

COVID-19 NEWS OF INTEREST

Should I Stay or Should I Close? Business Shutdowns in the Age of COVID-19

Part 3: Latest Trends

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AUTHORS

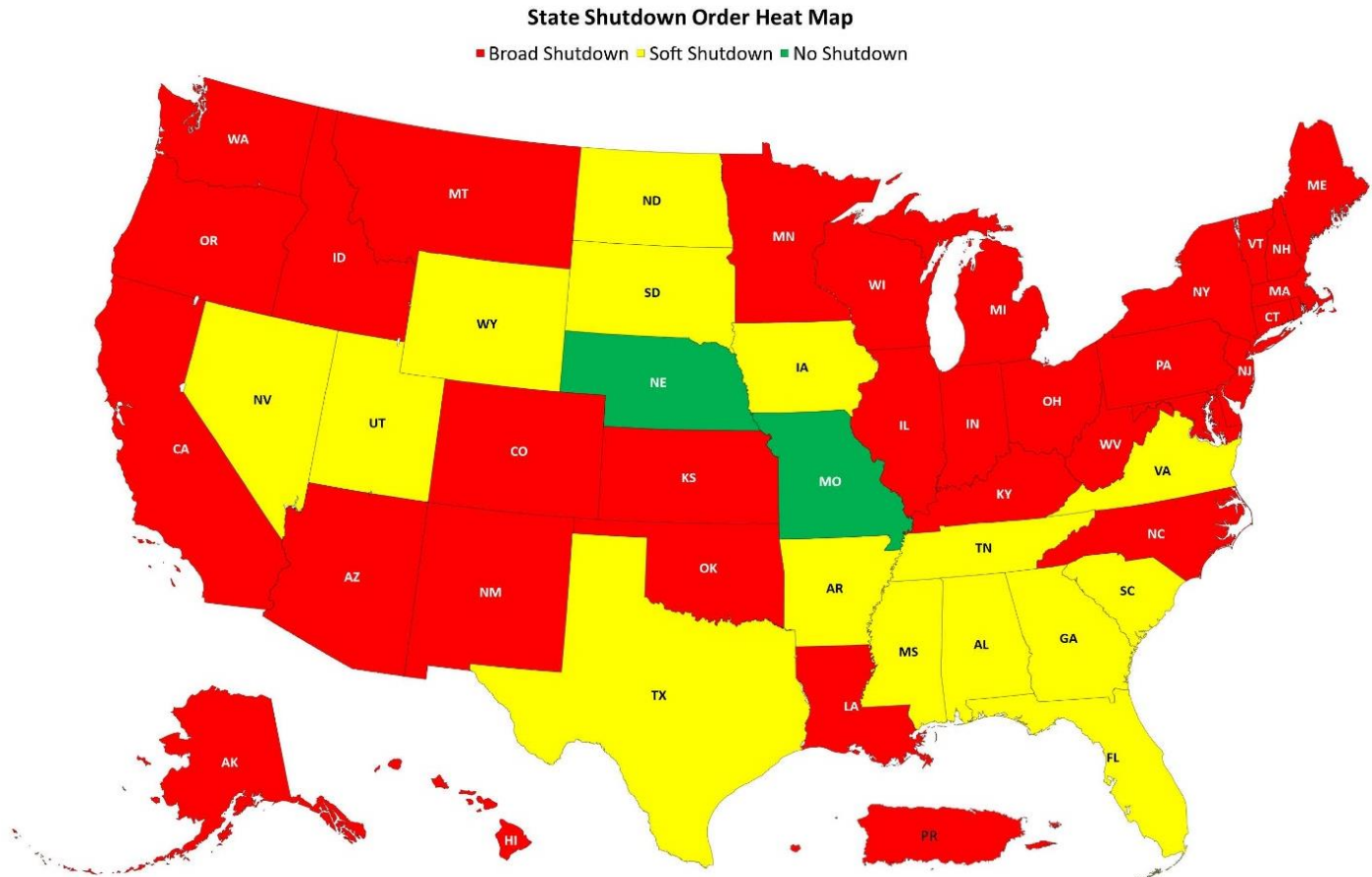
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As the spread of COVID-19 accelerates across the United States and the pandemic becomes a reality to those not living in the areas of the original outbreaks, executive officials of more and more states and counties are putting into place shutdown orders (sometimes referred to as “stay home, stay safe” or “stay-at-home” orders). Since the first five orders were issued by the Governors of California, Connecticut, Illinois, New Jersey and New York between March 19, 2020 and March 21, 2020, shutdown orders have been issued in 48 states. In addition, shutdown orders were issued by the Governor of Puerto Rico, the Mayor of Washington, D.C., and by county judges in several major metropolitan counties in Texas (addressing Austin, Dallas/Fort Worth, Houston and San Antonio). Most of these orders were put in place between March 23, 2020 and March 28, 2020.

We have generated a heat map showing which of the states have implemented shutdown orders. As of March 30, 2020, 48 states, as well as Washington, D.C., and Puerto Rico, are subject to business shutdown orders. We have categorized (i) “broad shutdowns” as those shutdown orders that require non-essential businesses to close or have a significant portion of their workforce to work remotely and (ii) “soft shutdowns” as those shutdown orders that are less stringent than a broad shutdown while applying at least some measure of restriction on the operations of private businesses, including, among other things, prohibiting restaurants and other food services from serving food and beverages on-site and closing casinos, fitness centers, salons and certain retail stores.

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(1) As of March 30, 2020, certain individual counties in each of Wyoming, Utah, Oklahoma, Texas, Missouri, Tennessee, Mississippi, Alabama, Georgia, Florida, South Carolina, Pennsylvania and Maine have enacted supplemental measures to those issued by their respective Governor, including some county-wide broad shutdown orders.

We profiled the contents of the shutdown orders issued by the first-mover states in our first two alerts in this series. In this alert, we cover at a high level some key trends and a few notable outliers that we have observed during our continued review of both newly issued shutdown orders and updates to existing shutdown orders. The common theme is that states, counties, businesses and individuals are feeling their way to the correct answers in how to interpret, enforce and comply with the directives contained in these orders during these uncertain times.

The Willkie team has prepared a chart, which is available [here](#), containing information regarding current shutdown orders issued in the 50 states, Washington, D.C., Puerto Rico and certain counties in Texas. 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.

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Common Features of Shutdown Orders

By and large, shutdown orders are following the Cybersecurity and Infrastructure Security Agency (CISA) guidelines,¹ with some variations making them either more or less inclusive. As expected, most of the shutdown orders shy away from the more restrictive “life-sustaining” business construct employed in Pennsylvania, and the orders are more focused on keeping non-essential persons off the streets and out of enclosed spaces while allowing the general economy to remain operating.

Some common features in these shutdown orders are (i) mandatory closings of restaurants, bars, and recreational, personal care and entertainment businesses (other than general carve-outs for take-out or delivery services), (ii) requiring essential employees to work from home, where possible, (iii) permitting any business (including non-essential businesses) to carry on “minimum business operations” (e.g., maintenance of inventory, payroll processing, security, activities that allow employees to work from home, etc.), (iv) requiring any business remaining open to adhere to social distancing and cleaning guidelines (either as released by the CDC or as set forth in such order), (v) allowing businesses to apply online or over email for designation as an “essential business”, and (vi) permitting only “essential” portions of businesses to continue in-person operations.

Construction Industry

One of the areas of the economy that was not included in the original CISA guidelines, but that is addressed in most of the recent shutdown orders, is commercial and residential construction. That being said, some newly issued shutdown orders (or recent guidance on existing shutdown orders) are pushing back on including broad-based construction not tied to critical infrastructure, so this is an area that should continue to be watched. For example, the Governor of Washington state recently issued a memorandum clarifying that, subject to certain exceptions, residential and commercial construction are generally not considered to be essential activities and on March 27, 2020, the Empire State Development Corporation updated its guidance on essential businesses in New York to provide that non-essential construction is required to shut down.²

We have received quite a few requests for advice on whether certain companies are considered essential in their jurisdiction and are therefore permitted to continue operating. These questions are not only coming to us, but many state and local governments are fielding the same questions and may issue additional guidance on their orders in this area in the near future. In general, we expect states and counties will provide more guidance regarding the scope and duration of their

¹ <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>.

² https://www.governor.wa.gov/sites/default/files/03.25.20-Construction%20Guidance%20Memo%20%28002%29.pdf?utm_medium=email&utm_source=govdelivery.
<https://esd.ny.gov/guidance-executive-order-2026>.

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shutdown orders as government officials receive a high volume of feedback from business owners and the general public and as the COVID-19 outbreak continues to develop.

Decentralized Rulemaking

It appears that some governors have decided that a one-size-fits-all approach to a shutdown order does not work for their state, and instead are relying on county and/or city officials to implement their own shutdown orders that can better address the specifics of their demographics. Texas is one such state where the Governor has not issued a statewide, broad, non-essential business shutdown order and judges in major metropolitan counties of Texas have issued their own orders, including county judges in Harris County (Houston); Dallas, Tarrant and Denton counties (Dallas/Fort Worth); Bexar County (San Antonio); and Travis County (Austin). Officials in certain cities in Texas have also issued their own shutdown orders, most of which are generally consistent with the overriding county orders, but some of which provide a narrower definition of essential business. We have included information regarding the shutdown orders in these listed counties and cities of Texas in our fifty-state chart. In addition to Texas, Mississippi and Missouri have also taken a less centralized approach with their shutdown orders and are relying on local counties to address workplace shutdowns on their own.

Supplier and Service Provider Designations – Michigan

One area of uncertainty in a number of orders is whether businesses that are a part of the supply chain for critical infrastructure or businesses should be permitted to continue in-person operations. Some shutdown orders explicitly provide that businesses supplying products or services or otherwise supporting other essential businesses may remain open, whereas others are silent.

Michigan has taken an interesting approach in expanding the scope of exempted businesses to cover more of the supply chain by providing that businesses employing critical infrastructure workers (as defined in the CISA guidelines) (i) must determine which of their own workers are critical infrastructure workers, and must inform such workers of this designation, and (ii) may designate other suppliers or service providers whose continued operation is necessary to enable, support or facilitate the work of such business's critical infrastructure workers.³ Any such designated supplier or service provider may then designate certain of its workers as critical infrastructure workers and in turn so designate additional suppliers and service providers that enable their critical infrastructure workers to operate. Instead of allowing businesses to apply for essential business designations through government channels, which seems inefficient given the likely high volume of requests the state governments are bound to receive, Michigan allows its essential businesses to self-regulate in determining which other supply chain participants must be operational in order for critical infrastructure businesses to operate.

³ https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html.

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We note that the Michigan order stipulates that any such designation initially may be done orally. However, after 11:59 p.m. on Tuesday, March 31, 2020, such designations must be made in writing. We would recommend that suppliers in Michigan reach out to those of their customers that are critical infrastructure businesses for such written designations in advance of that deadline.

Enforcement of Shutdown Orders

Local law enforcement has been vigilant in ensuring businesses comply with shutdown orders and are stepping up efforts to do so as people and businesses adjust to the new normal.

The New York Police Department has added more patrols in public areas in New York City to break up social gatherings that violate the stay-at-home order.⁴ Encouragingly, most people and businesses seem to be complying with the orders.

On the first day of enforcement of the Pennsylvania order, only 27 warnings were issued statewide and no citations were issued and as of March 26, 2020, 57 warnings were issued.⁵ The Governor of Pennsylvania also subsequently issued clarifying guidance stating that discipline for violations of the Pennsylvania shutdown order will be progressive in nature with suspected violators first receiving a warning. The Pennsylvania Governor's clarifying guidance also stated that Pennsylvania authorities will focus their enforcement efforts on businesses at which people congregate.⁶

Alaska has taken a stricter approach in deterring violators of its shutdown order. The Alaska shutdown order provides that, in addition to the maximum \$1,000 per-violation civil fine that individuals and businesses are subject to for violating the state's shutdown order, violators may also be criminally prosecuted for Reckless Endangerment, which carries a \$2,500,000 fine for an offense that results in death, or a \$500,000 fine for an offense that does not result in death. Reckless Endangerment also carries a prison sentence of up to one year.⁷

As expected, given the hardship imposed by COVID-19 and the shutdowns, as well as uncertainty around interpreting some elements of the "essential business" definition in shutdown orders, enforcement efforts generally do not appear heavy-handed during the early days of a shutdown. However, as the pandemic worsens, recalcitrant offenders can likely expect harsher treatment upon discovery of violations of these orders. In fact, some states are actively encouraging whistle-blowing to aid in enforcement. New York Attorney General Letitia James tweeted on March 21, 2020 that employees who believe that their employer is in violation of recently issued New York State executive orders should contact her office.

⁴ <https://www.politico.com/states/new-york/albany/story/2020/03/23/police-step-up-patrols-to-enforce-coronavirus-shutdown-rules-1268750>.

⁵ <https://www.wtae.com/article/pennsylvania-state-police-warnings-citations-non-life-sustaining-businesses/31912894>.

⁶ <https://www.scribd.com/document/452553495/UPDATED-1-45pm-March-27-2020-Life-Sustaining-Business-FAQs>.

⁷ <https://gov.alaska.gov/wp-content/uploads/sites/2/03272020-SOA-COVID-19-Health-Mandate-011.pdf>.

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Progressive Shutdowns – Oklahoma

While most gubernatorial shutdown orders are enacted statewide, the Governor of Oklahoma's stay-at-home order only shuts down non-essential businesses in counties experiencing community spread of COVID-19, which is presumably in an effort to balance controlling the virus's spread with the deleterious economic impact of shutting down businesses.⁸ The Oklahoma State Department of Health maintains a regularly updated list of impacted counties on its website.⁹ While allowing businesses to stay open will benefit the Oklahoma economy, underpinning the broad shutdown orders is the notion that closing a state's infected and uninfected areas is the only way to control the virus's spread given the delayed onset of symptoms in infected persons. It remains to be seen if a progressive shutdown can both effectively control the virus's spread beyond infected counties and salvage a state's economy by allowing to remain open non-essential businesses in uninfected areas.

Mandatory Quarantine for Travelers – Florida, Oklahoma, Rhode Island, Texas and Vermont

Recently, the Rhode Island Governor issued a directive that requires all persons (subject to exceptions for military personnel and health and safety workers, among others) arriving into the state to self-quarantine for a period of 14 days.¹⁰ The Governor of Rhode Island's initial order instating the mandatory quarantine had only applied to residents of New York but was repealed and reissued in response to statements by the Governor of New York that, among other things, questioned the directive's legality.

The Oklahoma Governor¹¹ and the Florida Governor¹² have also issued directives obligating all persons (subject to exceptions similar to Rhode Island) arriving from areas with "substantial community spread" to self-quarantine for 14 days; in the case of Oklahoma, the Governor specifies residents of California, Connecticut, Louisiana, New Jersey, New York and Washington as subject to the mandatory quarantine upon entering Oklahoma.

Similarly, the Vermont Governor has issued an executive order obligating all persons travelling into Vermont to self-quarantine for 14 days if entering the state for a reason other than an "essential purpose", which the directive defines as (i) travel required for personal safety; (ii) food, beverage or medicine; (iii) medical care; (iv) care of others; and (v) to perform work, services or functions deemed critical to public health and safety, as well as economic and national security.¹³ The

⁸ <https://www.sos.ok.gov/documents/executive/1919.pdf>.

⁹ <https://coronavirus.health.ok.gov/>.

¹⁰ <http://www.governor.ri.gov/documents/orders/Executive-Order-20-14.pdf>.

¹¹ <https://www.sos.ok.gov/documents/executive/1924.pdf>.

¹² https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-86.pdf.

¹³ <https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%207%20TO%20EXECUTIVE%20ORDER%2001-20.pdf>.

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Vermont directive instructs persons not to travel to Vermont if they are displaying symptoms of COVID-19 or if coming from cities and regions identified as COVID 19 “hot spots”, which specifically includes Florida, Louisiana, Detroit, Chicago and New York.

The Governor of Texas has followed suit and issued a directive obligating all persons (subject to exceptions similar to Rhode Island, Oklahoma and Florida) entering Texas to self-quarantine for 14 days and, in addition, to complete a form on which such person designates a quarantine location in Texas and provides certain personal information, including driver’s license or passport information.¹⁴ The Texas executive order provides that Texas Department of Public Safety Special Agents will conduct unannounced visits to the designated quarantine location to verify compliance with the self-quarantine mandate; failure to comply is deemed a criminal offense and is punishable by either or both of a fine not to exceed \$1,000 and confinement in jail for a term not to exceed 180 days. If a person is exempt from the self-quarantine order because of commercial activities or critical-infrastructure functions, such person should file an application with the Texas Division of Emergency Management to obtain a state-issued letter granting the exemption that can be presented to government officials.¹⁵

The self-quarantine requirement is a new trend among states, which we are actively monitoring. While we hope that such measures soon become unnecessary, we expect that if these directives remain in place for an extended period they will likely be challenged by out-of-state individuals with occupations in a state requiring a 14-day quarantine and therefore unable to work.

Conclusion

The initial flurry of shutdown orders has proven confusing to many individuals and businesses, but as more information is disseminated and orders interpreted by businesses and state and local governments alike, the lines are becoming clearer, which will only benefit the country as a whole and help to “flatten the curve” as medical facilities struggle to ramp up capacity. As always, we continue to monitor and analyze the shutdown orders as they are issued or amended, and new official guidance and clarification as they are provided, and remain available to answer any questions on these matters.

¹⁴ https://gov.texas.gov/uploads/files/press/EO-GA-12_roadway_quarantine_for_COVID-19_IMAGE_03-29-2020.pdf.

¹⁵ <https://tdem.texas.gov/ga-11-and-ga-12-travel-exemption-form>.

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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. 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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