

Senate Committee on Judiciary

Testimony in Support of Extending KEMA Provisions

Presented by Eric Stafford, Vice President of Government Affairs

Tuesday, January 12, 2021

Madam Chair and members of the committee, my name is Eric Stafford, Vice President of Government Affairs for the Kansas Chamber. The Kansas Chamber represents small, medium and large businesses of all industry segments across the state. We appreciate the opportunity to testify in support of extending KEMA reforms from the 2020 Special Session, specifically the business liability provisions.

We often hear about “unprecedented times” but in 2020, nothing has been truer. The last year has been a difficult time for everyone from students, to business owners, to government officials. The rapid development of a vaccine gives us hope that we can return to normal as we move into 2021.

Over the last year, businesses adapted for survival. Remote work is normal. Travel has been restricted or stopped all together. Safety precautions such as protective equipment and additional sanitization requirements have been put in place by businesses whose top concern is employee and customer safety. Unfortunately, we’ve seen too many businesses close.

The Special Session of 2020 saw the Legislature pass and Governor sign, HB 2006 to address deficiencies in the emergency management act, and offer health care providers and businesses limited liability protections. The COVID-19 response and reopening for business liability protection act signed into law protects anyone conducting business in the state if such person was acting pursuant to and in substantial compliance with public health directives applicable to the activity giving rise to the cause of action.

HB 2006 also offered limited product liability protection for anyone who made, sold, distributes or provided a qualified product in response to the COVID-19 emergency if such actions were taken at the request of or in response to a written directive finding a public need for a qualified product issued by the Governor, Adjutant General, or Division of Emergency Management.

- ➔ Like other provisions in HB 2016, this liability protection is set to expire on January 26, and we ask this committee to consider extending these protections. While a permanent extension would be ideal, an extension to the end of the emergency declaration would serve as an acceptable alternative for our members.
- ➔ The liability protection language passed last year was carefully drafted to protect businesses from no-injury COVID-related litigation, while still allowing for businesses to be held responsible when acting maliciously failing to guard or warn against risk. Liability protection for a viral disease is essential for businesses seeking to reopen or remain open.

Executive Orders

Governor Kelly issued EO 20-03 on March 16 in response to the COVID pandemic. EO 20-03 declared a state of disaster emergency as allowed under K.S.A. 48-924. Following that initial declaration, Governor Kelly issued numerous executive orders to manage the state through this crisis. The Governor sought input from the business community on many of these and we applauded Governor Kelly for her consideration of the concerns we were hearing from our two organizations during the initial weeks of the pandemic. The following are executive orders which we believe could be added into statute under an emergency declaration to avoid confusion and delay:

- Executive Order 20-09 offered temporary relief from motor carrier regulations.
- Executive Order 20-13 allowing for deferred tax deadlines and payments.
 - Would ask to include deferred property tax payments in addition to income tax.
- Executive Order 20-20, allowing notaries and witnesses to act via audio-video communication technology.

In the early stages of the pandemic, the focus we heard repeatedly from health experts was “flatten the curve” to avoid overwhelming the hospital system in our state, and country for that matter. As such, EO 20-15 established essential businesses that were allowed to remain open. While this was an appropriate response at the beginning of the pandemic when little was known, businesses have suffered over the last 10 months as COVID lingers.

Our focus from the business community in June during the Special Session helped lead to the passage of the liability protections in HB 2016. Leadership worked diligently on providing stronger oversight and limited liability protection, as the conversation shifted to how businesses can safely open and operate. What practices and precautions can businesses put into place to safely function and protect society? It is difficult for a business owner to be told that they are “not essential” and therefore cannot open, while a potential competitor or other business of a different type is declared “essential” and can remain open. I can buy flowers from a large grocery retailer, but not from a local florist, for example.

If businesses are going to be forced to close during a pandemic, our first request would be to reference, at a minimum, the Department of Homeland Security list of “critical infrastructure” as the state’s “essential business” list- if dealing with short-term solutions. We would strongly recommend **IF** there is any sort of reference to DHS Critical Infrastructure, that there be significant oversight, whether it be from the Attorney General, State Finance Council or another group to offer checks and balances against prolonged economic shutdowns like the one we have experienced this year that keep businesses unnecessarily closed or restricted.

In the future, whether it be this current COVID crisis, or another unforeseen event, we believe the state’s management approach should be centered around “operational risk management” versus “essential/non-essential.” This shift in mindset would allow consumers and business owners to choose what level of risk they are willing to accept or not. It allows them to determine what level of precaution needs to be put in place to safely protect customers and employees.

Businesses are always adapting to changes in the marketplace and consumer behavior. We have seen businesses take the lead to ensure customer safety by implementing new practices to properly sanitize their stores and offices, offering protective equipment for their employees, and issuing social distancing guidance to name a few. Businesses have found ways to operate safely to effectively manage the risk of their employees and customers. We must trust our residents to assume the proper level of risk based on

their own personal health status and comfort level, rather than forcing certain behavior limitations on Kansans for prolonged periods of time. We have had 10 months to see the data and learn more about the risks associated with COVID-19. Everyone plays a part in protecting ourselves and others from infection, but we can take those necessary steps without causing long-lasting economic harm.

Due Process

Local health officials have been given a large amount of authority regarding business closures. We saw a restaurant and bar owner in Emporia successfully have a case dropped against them after being told they must remain closed while other restaurants could safely open. In Johnson County, the owner of a Pilates studio challenged a ruling by the County under K.S.A. 65-129c which allows for a hearing within 72 hours if an individual is required to quarantine. That business owner argued being forced into isolation prevented them from operating their business, which in their view, was essential. That business showed how they can safely open and protect their customers.

In that case, the District Court Judge said "Even in an emergency format there has to be some way for people to get the attention of the authorities through some recognized channel. And having a law enforcement officer show up and say "Hey, KEFF says this and you're not -- and my opinion is you" -- you know, you're threatened with criminal prosecution if you don't comply. That's not good enough."

While K.S.A. 65-129c allows for a hearing for orders issued by local health official, we believe to fully offer due process for individuals and businesses in Kansas, the same requirement for a quick hearing to challenge these orders should apply to orders issued under K.S.A 65-119 and 65-202, as well as any Executive Order issued by the Governor related to public health that significantly inhibits the movement of individuals, and operations of businesses, civic organizations or churches. Again, we strongly believe greater oversight on these matters by the Attorney General would greatly strengthen the Emergency Management Act and offer necessary protections for our citizens. HB 2016 offered checks and balances on local health officials by requiring orders to be approved by the county commission. A similar system of checks and balances should be adopted at the state level as well.

These have been difficult times. We know the Governor and local government officials are doing their best to protect the public as much as possible. However, as Judge Hauber stated, even in an emergency, people must have the proper available channels for due process in our state. Executive orders during a pandemic do not suspend constitutional rights. The vagueness and uncertainty created through from the executive orders and emergency management act created problems regarding authority of local health officials. While the KEFF created under the Governor's Executive Order 20-16 allowed for repurposing, business interactions with the County were leaving different interpretations of whether the business was actually essential, and if it was, that they're doing everything necessary to protect their customers- which in this case was very clear they were.

We appreciate the opportunity to testify in support of extending these important provisions, and support more broad reforms to the emergency management act to strengthen due process and the checks and balances of government. I am happy to answer any questions at the appropriate time.