

COVID-19 NEWS OF INTEREST

Should I Stay or Should I Close? Business Shutdowns and Reopenings in the Age of COVID-19 – Part 4

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AUTHORS

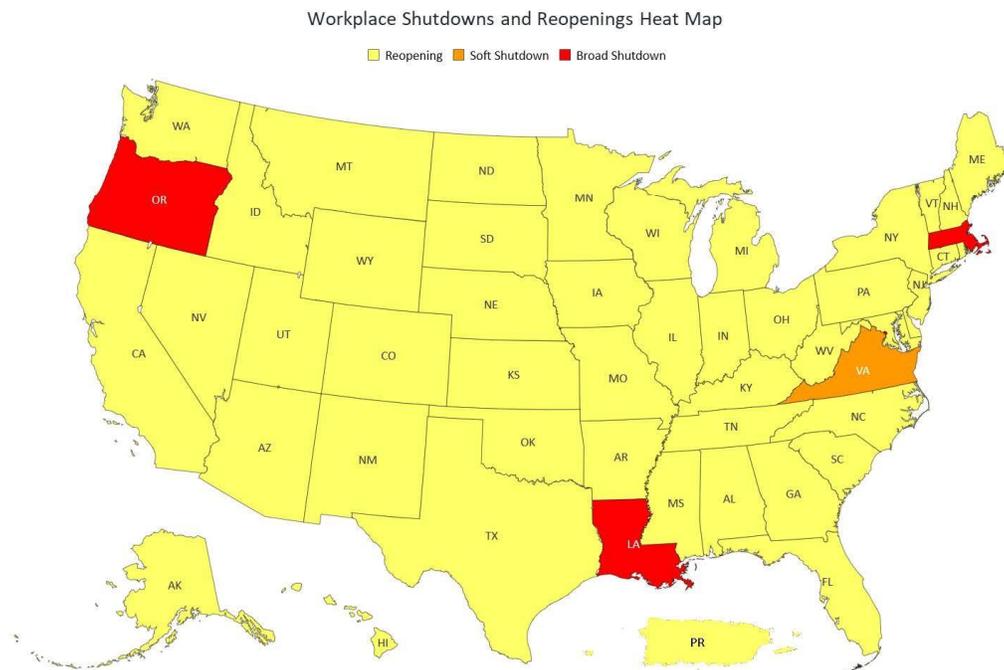
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Having spent the month of April issuing various shutdown orders (sometimes referred to as “shelter-in-place,” “stay home, stay safe” or “stay-at-home” orders), governors have turned their attention to adopting and implementing plans for reopening businesses within their respective states. A number of such plans have become effective as early as May 1, with most providing for a phased reopening of businesses as opposed to a full repeal of a previously issued shutdown order.

The heat map below identifies the states and territories that, as of May 7, 2020, (i) have adopted a plan of reopening or other official measures targeted at reopening businesses in their respective states and, (ii) for states that have not adopted a reopening plan and remain subject to a shutdown order, whether such shutdown order is a “broad” shutdown, requiring non-essential businesses to close or have a significant portion of their workforce work remotely, or a “soft” shutdown, requiring only food and beverage establishments, recreational and entertainment businesses and venues, close-contact personal care businesses and certain retail stores to close.

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Workplace Shutdowns and Reopenings Heat Map



This alert provides an overview of key trends and a few notable outliers in the reopening orders. As with the shutdown orders and their enforcement, the reopening orders appear to be feeling their way towards striking a balance between a quick reopening of economies and ensuring the health and safety of residents.

The Willkie team has prepared a chart, which is available [here](#), containing information regarding current shutdown and reopening orders issued in the 50 states, Washington, D.C., and Puerto Rico. This chart is intended to be updated on a regular basis, so please refresh the link at least daily to ensure you are reading the latest version.

Common Features of Reopening Orders

Some common features in these reopening orders include: (i) restaurants and bars remaining closed for on-premises consumption of food and beverages, (ii) entertainment and recreational facilities remaining closed, (iii) certain personal care services being permitted to reopen (subject to stringent social distancing and health and safety measures being implemented), and (iv) office workers being required to continue working from home as much as possible.

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Most states have also required businesses that either reopen or continue to remain open to comply with general health and safety precautions, including guidelines issued by the CDC and OSHA (and comparable state agencies), such as social distancing, requiring masks to be worn by employees and customers, implementing symptoms screening (including temperature checks) for employees prior to beginning shifts, and in some cases preparing reopening plans that lay out these measures for employees to follow and submitting such plans to government agencies for review. In addition to these general precautions, some states also require businesses to follow industry-specific requirements. For example, some states require retailers to limit occupancy in stores based on a percentage of their fire code or other capacity limits. See also our discussion regarding the construction industry below.

Differing Approaches to Reopening

The trend among reopening states is to adopt a phased approach to reopening businesses rather than a full repeal of a previously issued shutdown order. Typically, the initial phases of reopening plans tend to be only slightly less restrictive than current shutdowns, with more restrictions being lifted as the state or region enters a more advanced phase. Some of these reopening states have indicated that they will review health-based criteria such as the number of confirmed COVID-19 cases and hospital capacity before allowing the state, as a whole, to progress to more advanced reopening phases.

States have also generally tailored their reopening plans to address, among other things, the disparate impact COVID-19 may have had on different regions within a state.

In the case of New York, while a formal reopening plan has not yet been adopted, Governor Andrew Cuomo has provided a preliminary reopening plan pursuant to which the state will reopen in phases determined on a region-by-region basis. Under this preliminary plan, the state is being divided into 10 regions with each region permitted to enter advanced reopening phases only after satisfying certain health and safety metrics. Regions may be permitted to advance or may be directed to revert back to an earlier phase, in both cases independently from other regions.

In the case of Indiana, where COVID-19 has had a greater impact on some counties compared to others, certain counties are, from the outset, obligated to remain within a preliminary or “soft” reopening phase for an extended period while other counties are permitted to enter advanced reopening phases. Under the Indiana reopening order, the counties of Lake (a suburb of Chicago), Marion (the county in which Indianapolis is situated), and Cass (the county in which a Tyson food plant experienced a severe COVID-19 outbreak), are required to remain in phase 1 of Indiana’s reopening plan for an additional one to two weeks beyond the time when other counties are first able to advance to phase 2.

By contrast, Georgia has generally reopened statewide with most businesses being allowed to reopen, subject to compliance with social distancing and other health and safety requirements. Notable exceptions from Georgia’s reopening include bars, nightclubs, amusement parks and live performance venues which present a higher risk of COVID-19 spread.

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Construction Industry

One of the areas of the economy that was not generally included as an essential business in shutdown orders is commercial and residential construction. Many of the reopening orders specifically address how commercial and residential construction projects can restart. States allowing the reopening of construction generally require construction firms to deploy additional health and safety measures before their projects may commence.

Such additional measures include, among other things, (i) designating dedicated entry and exit points on worksites, (ii) conducting pre-shift health checks (e.g., temperature checks and symptom assessments), (iii) limiting construction to outdoor construction, (iv) limiting the number of employees present on worksites, and (v) maintaining a log of worksite visitors to permit contact tracing. Some states, such as Washington, also require contractors to adopt a comprehensive COVID-19 exposure control, mitigation and recovery plan.

Treatment of Employees

In connection with permitting businesses to reopen while continuing to combat the spread of COVID-19 among employee populations, some reopening orders provide (i) guidance and/or mandates with respect to the treatment of employees (both those that come back to work and those that cannot or are unwilling to come back in this environment) and (ii) measures employers must take to protect the health and safety of their employees, such as providing on-site employees with face coverings and requiring daily symptom screening of employees.

In addition, a number of reopening orders specifically address employers' treatment of vulnerable individuals (e.g., persons above age 65, pregnant individuals and persons with existing health conditions or who are otherwise immunocompromised), and require that employers make special work accommodations for such persons. In the case of Colorado, employers are also directed to accommodate workers with childcare and/or eldercare responsibilities, as well as persons living in the same household as a vulnerable individual. Some states have also issued guidance relating to employee sick leave policies. For example, (i) in Kentucky, employers are encouraged to offer sick employees paid leave and (ii) in New Hampshire, employers are obligated to update their employee illness policies to include COVID-19 symptoms and permit employees to stay home if ill or to care for sick family members.

Washington also recently issued a worker protection order that obligates employers to (i) utilize alternative work assignments for high-risk employees whose jobs are not conducive to telework and (ii) permit employees that cannot be reassigned to use accrued leave or unemployment insurance. Washington has also prohibited employers and unions from applying or enforcing any employment contract provision that contradicts the provisions of Washington's worker protection order. However, Washington's worker protection order does not prohibit employers from (a) hiring temporary employees if it does not negatively impact the permanent employee's employment status, or (b) taking employment action

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when no work reasonably exists (e.g., reductions in force) so long as employers do not take any action that may adversely impact an employee's eligibility for unemployment benefits.

Conclusion

Consistent with the initial flurry of shutdown orders, the initial influx of reopening orders has proven confusing to many individuals and businesses. Despite such confusion, states appear to be appreciating the uncertainty their shutdown orders have caused and, accordingly, have been quicker to supplement their reopening orders with FAQs and specific standalone guidance to assist in their interpretation as they navigate striking a balance between quickly reopening state economies to minimize economic disruption from the pandemic and ensuring the health and safety of residents. Businesses in the process of reopening should be careful to follow reopening guidelines and health and safety measures for the same reasons. As always, we continue to monitor and analyze the shutdown and reopening orders as issued or amended, and new official guidance and clarification as provided, and remain available to answer any questions on these matters.

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Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters, and CFTC and bank regulation. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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