

**From:** [Zach Cook](#)  
**To:** [Apodaca, Sheila, DOH](#)  
**Subject:** [EXT] Public Comment  
**Date:** Wednesday, July 22, 2020 9:51:35 PM  
**Attachments:** [Anaheim Jack's Public Comments.pdf](#)  
[Papa's Pawn Public Comments on Proposed Rulemaking.pdf](#)

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Dear Ms. Apodaca,

Please see the attached public comments on behalf of my clients, Papa's Pawn, LLC, and Anaheim Jacks, LLC for the hearing tomorrow morning. Thank you.

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Sincerely,

Zach Cook, Esq.

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## **Public Comment on the Proposed Rulemaking – Proposed Rule 7.30.1**

**Zach Cook, Esq. on behalf of Anaheim Jack's, LLC – a New Mexico restaurant**

### **The Proposed Rule and Department's Actions exceed the Department's Statutory Authority**

On May 23, 2020, the Department of Health issued a Notice of Contemplated Action to the Commenter Anaheim Jack's which stated in part:

By this Notice, the Department gives notice that, pursuant to the Public Health Emergency Response Act ("PHERA"), at NMSA 1978, § 12-10A-19, the Department intends to impose upon Anaheim Jack's, LLC a civil administrative penalty of \$5,000 per day that the business has continued in operation in violation of the Public Health Orders." As of the date of this Notice, Anaheim Jack's, LLC has operated on May 16 through 22, 2020, in violation of the Public Health Orders, for a total of 7 business days and a combined total administrative penalty of \$35,000.00."

The Proposed Rule, Scope, provides:

7.1.30.2 SCOPE: This rule applies to all persons who receive a notice of contemplated action for imposition of a civil monetary penalty pursuant to the Public Health Emergency Response Act ("Act"), Section 12-10A-19 NMSA 1978.

Section 12-10A-19 of the Public Health Emergency Response Act ("PHERA") provides that the Secretary of the Department may enforce the provisions of the Act by imposing administrative penalties. But the Notice of Contemplated Action issued by the Department on April 29, 2020 does not seek to enforce any provision of the PHERA. Instead, the Department is seeking to improperly and illegally use the penalty provisions of the PHERA to enforce the Governor's Public Health Orders.

Commenter Anaheim Jack's is not covered by any of the definitions contained in the PHERA. It is not a health facility and does not provide healthcare supplies. The Department is improperly seeking to apply the provisions of the PHERA to entities not governed by the Act through the improper adoption of the proposed administrative rule.

### **The definitions contained in the rule are overly broad and exceed the Department's statutory authority**

Commenter Anaheim Jack's is not covered by any of the definitions contained in the PHERA. They are not a health facility and they do not provide healthcare supplies. Anaheim Jack's is a restaurant and does not come under the provisions of the PHERA.

The PHERA provides "special powers" for the Secretary of the Department of Health during a public health emergency under NMSA 1978, § 12-10A-6.

Those powers are specific and limited as follows:

- (1) utilize, secure or evacuate health care facilities for public use;
- (2) inspect, regulate or ration health care supplies by controlling, restricting or regulating the allocation, sale, dispensing or distribution of health care supplies. Under that Section the state medical investigator, after consultation with the secretary of health, the secretary of public safety, the director and the chair of the board of funeral services, may implement and enforce measures to provide for the safe disposal of human remains.

The Act also allows the Secretary to seek a court order for the isolation or quarantine of a person, subject to extensive restrictions to protect the rights of the person under quarantine. In that case, the Secretary cannot unilaterally impose quarantine and isolation and then impose civil penalties upon a person. The Secretary must obtain a district court order after presentation of sufficient evidence, in order to have a person isolated or quarantined. If the Secretary determines that an emergency situation requires the immediate quarantine of a person without a court order, the Secretary is required to implement the due process procedures otherwise provided within 24 hours. A person who is subject to isolation or quarantine has the right to request a hearing in court, as provided in § 10 of the Act, for remedies regarding treatment or the terms and condition of the isolation or quarantine. If the court finds that the isolation or quarantine of a person is not in compliance with the provisions of the Public Health Emergency Response Act, the court may fashion remedies appropriate to the circumstances of the public health emergency

Anaheim Jack's, the recipient of a Notice of Contemplated Action governed by the proposed rule, has not been afforded any of the due process rights provided by the Act for persons who are subject to quarantine or isolation. Further, since it is not in the health care business, the Act does not subject Anaheim Jack's to forfeiture and use of their facilities. While the Act provides for liberal interpretation of these specific enforcement provisions, those provisions may be applied only to specifically delineated businesses. It does not give the Secretary authority to impose fines on other types of businesses. It does not allow the Secretary to invest herself with a completely new set of powers and authorities never mentioned in the Act through the adoption of the Proposed Rule.

The PHERA does not contain provisions which allow for the issuance of a Notice of Contemplated Action to a business such as Anaheim Jack's, LLC. The Proposed Rule should redefine "recipient" to mean only those categories of individuals or businesses governed by the PHERA.

There is nothing found in the PHERA which allows the Secretary to use its provisions to impose civil penalties on a business which is operating as a restaurant.

The extreme civil penalties under the PHERA of \$5,000 per occurrence can only be imposed in conjunction with the specific due process and eminent domain provisions that the PHERA require of the State in that Act. Those provisions act as a check on the power of the State in a public health emergency under the Act. The State cannot choose to rely upon some portions of the PHERA such as the \$5,000 per day penalty, while ignoring the requirements to obtain district court orders, protect civil liberties and individual civil rights or provide compensation for the taking of property. The Department's attempt to adopt the Proposed Rule in order to move forward with an illegal application of the PHERA is invalid and illegal.

The Issue of Whether the State Has Authority to Impose Fines under the PHERA for alleged violations of the Governor's Public Health Orders is currently pending before the New Mexico Supreme Court in Michelle Lujan Grisham et al. v. Reeb and Strebeck et al., No. S-1-SC-38336. The Department should stay the adoption of the Proposed Rule pending the outcome of the that Supreme Court proceeding. The Department is acting in bad faith in attempting to implement the Proposed Rule during the pendency of the referenced action in the state supreme court.

Respectfully submitted:

ZACH COOK, LLC

*electronically signed* \_\_\_\_\_

Zach Cook

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Ruidoso, New Mexico 88345

Attorney for Anaheim Jacks, LLC

## **Public Comment on the Proposed Rulemaking – Proposed Rule 7.30.1**

**Zach Cook, Esq. on behalf of Papa's Pawn, LLC**

### **The Proposed Rule and Department's Actions exceed the Department's Statutory Authority**

On April 29, 2020, the Department of Health issued a Notice of Contemplated Action to the Commenter which stated in part:

By this Notice, the Department gives notice that, pursuant to the Public Health Emergency Response Act ("PHERA"), at NMSA 1978, § 12-10A-19, the Department intends to impose upon Papa's Pawn, LLC a civil administrative penalty of \$5,000 per day that the business has continued in operation in violation of the Public Health Orders." As of the date of this Notice, the business has remained in operation for at least 12 days in violation of the Public Health Orders, for a combined total administrative penalty of \$60,000.00."

The Proposed Rule, Scope, provides:

7.1.30.2 SCOPE: This rule applies to all persons who receive a notice of contemplated action for imposition of a civil monetary penalty pursuant to the Public Health Emergency Response Act ("Act"), Section 12-10A-19 NMSA 1978.

Section 12-10A-19 of the Public Health Emergency Response Act ("PHERA") provides that the Secretary of the Department may enforce the provisions of the Act by imposing administrative penalties. But the Notice of Contemplated Action issued by the Department on April 29, 2020 does not seek to enforce any provision of the PHERA. Instead, the Department is seeking to improperly and illegally use the penalty provisions of the PHERA to enforce the Governor's Public Health Orders.

Commenter Papa's Pawn is not covered by any of the definitions contained in the PHERA. It is not a health facility and does not provide healthcare supplies. The Department is improperly seeking to apply the provisions of the PHERA to entities not governed by the Act through the improper adoption of the proposed administrative rule.

### **The definitions contained in the rule are overly broad and exceed the Department's statutory authority**

Commenter Papa's Pawn is not covered by any of the definitions contained in the PHERA. They are not a health facility and they do not provide healthcare supplies.

The PHERA provides "special powers" for the Secretary of the Department of Health during a public health emergency under NMSA 1978, § 12-10A-6.

Those powers are specific and limited as follows:

(1) utilize, secure or evacuate health care facilities for public use;

(2) inspect, regulate or ration health care supplies by controlling, restricting or regulating the allocation, sale, dispensing or distribution of health care supplies. Under that Section the state medical investigator, after consultation with the secretary of health, the secretary of public safety, the director and the chair of the board of funeral services, may implement and enforce measures to provide for the safe disposal of human remains.

The Act also allows the Secretary to seek a court order for the isolation or quarantine of a person, subject to extensive restrictions to protect the rights of the person under quarantine. In that case, the Secretary cannot unilaterally impose quarantine and isolation and then impose civil penalties upon a person. The Secretary must obtain a district court order after presentation of sufficient evidence, in order to have a person isolated or quarantined. If the Secretary determines that an emergency situation requires the immediate quarantine of a person without a court order, the Secretary is required to implement the due process procedures otherwise provided within 24 hours. A person who is subject to isolation or quarantine has the right to request a hearing in court, as provided in § 10 of the Act, for remedies regarding treatment or the terms and condition of the isolation or quarantine. If the court finds that the isolation or quarantine of a person is not in compliance with the provisions of the Public Health Emergency Response Act, the court may fashion remedies appropriate to the circumstances of the public health emergency

Papa's Pawn, the recipient of a Notice of Contemplated Action governed by the proposed rule, has not been afforded any of the due process rights provided by the Act for persons who are subject to quarantine or isolation. Further, since it is not in the health care business, the Act does not subject Papa's Pawn to forfeiture and use of their facilities. While the Act provides for liberal interpretation of these specific enforcement provisions, those provisions may be applied only to specifically delineated businesses. It does not give the Secretary authority to impose fines on other types of businesses. It does not allow the Secretary to invest herself with a completely new set of powers and authorities never mentioned in the Act through the adoption of the Proposed Rule.

The PHERA does not contain provisions which allow for the issuance of a Notice of Contemplated Action to a business such as Papa's Pawn, LLC. The Proposed Rule should redefine "recipient" to mean only those categories of individuals or businesses governed by the PHERA.

There is nothing found in the PHERA which allows the Secretary to use its provisions to impose civil penalties on a business which is offering gun, pawn and check-cashing services.

The extreme civil penalties under the PHERA of \$5,000 per occurrence can only be imposed in conjunction with the specific due process and eminent domain provisions that the PHERA require of the State in that Act. Those provisions act as a check on the power of the State in a public health emergency under the Act. The State cannot choose to rely upon some portions of the PHERA such as the \$5,000 per day penalty, while ignoring the requirements to obtain district court orders, protect civil liberties and individual civil rights or provide compensation for the taking of property. The Department's attempt to adopt the Proposed Rule in order to move forward with an illegal application of the PHERA is invalid and illegal.

The Issue of Whether the State Has Authority to Impose Fines under the PHERA for alleged violations of the Governor's Public Health Orders is currently pending before the New Mexico Supreme Court in Michelle Lujan Grisham et al. v. Reeb and Strebeck et al., No. S-1-SC-38336. The Department should stay the adoption of the Proposed Rule pending the outcome of the that Supreme Court proceeding. The Department is acting in bad faith in attempting to implement the Proposed Rule during the pendency of the referenced action in the state supreme court.

Respectfully submitted:

ZACH COOK, LLC

*electronically signed* \_\_\_\_\_

Zach Cook

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Attorney for Papa's Pawn, LLC