Civil Penalties for Violations of State Emergency Orders?

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Some cities and counties are evaluating what more they might do to reduce the spread of COVID-19. One proposal that has received considerable attention would have them impose civil penalties for violations of the Governor's COVID-19 executive orders, especially provisions that mandate the wearing of face coverings and prohibit mass gatherings. This blog post concludes that cities and counties probably lack statutory authority to implement that proposal, thanks largely to a legal doctrine that generally prevents them from forbidding conduct that's already illegal under state law.

Since declaring a state of emergency due to COVID-19 on 10 March 2020 in Executive Order 116, the Governor has relied on his authority under the Emergency Management Act (EMA) to adopt a series of emergency measures. Under Executive Order 169, as modified by Executive Order 180, anyone not at home must wear a face covering indoors if anyone else in that space isn't a member of the same household and outdoors if it isn't possible to be consistently more than six feet away from non-household members. As amended by Executive Order 176, Executive Order 169 bans indoor gatherings of more than 10 people and outdoor gatherings of more than 50 people. Executive Order 169 contains exceptions – the mass gathering limits don't apply to "government operations[,]" for example – but they're not directly relevant to this discussion.

The EMA makes violations of the Governor's emergency orders Class 2 misdemeanors, so persons who disobey the face covering mandate or mass gathering restrictions are subject to criminal prosecution. G.S. 166A-19.30(d). However, the EMA doesn't authorize the Governor to enforce those rules through civil penalties. The EMA's limited enforcement options are one reason why the Department of Health and Human Services and the Department of Public Safety have urged local governments to assume a larger role in enforcing anti-COVID-19 measures.

Before continuing, I should acknowledge that I don't focus on the EMA in my work at the School of Government. The proposal under consideration here, though, involves the basic enforcement powers of cities and counties, a topic I do study. I should also point out that this post doesn't address the powers of local health departments or how they might be used to encourage compliance with the Governor's emergency orders.

As I've explained in a prior blog post, state law supplies cities and counties with an array of criminal and civil mechanisms for enforcing ordinances. G.S. 153A-123 (county ordinance enforcement); 160A-175 (city ordinance enforcement). On the criminal side, state law makes the violation of an ordinance a Class 3 misdemeanor unless (1) the ordinance regulates the operation or parking of motor vehicles or (2) the city council or board of county commissioners has acted to decriminalize the ordinance. G.S. 14-4; 153A-123(b); 160A-175(b). On the civil side, enforcement mechanisms include the imposition of civil penalties for ordinance violations. G.S. 153A-123(c) ("An ordinance may provide that violation subjects the offender to a civil penalty[.]"); 160A-175(c) (same). When an ordinance provides that persons who violate it will be subject to civil penalties in designated amounts, any properly authorized city or county employee may issue a civil citation in response to a violation. *See* David M. Lawrence, "Civil Penalties for Ordinance Violations – Specific or Variable?," Local Government Law Bulletin No. 127 p. 1 (May 2012) (city or county governing board must specify the exact amount to be charged per violation absent express authority to impose variable civil penalties); David M. Lawrence, "Criminal versus Civil Enforcement of Local Ordinances—What's the Difference?" Local Government Law Bulletin No. 130 p. 7 (Dec. 2012) (local governments may assign responsibility for issuing civil citations to employees who are not sworn law enforcement officers).

Obviously, the Governor's emergency orders aren't ordinances, so they fall outside the scope of the ordinance enforcement statutes. Let's suppose, though, that a city or county adopts an ordinance that incorporates the orders by reference or substantially restates their restrictions. May the city or county impose civil penalties for violations of that ordinance?

It seems to me that the answer is no. The same statute that grants cities their basic power to adopt ordinances for the public health, safety, and welfare likewise preempts any city ordinance when "[t]he elements of an offense defined by [the] ordinance are identical to the elements of an offense defined by State or federal law." G.S. 160A-174(b)(6). The limitation extends to county ordinances as well. *Craig v. Cnty. of Chatham*, 356 N.C. 40, 45 (2002).

The statute's preemption language at least partially codifies a longstanding common law doctrine. The North Carolina Supreme Court has repeatedly held that local governments may not prohibit conduct that state law already forbids, except *perhaps* when the General Assembly has expressly authorized them to do so. In *State v. Tenore*, a lounge owner was charged with violating a county's obscenity ordinance by allowing a woman to perform "a nude and obscene dance" in front of a male audience. 280 N.C. 238, 244 (1972). The supreme court held that the ordinance was invalid because a "state-wide statute in effect at the time the ordinance was

adopted dealt specifically with the identical conduct with which the defendant [had been] charged." *Id*. at 248. *See also State v. Furio*, 267 N.C. 353, 357 (1966) ("[W]here the Legislature has enacted a statute making an act a criminal offense, a city may not adopt an ordinance dealing with the same conduct."); *State v. Brittain*, 89 N.C. 574, 575 (1883) ("[W]hen an offense is indictable in the superior court, a city or town ordinance, making the same act, or substantially the same act, an offense punishable by fine or imprisonment, such ordinance is void. It may be that the legislature has power to authorize a town to make an offense against the state a separate offense against the town, but this could be done only by an express grant of authority"); *Town of Washington v. Hammond*, 76 N.C. 33, 36 (1877) (ordinance invalid in part because "[b]oth the ordinance and the general law make the same offense a misdemeanor").

As noted above, the EMA criminalizes violations of the Governor's emergency orders. An ordinance that copied the orders' restrictions would be violated by conduct that would also constitute a misdemeanor under the EMA. Moreover, to the best of my knowledge, the General Assembly hasn't enacted any legislation that expressly allows cities or counties to adopt ordinances for the purpose of enforcing the Governor's emergency orders. Accordingly, I think that such ordinances are preempted by our supreme court's preemption case law and possibly by G.S. 160A-174(b)(6).

What if, instead of adopting an *ordinance* to enforce the Governor's emergency orders, a city or county were to incorporate them into a *local state of emergency declaration* either by reference or substantively? One might argue that this approach avoids the preemption problem because (1) preemption principles apply to ordinances and (2) local emergency declarations aren't ordinances, even though – as explained in more detail here – a city or county may not issue one unless it has adopted an emergency declaration ordinance pursuant to G.S. 166A-19.31. This argument is, to put it mildly, unpersuasive. The city or county would still be proscribing conduct already illegal under state law. Furthermore, even if accepted as sound, the argument leads to a dead end. State law allows local governments to impose civil penalties for *ordinance* violations. If violations of local emergency declarations don't qualify as ordinance violations, local governments lack any statutory basis for subjecting offenders to civil penalties.

Alternatively, the city or county might argue that preemption doesn't stop it from incorporating the Governor's emergency orders into a local emergency declaration because the EMA exempts such declarations from the preemption principles just discussed. To succeed with this argument in the event of a legal challenge, the city or county would have to identify one or more EMA provisions that plainly manifest an intent on the part of the General Assembly to create the exemption.

Even if the city or county could show that preemption isn't a barrier to incorporating the Governor's emergency orders into a local emergency declaration, the court might not view civil penalties as a permissible remedy for violations. As with violations of the Governor's emergency orders, the EMA makes violations of local emergency declarations Class 2 misdemeanors. G.S. 166A-19.31(h). The court might regard this provision as the sole enforcement mechanism for local emergency declarations. After all, the court might ask, did the General Assembly really mean to allow local governments to enforce their emergency declarations with civil penalties when it didn't grant the Governor the power to impose civil penalties for violations of his emergency orders?

In arguing for its authority to impose civil penalties for emergency declaration violations, the city or county might highlight the following statement in the EMA's statute setting out local emergency powers:

This section is intended to supplement and confirm the powers conferred by G.S. 153A-121(a), G.S. 160A-174(a), and all other general and local laws authorizing municipalities and counties to enact ordinances for the protection of the public health and safety in times of riot or other grave civil disturbance or emergency.

G.S. 166A-19.31(f).

Does this statement open the door to enforcing local emergency declarations through civil penalties and other civil enforcement mechanisms? I'm skeptical. I read it to say that the EMA is another – and a different – tool in the toolbox of powers that cities and counties can employ during public emergencies. For instance, so long as its actions weren't preempted, a city could react to a public health threat by issuing an emergency declaration and by making appropriate amendments to its public nuisance ordinance. Anyone who violated the emergency declaration would risk criminal prosecution under the EMA, while anyone who violated the amended nuisance ordinance would face the prospect of criminal prosecution and, if the ordinance so provided, civil penalties under the city ordinance enforcement statute.

In sum, longstanding preemption principles likely bar cities and counties from adopting ordinances that impose civil penalties for violations of the Governor's emergency orders. Even if cities and counties could avoid the preemption problem by incorporating the orders into local emergency declarations, there's reason to question whether they could enforce those declarations with civil penalties.