



March 27, 2020

State and Local Government's Emergency Powers During COVID-19: Is Your Business Essential?

Updated March 31, 2020

- Maryland – Effective March 30, 2020 at 8:00pm, Governor Larry Hogan ordered residents to stay at home and directed the **closure of non-essential businesses**. The order did not change Maryland's prior guidance regarding which businesses constitute essential businesses.
- Virginia – Governor Ralph Northam joined the DC-area by **ordering the cessation of various public and group activities**, as well as closure of various non-essential businesses.
- Rhode Island – On March 28, 2020, Governor Gina M. Raimondo **ordered the closure of all non-critical businesses** until April 13, 2020.
- North Carolina – Governor Roy Cooper **directed the closure of non-essential businesses** until the end of April.
- Kansas – Governor Laura Kelly also issued an executive order **requiring residents to shelter-in-place and closing non-essential businesses** until April 19, 2020.

Updated March 27, 2020:

- Maine – Maine's Governor Janet Mills also **instructed non-essential businesses to close**. Her executive order incorporates the essential infrastructure categories set forth in the CISA guidance discussed in the client alert below.
- New Hampshire – On March 26, 2020, New Hampshire Governor Chris Sununu **ordered that non-essential businesses close**. Exemptions apply to law enforcement, first responders, food and agriculture, healthcare and human services, energy, transportation, public works, communications, IT, manufacturing, and others.
- Montana – On March 26, 2020, Montana Governor Steve Bullock **directed residents to stay at home and ordered the closure** of non-essential businesses. The directive excludes from closure health care, human services, essential government functions, essential infrastructure, and categories of businesses similar to those in other states: groceries, medicine, agriculture, media, automotive repair and gas stations, mail, laundry, and certain subsets of charities and restaurants.

Updated March 26, 2020:

Since publishing our client alert on March 24, 2020, additional states have issued orders requiring the closure of non-essential businesses. As of March 26, 2020, the following additional states have issued closure directives:

- Colorado – On March 25, 2020, Colorado Governor Jared Polis **issued a stay-at-home order that also mandates closure** of various non-essential businesses. The very next day, the Governor’s office **released an amended order** that included additional essential businesses exempt from closure, including K-12 schools and various other educational institutions (limited to certain specific purposes), pastoral services for crises and end-of-life services, houses of worship (with appropriate social distancing), and professional services (e.g., legal, accounting, title companies, etc.).
- Oklahoma – On March 24, 2020, Oklahoma Governor J. Kevin Stitt **released an executive order directing the closure of non-essential businesses**, in reliance on CISA’s categories of critical infrastructure. On March 25, 2020, the Governor **amended the first order** to include additional, specific subsets of workers deemed essential and thus exempt from the closure mandate.
- Vermont – On March 24, 2020, Vermont Governor Philip B. Scott **directed that non-essential businesses cease in-person operations**. The order exempts around 18 categories of services from the order, with broad definitions of each.

Original alert published March 24:

Since the outbreak of COVID-19 in the United States, nearly every state in the country has declared a state of disaster or emergency and decision-makers in numerous counties, cities and localities have followed suit. The powers associated with a disaster or emergency declaration vary by jurisdiction, but can include virtually limitless tools such as mandatory quarantines and curfews, prohibiting public congregations of people, traffic on streets, rationing, price controls, seizures of private property and goods like medicine, as well as relaxing medical licensing requirements to permit out-of-state medical professionals or doctors with expired licenses to assist in response and treatment. States also have the power to suspend laws and regulations.

A key emergency power that state and local governments are increasingly exercising is distinguishing between essential and non-essential businesses and, correspondingly, implementing a variety of restrictions on the operations of businesses that are deemed non-essential. Restrictions imposed on non-essential businesses range from telecommuting mandates to workforce reductions and business closures. As a result, the designation of essential businesses has the potential to affect millions of business owners and their employees.

What Is an Essential Business?

At this time, the definition of essential business varies by state (and in some cases, by locality). The Cybersecurity and Infrastructure Security Agency (“CISA”), a division of the U.S. Department of Homeland Security, has issued **guidance** on what industries and services qualify as “essential critical infrastructure.” While the agency maintains that, among 16 essential categories, “medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works” services should generally be considered vital infrastructure, it is important to understand that CISA’s guidance is not a federal directive and therefore is not binding. As such, while many states and local governments have used CISA’s list of “essential critical infrastructure” industries and services as a reference or proxy for their own rules, several have implemented orders that differ from the federal government’s guidance.

State and local governmental entities continue to make their own determinations, which can be modified, extended and rescinded. Often, specific examples not provided as jurisdictions typically list broad industries and services as essential or non-essential, and the evolving nature of the COVID-19 pandemic has resulted in policymakers

continuously increasing, updating or amending the scope of the designations under their disaster or emergency decrees.

Despite the somewhat disparate approach state and local governments are taking in response to the outbreak, there are some similarities in how the essential or non-essential business designation is applied. Namely, the non-essential business designation and its accompanying restrictions have ostensibly been focused on protecting the public's health and safety. Accordingly, most of the limitations impact businesses in which people congregate in larger groups, such as dine-in restaurants, bars, theaters, gyms, casinos and sport venues, or involve close interpersonal contact (e.g., salons, massage parlors, elective surgeries). While most governments are mandating their restrictions through a mix of civil enforcement (i.e., fines and inspections) and voluntary self-enforcement, they maintain the ability to revise their orders so that they are enforceable using state and local police officials.

However, a growing number of states are following public health guidance and issuing more onerous orders in an attempt to curb the community spread of the coronavirus. Please see the case studies from California, Colorado and Massachusetts below.

- *California:* On March 19, Gov. Gavin Newsom (D) issued Executive Order [N-33-20](#), which, in addition to including a statewide shelter-in-place mandate, specifically incorporates CISA's list of "essential critical infrastructure" as sectors that need to maintain continuity of operations. However, beyond referencing CISA's list, Newsom's order does not give clear guidance as to whether specific businesses may fit into the list of essential sectors. For an in-depth review of Gov. Newsom's order, click [here](#).
- *Colorado:* On March 22, Gov. Jared Polis (D) announced he would be issuing an executive order to "non-critical workplace" employers to reduce their in-person workforces by 50%. To achieve the reduction, [Order D2020-013](#) tasks employers with implementing telecommuting capabilities or, if that is not possible, staggering work schedules in order to achieve maximum social distancing. The order does not apply to critical workplaces or employers that can certify that employees can maintain a six-foot distance from other employees throughout the course of their workday.

While critical workplaces are exempt from the order's requirements, it strongly encourages that critical workplaces institute telecommuting or staggered work hours to the extent possible. The order and its accompanying guidance, which become effective March 24, include many of the same "essential critical infrastructure" industries and services (e.g., health care, public infrastructure, grocery stores, etc.) as CISA. However, in contrast to CISA's list, certain industries and services, including news media, medical marijuana dispensaries (for analysis specifically related to cannabis qualifying as an essential business, click [here](#)), and child care are also listed as "critical" workplaces under Gov. Polis' order.

Perhaps in response to the still-optional guidance provided at the state level, Mayor Michael B. Hancock (D) issued on March 23, 2020, [an executive order](#) requiring residents to shelter in place, while also ordering the closure of all non-essential businesses, except to maintain certain minimum basic operations. Mayor Hancock's order contains some six pages of text seeking to define what industries and businesses constitute essential businesses, including health care operations, infrastructure (e.g., roads, utilities, transportation, waste removal, etc.), government functions, and businesses more broadly (e.g., grocery stores, food cultivation plants, banks, media, gas stations, etc.).

- *Massachusetts:* On March 23, Gov. Charlie Baker (R) publicized [COVID-19 Order No. 13](#), which (in part) mandates the full and complete closure of in-person operations at non-essential businesses between March 24 and April 7. Gov. Baker's order includes a [nine-page addendum](#) that provides greater clarity in regard to what businesses qualify as essential. While the order still does not include specific examples of businesses that are non-exempt, it does provide more detailed descriptions of businesses and services that are exempt within broad industry sectors.

Other states and localities that have issued orders relating to non-essential businesses include:

- States
 - Connecticut
 - Illinois
 - Wisconsin
 - New Jersey
 - New York
 - Maryland
 - Michigan
 - Washington
 - Wyoming
 - Louisiana
 - Nevada (for an in-depth review of Gov. Steve Sisolak's directive, click [here](#))
 - Hawaii
 - Oregon
 - Delaware
 - Indiana
 - Massachusetts
 - New Mexico
 - Pennsylvania
- Localities
 - City of Denver
 - City of San Francisco
 - City of New Orleans
 - City of Los Angeles
 - City of Kansas City
 - Miami-Dade County
 - City of Philadelphia

(Please note this list is constantly changing and therefore may be non-exhaustive. The Council of State Governments is maintaining an active list of state executive orders pertaining to COVID-19, which can be accessed [here](#).)

What Can You Do For Your Business?

The lack of uniformity and specificity among state and local government actions in regard to essential business designations poses a unique challenge for business owners and employers. However, because of the sweeping nature of executive power under disaster or emergency decrees, the only recourse available is political or government relations advocacy as governments continue to wrestle with the COVID-19 pandemic.

Because determinations of what constitutes an essential business continuously evolves at every level of government, business owners should focus on implementing policies and procedures intended to protect employees and customers from exposure to the virus, while simultaneously reaching out to public officials to seek assistance and clarification. Despite sweeping emergency powers, state and local governments are doing their best to balance citizens' day-to-day concerns against stemming the growing number of infections and deaths associated with the coronavirus. Governments remain flexible in how they approach the closure of non-essential businesses. If your business may be affected by a government-imposed shutdown, but you provide an essential community service, it is vital that you coordinate with similarly situated businesses in your area and develop plans to mitigate risk. Further, maintaining key personnel to perform essential functions of nonessential businesses is an important issue to be addressed. This

includes, but is not limited to, switchboards, shipping and delivery, and processing mail. By coordinating among other business owners and affected customers, as well as legal and policy counsel, you are best positioned to have state and local government officials receive your suggestions and—if appropriate—act on them.

If you are not sure whether your business is deemed essential or non-essential under a state or local government order, or want to address amend or address a current order or strategize in case other jurisdictions roll out protective orders, please contact us.

[Click here](#) to read more *Brownstein alerts on the legal issues the coronavirus pandemic raises for businesses.*

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This document is intended to provide you with general information regarding the classification of “essential” businesses in light of COVID-19 emergency measures by states and local governments. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.