

Confusion remains as state attorneys general order businesses to shutdown

CORONAVIRUS



Teresa Metcalf Beasley, Kelsey M. Smith, James E. Stief, Michael W. Wise | Tuesday, April 7, 2020

Businesses all around the country are struggling to decode their respective states' stay-at-home orders. Since the first confirmed case of COVID-19 in the United States on Jan. 21, over 40 states have issued some type of state-wide stay-at-home order. Each order generally requires all individuals residing in the state to limit their movements unless absolutely necessary and restricts which businesses may operate and to what extent operations may continue. Businesses defined as "essential" are permitted to continue operations so long as they meet social distancing restrictions and additional requirements created by each respective state. However, although each state provides a definition or list of examples of businesses that qualify as essential, businesses not expressly listed continue to face difficulties when determining if they are permitted to continue operating. As a result, state attorneys general have been forced to decipher these stay-at-home orders and hold businesses accountable.

Ohio

On Wednesday, April 1, Ohio Attorney General Dave Yost issued a [cease and desist letter](#) to Hobby Lobby ordering the business to shutter all Ohio locations immediately. Hobby Lobby initially closed all 19 Ohio stores in response to the state-wide stay-at-home order. However, only a few days later, the chain reopened its doors. Yost addressed the letter on his social media, stating "Hobby Lobby properly closed its stores during the Ohio stay-home order. Now they're open again – what's changed? Neither the order, nor the seriousness of the health threat, for sure."

Confusion remains as state attorneys general order

This is only one example of the difficulty businesses face when attempting to determine if they are included in the definition of essential. For example, Ohio's list of essential businesses includes stores that sell non-grocery products necessary to maintain the safety, sanitation and essential operation of residences and essential businesses. Although craft and fabric stores are not expressly listed as essential, defenders of Hobby Lobby argued that the store should remain open because it sells materials needed for homemade masks and provides materials used in classrooms and by home-schoolers for educational purposes, both of which are considered essential under the stay at home order.

Despite these arguments, Attorney General Yost determined that Hobby Lobby did not qualify as an essential business and ordered the chain to immediately close all Ohio locations. A violation of the stay at home order may be punished criminally as a second-degree misdemeanor or enforced by civil injunction.

Michigan

Michigan Attorney General Dana Nessel has also taken on the task of enforcing Governor Whitmer's executive order prohibiting entities from operating except to the extent it is necessary to sustain or protect life or to conduct basic minimum operations. Nessel issued a [cease and desist notice](#) to Crystal Car Wash on April 3 for failing to comply with the state's Stay Home, Stay Safe executive order. In the notice, Nessel cited the "Guidance for Business" which is intended to help businesses in determining if their on-site operations are "necessary to sustain or protect life." The guidance states that "car washes or car detailing businesses do not employ critical infrastructure workers and in-person operations should be closed." As a result, Crystal Car Wash was required to immediately comply with the executive order.

Although the car wash was easily determinable as non-essential, the Michigan notice exemplifies the seriousness of complying with each states' stay at home order. Nessel stated that "businesses across Michigan must carefully consider the legal and financial consequences they will face if they are not complying with the Stay Home, Stay Safe executive order, as well as their individual moral responsibilities to protect the health and safety of their customers and employees." Willful violations of the Michigan executive order can result in a \$1,000 fine and/or 90 days in jail, as well as licensing penalties for businesses and other entities.

In addition to Crystal Car Wash, Nessel, with the assistance of Menominee County Prosecutor Jeffrey Rogg, sent two separate cease and desist notices to [Grow Masters Indoor & Outdoor Gardening Supplies](#) and [Holy Smoke Tobacco Shop](#). The notices stated that neither of the businesses were considered critical infrastructures and should not maintain on-site operations. However, in accordance with the executive order, Grow Masters Indoor & Outdoor Gardening Supplies was allowed to continue providing curbside service for agricultural purposes only.

Prosecutor Rogg stated "there is a big difference between the need for food and cigarettes [or] smoking supplies.... I see the continued operation of these businesses as an unnecessary threat to public health, which has the potential to encourage others to try to get around the Governor's closure orders."

Colorado

Colorado Attorney General Phil Weiser issued several cease and desist letters to various businesses in an effort to better define what businesses are included as essential. On March 31, Weiser issued a [letter](#) to a RE/MAX relator alleging that the broker forced residents to leave their homes for public showings and open houses. Under Governor Jared Polis' stay-at-home directive certain real estate marketing providers, such as appraisers and title companies, are deemed essential. However, Weiser explained that real estate

Confusion remains as state attorneys general order

marketing services, such as showings and open houses, are not included in the list of essential businesses. As such the RE/MAX realtor was directed to immediately comply with Governor Polis' directive or face a fine of up to \$1,000 and imprisonment for up to one year.

Texas

In response to Representative Dustin Burrows' [request](#), Texas Attorney General Ken Paxton determined that firearms sales are considered an essential business and should be exempt from all stay at home orders, even if not expressly listed. Burrows pointed out that none of the city or county stay at home orders designated firearms manufacturers, firearms retailers or shooting ranges as essential businesses. Paxton provided his [opinion](#) and explained that, although local officials are granted certain emergency powers to address disaster situations that authority is not without limitation. As such, municipal and county officials may not restrict the transfer, possession, ownership or sale of firearms, even in a local disaster area.

Again, this demonstrates the difficulty businesses face when attempting to determine if they may legally operate, especially when officials disagree on what the definition of essential includes. Failure to comply with an executive order in the State of Texas is punishable by a fine up to \$1,000 and/or confinement in jail for up to 180 days.

State Enforcement

Although the majority of states have issued stay at home orders that are largely similar in composition, enforcement of the orders and defining what businesses are essential varies. This may largely be explained by different needs and requiring services that may be essential in one state but not in another. Additionally, the definition for "essential" may have remained broad due to the fear of violating civil liberties. State officials continue to struggle with determining what businesses should remain open while also attempting to keep residents safe and slow the spread of COVID-19. In any case, businesses and individuals should remain cautious when deciding to continue operations and should seek guidance when deciphering state stay at home orders in order to avoid criminal and civil penalties.

McDonald Hopkins has a team of professionals dedicated to assisting businesses experiencing financial distress as result of the Coronavirus. A list of articles focused on providing legal and business solutions to the impact of the Coronavirus on your business can be found at

<https://www.mcdonaldhopkins.com/Insights/March-2020/Coronavirus-Legal-and-business-concerns>

If you have questions regarding your state's stay at home order or if your business may continue to legally operate, please contact one of the attorneys listed below.



Teresa Metcalf Beasley

[Team member bio](#)



Kelsey M. Smith

[Team member bio](#)

Confusion remains as state attorneys general order



James E. Stief

[Team member bio](#)



Michael W. Wise

[Team member bio](#)