
COVID-19: Examining State Work-From-Home and Shelter-in-Place Orders—Issues and Trends As We Enter Month Two

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In response to the COVID-19 pandemic, governors of 49 states have issued executive orders restricting operations or closing categories of businesses and/or requiring residents to shelter-in-place.¹ These orders vary significantly, yet often subtly, in their scope and impact. They are also frequently amended, relaxing certain requirements while strengthening others—sometimes in response to legal challenges. Local orders, which have been issued in many major cities and counties, add a further layer of complexity, particularly as local agencies are often charged with the enforcement of all applicable orders.

Particularly for companies doing business or with operations in more than one state, it is important to understand these orders—and how they are being enforced—both individually and collectively.

WilmerHale has closely tracked developments in state orders, with teams monitoring developments in every state in the country. This alert focuses on issues these orders present that employers should be aware of, as well as the trends that we have discerned from our state-by-state monitoring.

I. Types of Work-From-Home Orders Issued to Date

The 49 states with work-from-home or shelter-in-place orders adopt different approaches. These orders raise a number of legal questions and issues—some overlapping, some distinct—that businesses need to evaluate in order to comply and to understand the regulatory environment impacting their suppliers and customers.

¹ Although it issued an order restricting gatherings, South Dakota has not issued a work-from-home or shelter-in-place order.

A. Who Is Responsible: Employers or Individuals?

Some state orders—so-called work-from-home orders—limit the operations of employers, requiring certain categories of businesses to close or limit operations. For instance, [Rhode Island](#) has closed only nonessential “retail” businesses, which are defined as businesses that “sell[] things” “in person” – whereas all service-related businesses, regardless of their function, remain open.

[Arkansas](#), [North Dakota](#) and [Nebraska](#) have similarly issued limited orders.²

Although “shelter-in-place” orders directed at residents have the same effect—namely, shuttering non-essential businesses—other states, such as [Kansas](#), [Missouri](#), [Texas](#) and [Utah](#), have issued such orders rather than explicitly curtailing business operations. These orders also have exceptions. [Arizona’s](#) expansive shelter-in-place order requires individuals to remain home in all circumstances, except to participate in enumerated “essential” activities and functions. [Alabama’s](#) order has an exception for performing “essential work-related activities,” including “maintain[ing] the value of a business, establishment, corporation or other organization” or “work-related activities that do not require any regular interaction within six feet of another person.”

Several states have done both, issuing employer and public directives. For instance, [California](#) and [Colorado](#) have ordered nearly all employees of non-essential businesses to work from home, and have also limited or prohibited non-essential gatherings.³

B. Federal Government Influence Over State and Local Orders

State and local officials—governors and mayors—have been the primary actors in issuing and enforcing these work-from-home and shelter-in-place orders. Yet that does not mean the federal government has been either entirely without influence over the scope of such orders or agnostic regarding which categories of employers or employees should continue to proceed with their operations and roles. Indeed, either explicitly or implicitly, federal guidance concerning both the scope of continued commercial activity and the adoption of safety restrictions to prevent the virus’s spread has been incorporated in many state and local orders.

The Cybersecurity and Infrastructure Security Agency (CISA), an entity within the Department of Homeland Security (DHS), has issued nonbinding COVID-19-specific guidance. CISA was established by the Cybersecurity and Infrastructure Security Agency Act of 2018 to protect the nation’s critical infrastructure from physical and cyber threats. Although CISA’s guidance is nonbinding, 31 states have expressly referred to or otherwise incorporated it into their orders to define essential categories of businesses, workers and/or services. CISA released on [March 19](#) an “initial list of ‘Essential Critical Infrastructure Workers’” that identified conduct within 14 sectors as

² [Arkansas](#) issued an order closing bars, clubs and restaurants for dine-in purposes, gyms, indoor entertainment venues, casinos, barbershops, body art establishments and schools, cosmetologists, and massage therapy clinics and spas. [North Dakota](#) has ordered restaurants, bars, gyms, theaters, barbershops, cosmetologists, tattoo parlors, tanning facilities, and massage facilities to close in person operations. [Nebraska](#) has issued county-by-county orders that similarly close restaurants, bars, theaters, gyms, houses of worship, and other brick and mortar facilities where more than 10 people gather.

³ WilmerHale previously prepared alerts summarizing the [California](#) and [Colorado](#) orders.

critical to the COVID-19 response (known here as the “March 19 CISA guidance”). On [March 28](#), it updated this guidance to include three more sectors—Commercial Facilities, Residential/Shelter Facilities, and Hygiene Products and Services (known here as the “March 28 CISA guidance”). Additionally, the March 28 CISA guidance expands the definitions of the various sectors contained within the March 19 guidance.⁴

These state orders (1) expressly incorporate CISA’s guidance, (2) direct that they should not be read to conflict with the guidance, or (3) appear to have used the CISA guidance as a starting point for their own delineation of essential businesses and workers. The interplay between a state’s order and CISA’s guidance has therefore become critical to interpreting certain state business-closure rules. For example, California Governor Gavin Newsom’s March 19 Executive Order ([Executive Order N-33-20](#)) referenced the March 19 CISA guidance regarding essential workers but broadly exempted from its closure provisions any “Californians working in [CISA’s] 16 critical infrastructure sectors.”⁵ In contrast, Delaware Governor John Carney’s [March 22 Executive Order](#) incorporates much of the March 19 CISA guidance and then grants authority to a state agency to amend the list, instructing the agency to “consider” information from CISA.

Since the March 28 CISA guidance was issued, a number of states have adopted it, expanding their “essential” sectors and definitions to match CISA’s expansions. So far, [Alabama](#), [Florida](#), [Georgia](#), [Indiana](#), [Missouri](#), [Ohio](#), [Tennessee](#), [Texas](#), and [Wisconsin](#) have adopted it wholesale. [Massachusetts](#) has also generally adopted the March 28 CISA guidance. In contrast, [Michigan](#) issued an order on April 8 that explicitly references the March 19 CISA guidance and states, “This order does not adopt any subsequent guidance document released by this same agency.”

Regulators have also begun to suggest ways in which employers can aid employees to demonstrate to local authorities that they are essential. On March 27, the Board of Governors of the Federal Reserve System released a supervision and regulation letter ([SR 20-6](#)), which it subsequently revised on March 30. The letter references the CISA guidance on the financial services sector and states that any supervised financial institution “should provide its essential employees and contractors with a letter from the institution’s leadership explaining that the identified worker carrying the letter is an essential critical infrastructure worker who needs to be allowed access to their place of work.” SR 20-6 further recommends that such institutions attach

⁴ WilmerHale previously prepared an [alert](#) summarizing the March 28 CISA guidance.

⁵ Prior to the COVID-19 pandemic and pursuant to Presidential Policy Directive 21 (Feb. 12, 2013), the DHS broadly defined [16 critical infrastructure sectors](#): (1) Chemical Sector; (2) Commercial Facilities Sector; (3) Communications Sector; (4) Critical Manufacturing Sector; (5) Dams Sector; (6) Defense Industrial Base Sector; (7) Emergency Services Sector; (8) Energy Sector; (9) Financial Services Sector; (10) Food and Agriculture Sector; (11) Government Facilities Sector; (12) Healthcare and Public Health Sector; (13) Information Technology Sector; (14) Nuclear Reactors, Materials, and Waste Sector; (15) Transportation Systems Sector; and (16) Water and Wastewater Systems Sector. CISA’s website provides brief descriptions of each sector as well as Sector-Specific Plans that further define the sectors and set forth risk management plans.

the CISA guidance to these letters. Employers in other industries also have developed letters to assist their employees in demonstrating the essential nature of their work.

Federal health-related guidance has also been incorporated in many state and local orders directing employers that continue their operations as to how to do so safely. State orders often require such employers to institute social distancing practices based on the recommendation by the Centers for Disease Control and Prevention (CDC) that people remain six feet apart. Many specifically state that businesses must follow the [coronavirus guidelines](#) for public safety enumerated by the CDC, including regularly cleaning high-touch surfaces and not shaking hands. For instance, Delaware's order contains a list of CDC recommendations that businesses must follow, and states such as [Indiana](#), [Kentucky](#), [New Hampshire](#), [Pennsylvania](#), [Utah](#) and [Wisconsin](#) require essential businesses to follow the CDC's distancing and/or hygiene guidance.

Given the CDC's recent recommendation in its April 3 guidance that individuals wear cloth face coverings in public settings, states and localities may begin to expressly incorporate such mandates in future orders, particularly for employers that continue or resume operations. [New Jersey](#) already issued an order on April 8 stating that "essential retail businesses" that remain open, including retail banks, are required to have workers and customers wear face coverings.⁶ The order also incorporates other aspects of the CDC's guidance, including requiring such businesses to take actions to facilitate social distancing, such as limiting occupancy to 50% and installing physical barriers, and to mandate hygienic practices, signage promoting those practices and separation of symptomatic employees.⁷ Additionally, the order requires such businesses to establish hours of operation solely for high-risk individuals, such as older adults and people with "serious underlying medical conditions."

C. Other Trends and Developments

Governors continue to revise their orders on nearly a daily basis, in response to changing conditions regarding the spread of the virus as well as to news reports concerning compliance. A few trends and developments have been notable.

One recent trend, seen in certain states concerning both the construction and the hotel industries, has been to limit critical sectors' permissible activities, including to tasks essential to the COVID-19 response. For example, when adopting the March 28 CISA guidance, [Massachusetts](#) added an exemption category, "Construction-Related Activities," that the CISA guidance does not contain. While the state had [previously](#) designated all construction-related activities as essential, its March 31 order narrowed the permissible scope of construction to permit only construction of public works, infrastructure, housing, construction and maintenance services, and construction connected to other COVID-19-related essential products and/or services. New York's initial [work-from-home](#)

⁶ The CDC also released guidelines related to returning essential employees to work after exposure to COVID-19. WilmerHale summarized those guidelines in a [client alert](#).

⁷ WilmerHale previously issued a [client alert](#) on screening employee body temperatures.

[order](#) described all construction as essential; a [later order](#) “clarif[ied]” that only certain construction projects designated by the Empire State Development Corporation are essential.⁸

Similarly, an increasing number of states are limiting exemptions from their orders to hotels accommodating COVID-19 essential workers, public health workers and other vulnerable populations. Massachusetts [initially exempted all hotels](#) but [subsequently narrowed](#) the exemption.⁹ [Idaho](#) similarly exempts hotels, but only to the extent they are housing or quarantining individuals engaged in essential activities. And the [March 28 CISA guidance](#) no longer references hotel workers expressly, instead listing as essential those “[w]orkers who support food, shelter, and social services, and other necessities of life for needy groups and individuals, including in-need populations and COVID-19 responders (including travelling medical staff).”

Several states have implemented travel restrictions that require out-of-state visitors, whether traveling from designated “hot spot” locations or from anywhere, to quarantine for 14 days, unless the visitors are engaged in essential activities. These quarantine orders have been especially prevalent in New England, where states are imposing mandatory quarantines aimed at stemming the spread of the virus from New York. Some states, such as [Massachusetts](#), have made such self-quarantines voluntary, while others have imposed mandatory quarantines with criminal consequences for noncompliance (e.g., [Maine](#), [Rhode Island](#) and [Vermont](#)).

II. The Interaction Between State and Local Orders

The patchwork of state and local orders that governors and local officials have issued leads to a recurring question: If there is a conflict between a state order and a local order, which governs?

As a general matter, the state orders address issues of preemption in one of several ways: (1) setting a statewide standard that preempts all local orders, (2) setting a floor but allowing localities to impose more stringent requirements, or (3) not clearly addressing issues of preemption at all. It is important to note that this is a fluid list; governors can shift their state from one category to another simply by issuing an updated order. And—as discussed in more detail below—even where states have expressly addressed preemption, background state law preemption doctrines may affect the statewide orders’ scope.

First, many state COVID-19 orders—including from states such as [Arizona](#), [Connecticut](#), [Georgia](#), [Kansas](#), [Maryland](#), [Massachusetts](#), [New Jersey](#), [New York](#), [South Carolina](#), and [Wisconsin](#)—expressly provide that their restrictions are to be uniformly implemented statewide.¹⁰ Thus, for example, [Arizona’s](#) order bars any “county, city, or town” from making rules that “limit[] an individual from conducting, participating in, or receiving Essential Services, Essential Activities, or Non-essential Services as outlined in this order and prior executive orders.”

⁸ WilmerHale has summarized the New York order in a prior [client alert](#).

⁹ WilmerHale issued a [client alert](#) summarizing Massachusetts’ initial work-from-home order.

¹⁰ WilmerHale issued client alerts summarizing the [Connecticut](#) and [New Jersey](#) orders.

Second, other orders—from states including [Colorado](#), [Idaho](#), [Montana](#), [North Carolina](#) and [Utah](#)—take the opposite approach, making clear that their orders set only minimum restrictions (i.e., a floor) but permit localities to implement stricter measures. For example, the Colorado order states that “[n]othing in this Executive Order prevents a local public health authority from issuing an order more protective of [the] public health than this Executive Order.”

Third, a large number of states—including [California](#), [Delaware](#), [Florida](#), [Louisiana](#), [Maine](#), [Minnesota](#), [New Hampshire](#), [Nevada](#), [Oklahoma](#), [Pennsylvania](#), [Rhode Island](#), [Vermont](#), [Virginia](#), [Washington](#) and [West Virginia](#)—simply do not address how their orders interact with local orders. California provides a vivid example of the uncertainty this silence can cause. Despite the fact that a number of San Francisco Bay Area counties had already adopted local orders by the time the governor issued a statewide order, the state’s order does not [clearly](#) lay out which order controls, for example, a [conflict](#) concerning what constitutes an essential business.¹¹ In the absence of guidance, Bay Area counties [have asserted](#) that the statewide order creates a floor and have begun enforcing their [stricter](#) orders—even though such restrictions may be unenforceable pursuant to state preemption law.

A complicating factor that affects all three categories of orders is that each state has its own unique case law that may limit the preemptive effect of statewide orders in certain contexts. For example, a number of state constitutions—such as Arizona’s, California’s, and Colorado’s—grant special authority to cities to enact laws concerning local issues without being subject to preemption by state law. Relatedly, some states require a clear conflict between state and local law before preemption occurs (e.g., Texas) while in other states preemption may occur as soon as the state regulates a particular area of law (e.g., California). In the former group, local rules that supplement or complement the statewide order might be permitted; in the latter group, they might not.

A final consideration, discussed in more detail in the next section, is that localities—rather than the state—are the primary enforcers of both state and local orders. This is particularly the case in densely populated cities, where localities simply have far more enforcement personnel. This disparity gives local officials practical power and influence over activity within their jurisdictions.

III. Civil and Criminal Enforcement of State Orders

State orders also vary widely in their punishment of noncompliance. Some state orders do not provide for enforcement, instead urging voluntary compliance, while others impose civil fines or criminal penalties and imprisonment.

A. State and Local Law Enforcement Impose Civil and Criminal Penalties Against Individuals and Businesses

¹¹ Governor Gavin Newsom has issued separate [guidance](#) on the interaction between state and local law on the relatively narrow issues of evictions and access to basic utilities. The specificity of the March 16 order only highlights the lack of clarity in the March 19 statewide order.

Several states have a clear enforcement regime, authorizing state and local law enforcement to impose civil and/or criminal penalties for noncompliance. For example, [Alaska](#) and [Massachusetts](#) have established civil penalties with fines ranging from a maximum of \$300 per violation in Massachusetts to \$1,000 per violation in Alaska. Alaska also permits authorities to order businesses to cease operations. [New York's](#) order provides for different [penalties](#) for non-complying businesses and residents; residents who violate the ban on non-essential gatherings are subject to civil fines of up to \$1,000, whereas businesses that fail to comply with work-from-home requirements could be fined up to \$2,000 per violation (\$5,000 for repeat offenders) and could be subject to shutdown orders issued by state or local enforcement.

[Delaware's](#) order also states that essential businesses are subject to inspection for compliance with the CDC guidelines and may be shut down if they are found not to be using their best efforts to comply.

Other states, including [Alaska](#), [California](#), [Delaware](#), [Hawaii](#) and [Massachusetts](#), also authorize the imposition of criminal penalties.

B. Voluntary Compliance or Silence on Enforcement

Some state orders, including those issued by [Connecticut](#), [Florida](#) and [Louisiana](#), do not address enforcement, while others, such as those issued by [Illinois](#), [Montana](#) and [West Virginia](#), more broadly state that law enforcement authorities and other regulatory bodies have the power to enforce the orders pursuant to applicable state laws. Finally, one state, [Vermont](#), has explicitly chosen to urge voluntary compliance, and its work-from-home order does not explicitly reference any enforcement mechanism.

C. Examples of Recent Enforcement Actions

Thus far, several retailers that remained open after work-from-home orders were issued have had their stores closed by local law enforcement. For instance, the authorities closed arts and crafts retail stores in [Colorado](#), [Indiana](#) and [Wisconsin](#). In California, local law enforcement ordered two pawnshops to close pursuant to both state and local orders after the shops had asserted that they provided [essential financial services](#). In Los Angeles, [criminal enforcement actions](#) have been brought against a shoe store, an electronics store and two smoke shops for failing to close pursuant to the city's orders for non-essential businesses—and 30 other establishments are reportedly being investigated.

In addition to enforcement actions against businesses, individuals have been arrested for failing to follow shelter-in-place orders. For example, [three residents of Massachusetts](#)—a state in which golf courses are closed—are facing misdemeanor charges for golfing in Rhode Island after that state ordered visitors to self-quarantine for 14 days. New Jersey authorities [arrested](#) 15 funeral attendees for failing to abide by its shelter-in-place order. In Florida, a [pastor](#) is facing two misdemeanor charges for unlawful assembly and violation of health emergency rules after he continued to host church services in spite of the state's shelter-in-place order.

Of course, many state work-from-home orders have been in place for only a few weeks, and the enforcement landscape is still taking shape. Recently, there has been an increase in unannounced government visits during which businesses are asked to articulate why they are exempt from any applicable work-from-home order and how they are following social distancing protocols. As conditions surrounding the spread of the virus and compliance with state orders continue to develop, we may see other states further tightening their orders, including their provisions regarding enforcement.

IV. Legal Challenges to Work-From-Home Orders

Even at this early stage, state work-from-home orders have begun to face legal challenges. A number of plaintiffs—including firearms dealers and attorneys—have asserted they are engaging in constitutionally protected activity that cannot be subject to the broad circumscriptions contained within these orders. Other plaintiffs have asserted more general objections, including that the closures endanger public health and that the restrictions on commercial activity represent an unconstitutional taking.

States with orders that limit access to gun stores have faced lawsuits of the first variety. In California, for example, Governor Newsom has declared gun stores non-essential businesses and ordered their closure. The National Rifle Association, along with other gun owner groups and firearms dealers, [sued](#), seeking a temporary restraining order to enjoin enforcement of the order on the grounds that it violates their Second Amendment right to bear arms. On April 6, the US District Court for the Central District of California [denied](#) their application. The NRA and others in the gun industry have also filed similar [suits](#) in New York. Notably, the Department of Homeland Security added firearms vendors to its list of essential business in its March 28 CISA guidance—a move that led states that rely upon or incorporate this guidance, such as New Jersey, to relax earlier restrictions on firearms dealers.

In Massachusetts, five licensed marijuana operators and a marijuana user [sued](#) Governor Charlie Baker for closing recreational cannabis operations while allowing medical-use marijuana stores to stay open. The suit challenged the decision primarily on equal protection grounds and also argued that the closures would put people's health at risk by forcing marijuana users to obtain the drug on the illicit market.

In Pennsylvania, where Governor Tom Wolf issued a sweeping order closing all “non-life sustaining” businesses, a number of lawsuits have been filed. A handbell production company and several of its laid-off employees [filed a class action lawsuit](#) on March 26, alleging the order constitutes an uncompensated seizure in violation of the Fifth Amendment's Takings Clause. Plaintiffs argued that the order denied them the use of their physical property without just compensation while it was in effect. A law firm challenged Wolf's power to close law offices, claiming the order deprived their clients of their right to counsel. Two law firms, a gun shop, and a gun rights group and one of its members [filed](#) together for emergency, *ex parte* relief in the form of a preliminary injunction enjoining Wolf from enforcing his order. The court [denied](#) their motion. Additionally, on April 14, the

Pennsylvania Supreme Court, in a 4–3 decision, [rejected](#) a lawsuit brought by a political candidate, a golf course and a real estate agent challenging Governor Wolf’s authority to close “non-life sustaining” businesses.

As the nation’s COVID-19 response continues to evolve, state work-from-home and shelter-in-place orders, as well associated federal guidance, have been issued and modified on nearly a daily basis. Additionally, state enforcement efforts are on the rise. It is important that businesses, and especially those operating in multiple states, be aware of and responsive to these developments as they continue to operate in these challenging times. Furthermore, to prepare for potential COVID-19-related litigation, businesses should thoughtfully document key decision-making processes and outcomes in response to these executive orders and should consult with counsel when making decisions related to these orders and other COVID-19 regulatory issues. WilmerHale is continuing to monitor developments with respect to each state’s orders on a daily basis and is available to counsel clients on these issues.

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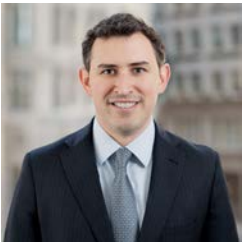
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