reason I do not immediately answer, please leave a message and I will return the call.



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