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Oregon County Counsel Association
Oregon City Attorney Association

Colleagues:

In Brief: *CIS does not cover members for intentional violation of statutes, ordinances, or regulations. Generally, liability insurance covers negligent acts, not an intentional violation of the law. Intentional violation of laws claims are rare, but cities and counties are frequently asking about the liability related to passing a local ordinance that objects to a state or federal law.*

Multiple Oregon counties and cities are considering ordinances and resolutions declaring their jurisdiction a “sanctuary” from COVID mandates, gun regulations, immigration laws and zoning rules. With an increasing number of entities asking CIS what effect their decisions and actions may have on liability coverage, we want to provide a brief summary of CIS’ coverage guidance so you can help your clients make informed decisions.

First, know that CIS takes no position on the political nature of these issues. Our intent is to remain neutral and allow political leaders to consider political issues, as they were elected to do. Instead, CIS will simply apply its Coverage Agreement to any lawsuit that alleges an ordinance or resolution directly caused harm.

For example, suppose that a fictional Evergreen City passed an ordinance declaring itself a sanctuary from COVID-related mask mandates. The ordinance declares that mask mandates are unconstitutional violations of citizens’ civil rights, and states that two main actions will be taken by the City: 1) Evergreen City will expend no resources enforcing mask-mandates; and, 2) Any business caught requiring a mask will be fined and any government employee caught expending resources on mask mandates will be fired.

Then, a city code enforcement officer cites a gas station mini market for not requiring customers who enter the store to wear masks. At the direction of the new ordinance, the City Manager fires the code enforcement

officer. Meanwhile, a customer of the mini mart catches Covid. The customer recovers but incurs substantial medical bills in the process.

Two lawsuits result. The customer sues the mini-mart and Evergreen City, asking the court to declare the anti-mask ordinance illegal, and to recover money to reimburse medical expenses. The fired Code Enforcement Officer sues the city for wrongful termination.

When Evergreen City sends the lawsuits to CIS, coverage is evaluated according to the City's [Coverage Agreement](#). The Coverage Agreement includes an exclusion for actions that are knowingly illegal. The exact language states that:

"The Coverage Agreement does not apply:

* * *

Z. To liability arising out of or attributable to:

* * *

(2) the willful violation of any federal, state, or local statute, ordinance, or regulation by

the governing body of the **named member** or any officer, employee, or agent of the

named member acting with the authority and consent of the **named member;**"

In other words, if the Council instructed city employees to violate state law, and the employees did violate state law which caused an injury, a lawsuit to recover money for that injury would be excluded from CIS coverage by Exclusion Z.

In the employee lawsuit above, the ordinance directed city management to terminate any employee who enforced a valid state law. Because the ordinance instructed city leadership to violate state law (fire employees who enforce a valid law) the resulting suit is not covered due to Exclusion Z.

The other lawsuit, by the mini-mart customer, seeks to void the ordinance and recover medical costs. This suit would also be excluded due to Exclusion Z. While the customer would surely have a very difficult time proving when and where exactly he caught COVID, it's only the allegations in the written lawsuit that affect coverage, not the likelihood of success at trial.

The lawsuit alleges that Evergreen's ordinance directed staff to fine businesses that follow state law. The plain words of the City's ordinance intentionally conflict with the plain words of the mask mandate. In fact, that was the very purpose of the City's ordinance, to conflict with the statewide mask-

mandate. As a result, this suit is also not covered by CIS because Exclusion Z applies.

This approach protects CIS members who follow the law from the expense of claims by members who try to violate the law with impunity because they have insurance to pay for the consequences of their illegal actions.

However, all “sanctuary” ordinances and resolutions are not illegal and uncovered. Consider the fictional Evergreen County, who passed a resolution that is similar to Evergreen City’s ordinance, but remains different in key ways.

Evergreen County’s resolution states that the County “respects the Second Amendment and is a sanctuary from all unconstitutional gun laws.” The resolution does not direct County leadership to terminate any employee who enforces a currently valid gun law, and does not order county employees to fine gun shop owners who perform background checks. The resolution simply states that the County values the Second Amendment, and does not direct employees to violate any currently valid law.

If this resolution were challenged in court, *and the lawsuit sought money damages*, then it would likely be covered. The caveat is that for any suit to be covered by the Coverage Agreement, the suit must seek money damages (beyond attorney fees). This is important to keep in mind because many lawsuits get filed that only ask a court to declare an ordinance invalid.

Because these “declaratory” suits do not seek money for economic or emotional damage, the defense of the suit is not covered by CIS. But, if a suit was filed against this hypothetical resolution and the suit *did* seek money damages as well as a declaratory judgment, then the case would likely be covered. This is because there is nothing in the ordinance that knowingly instructs staff to violate a valid state law. As a result, Exclusion Z does not apply.

Cities and counties currently ask CIS about both types of ordinances: some simply declare support for a constitutional right. Other proposed ordinances, however, go a step further and also instruct staff to violate a state law. Exclusion Z would not apply to the former (assuming the suit sought money damages). But, Exclusion Z would apply to the latter example in all cases.

This guidance is solely about liability coverage. Cities and Counties are free to pass whatever resolutions and ordinances their leaders see fit. But if maintaining liability coverage is a high priority, be sure that your client’s employees can follow every part of your ordinance without violating any part of the State’s laws.

If you or your clients have questions, we encourage them to first speak with you, their county counsel or city attorney; in addition, they can reach me at: kmylander@cisoregon.org. If you would like a copy of the Coverage Agreement, it is available for download [HERE](#).

Very Truly Yours,

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