

Guidance for Businesses Resolving Multiple “Shelter in Place” Orders and Differing Definitions of “Essential Business”

Article

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Although California was the first state to issue a “shelter in place” order on March 19, 2020, it quickly became clear that it would not be the last. Since the 19th, approximately 21 states have issued similar orders as they combat the COVID-19 outbreak and try to flatten the curve. Not only are states issuing “shelter in place” orders, but various city and county officials are issuing them. In some areas, businesses may be under both a local order and a state-wide order. Overall, approximately 75% of states are either under a state-wide “shelter in place” order or have at least one locality that has issued such an order. By the end of this week, that percentage is likely to rise.

The situation creates chaos and confusion for businesses that operate in more than one state or may be operating in an area subject to more than one order. This guidance is meant to help summarize some of the differences in the “shelter in place” orders that have been issued across the broader Midwest region. It will also provide some strategies for addressing these differences.

“Shelter in Place” Orders

“Shelter in place” orders are issued by state or local officials and direct citizens to remain in their homes and to limit travel to essential trips, such as going to the doctor, the bank, or the grocery store. The orders also require “non-essential businesses and operations” to close. The orders then define certain categories of businesses and operations as “essential.” Businesses and operations are presumed to be “non-essential” unless they fall into one of the defined categories.

In the past few days, Wisconsin businesses have watched as Michigan, Illinois, Ohio, and Indiana issued “shelter in place” orders. On March 23, 2020, Governor Evers declared that on March 24, 2020, Wisconsin would be under a “Safer At Home” Order. While different in name, Wisconsin’s “Safer At Home” Order is the same as a “shelter in place” order. It is effective as of 8:00 a.m. on March 25, 2020, until April 24, 2020. Additionally, on March 23, 2020, the City of Milwaukee

PROFESSIONALS

Sherry D. Coley
Partner

Tiffany E. Woelfel
Partner

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issued its own “shelter in place” order. Milwaukee’s order is effective as of March 25, 2020, and will continue indefinitely.

As of now, 21 states have issued state-wide “shelter in place” orders[1]. An additional 16 states have localities that had issued such orders[2]. Some states with state-wide orders, like Wisconsin, may have localities, like Milwaukee, which have also issued their own orders. On March 25, 2020, Governor Walz announced that a two-week “shelter in place” order would be issued to Minnesota effective 11:59 pm on March 27, 2020. Currently, Iowa is the only state neighboring Wisconsin that has not yet issued—or indicated it would issue—a “shelter in place” order. Like Minnesota’s announcement that an order would be coming by the end of the week, we expect many more states to issue such orders.

Because each jurisdiction defines an “essential business” in their order, what qualifies as an “essential business” in one location, may not in another. Businesses may face conflicting definitions of “essential business.”

“Essential Business and Operations”

The federal government provided guidance in determining what an “essential business and operation” is. On March 19, 2020, the Cybersecurity and Infrastructure Agency (CISA) issued a “Memorandum on identification of essential critical infrastructure workers during COVID-19 Response.”

Under the CISA Memo, the federal government categorizes types of “critical infrastructure workers.” Within each category, there may be a variety of different businesses, jobs, and operations. The CISA categories are:

- Health Care and Public Health;
- Law Enforcement, Public Safety, and Public Responders;
- Food and Agriculture;
- Energy;
- Water and Wastewater;
- Transportation and Logistics, including Post and Shipping;
- Public Works, including Media and IT;
- Other Community-Based Government Operations and Essential Functions, including state, tribal, and local governments;
- Critical Manufacturing;
- Hazardous Material;
- Financial Services;
- Chemical;
- Defense Industrial Base.

Within these categories, the “essential businesses and operations” include not only the end producer or servicer, such as a hospital or a nursing home, but they also include businesses that provide goods and services to a defined “essential business or operation.”

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CISA's determination has been the starting point for states in defining "essential businesses and operations." Some states, like Michigan, have closely followed the federal definition. Other states, like Wisconsin, Illinois, and Ohio, begin with the federal definition and then expand the definition to include additional types of businesses and operations as "essential." For example, a manufacturer of medical supplies or a manufacturer of restaurant supplies is deemed "essential" in these states. Likewise, businesses that create, manufacturer, supply, or distribute components or material used within the supply chain servicing an "essential business or operation" are also considered "essential."

States with Narrow Definitions of "Essential Businesses and Operations"

States like Michigan have strictly adopted CISA's critical infrastructure categories as the "essential businesses and operations." Because these states do not recognize additional types of businesses as "essential," they have a narrower definition of "essential businesses and operations." Michigan's "shelter in place" order defines "critical infrastructure workers" to include child care workers to allow employees to go to work at "essential businesses and operations," workers in the insurance industry only if their work cannot be done remotely, workers and volunteers at nonprofits serving the economically disadvantaged, and workers who perform critical union functions.

States with Broad Definitions of "Essential Businesses and Operations"

Many other states—like Wisconsin, Illinois, Indiana, and Ohio—and cities—like Milwaukee—start with CISA's critical infrastructure categories and then expand beyond those 16 categories to identify additional "essential businesses and operations."

Using Wisconsin's order, as an example, Wisconsin explicitly includes any business or employee within CISA's critical infrastructure categories. Wisconsin also includes the following additional types of businesses as "essential businesses and operations"[3] :

- Child care facilities, which must follow all previous orders about gatherings;
- Organizations providing charitable and social services;
- Wedding, funeral, and religious venues, which must follow all previous orders about gatherings;
- Funeral establishments, which must follow all previous orders about gatherings;
- Media;
- Hardware and supply stores;
- Critical trades, for example, including building and construction tradesmen, plumbers, electricians, carpenters, laborers, janitorial staff, HVAC, etc. [4];
- Laundry services;
- Retailers of supplies to work from home;
- Retailers of supplies for "essential businesses and operations" and essential government functions;

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- Additional transportation services, including rental vehicles and transportation network providers, such as Uber and Lyft;
- Professional services, such as accounting, legal, insurance, and real estate services;
- Critical labor union functions;
- Hotels and motels, which must follow all previous orders;
- Higher educational institutions performing critical research or providing distance learning.

Wisconsin's Order also provides that businesses that believe that they are essential businesses, but do not fall into one of the defined categories may apply to the Wisconsin Economic Development Corporation, requesting such a designation.

Interstate businesses and businesses located in a jurisdiction that is covered by both a state and local "shelter in place" order must be aware of the differences between the orders.

Comparison of "Essential Businesses" across Midwest States [5]

Resolving Conflicts in Definitions of "Essential Businesses and Operations"

Here are some tips for resolving conflicting "shelter in place" orders:

Stay Updated: Businesses need to be aware of all "shelter in place" orders they may currently be operating under. This includes checking state, county, and city orders that may be issued for each and every business location. As seen in Milwaukee, a business may be under both a state and local order.

Review the Order(s): The orders issued by each state and locality will provide the most guidance to a business. Additionally, the order may detail how conflicts with other orders should be resolved. For example, the Wisconsin Order explicitly states that it supersedes any local order that conflicts. So, if the Milwaukee Order determined that one type of business was "essential" but the Wisconsin Order did not declare that type of business "essential," then the business must follow Wisconsin's Order. The business would be deemed "non-essential." As more states issue state-wide orders after their municipalities have issued order, we would expect the state orders to control.

Apply Specific Location's Order: For businesses with plants, offices, factories, or other operations in multiple states, the business should apply the order of the specific location governing that business operation. For example, if a business owns an office-supply store in the Upper Peninsula of Michigan and in Wisconsin, the business should treat each location separately and apply the specific orders to each location. Under Michigan's Order, office supply stores are "non-essential" and, therefore, the location would need to be closed. Under Wisconsin's Order, office supply stores that sell supplies to work from home are "essential." Thus,

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the Wisconsin stores could remain open. By following the order applicable to each location, it allows businesses to remain open where they are essential.

Follow the Narrower Definition: If a business location is subject to two orders with differing definitions (and the orders don't indicate which order is superior), apply the narrower definition. By applying the narrower definition of "essential business or operation," you will act in accordance with both orders. For example, if the State Order states that Business X is an "essential business," but the City Order does not declare Business X an "essential business" (thus, it is presumed "non-essential"), Business X should follow the City's Order, and close the business or work remotely. Because the City Order is narrower than the State Order, it is not "in conflict" with the State Order, thus Business X must comply with both.

Ask for Help: If you are unsure whether your business is an "essential business or operation" or want guidance resolving conflicting orders, ask for help. The states and localities issuing these orders are trying to provide as much guidance to businesses as they can.

We are continuously monitoring this rapidly evolving impact to provide our clients with the most updated guidance on how best to safeguard their workforce while maintaining business operations. In the coming days please watch for updated guidance and recommendations for employers to consider when reviewing their policies to respond to this ever-changing pandemic. This is a dynamic and developing situation, therefore, the perspectives given are at the time of the publication.

[1] Those states include: California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Vermont, Washington, West Virginia, and Wisconsin. This list is as of 2 pm on March 25.

[2] Those states include: Alabama (Auburn & Opelika), Alaska (Anchorage, Ketchikan, & Sitka), Arizona (Navajo Nation), Colorado (Boulder, Denver, Navajo Nation, & San Miguel County), Florida (Miami Beach), Georgia (Athens-Clarke, Covington, & Dougherty Counties), Hawaii (Honolulu & Maui), Idaho (Blaine County), Iowa (Des Moines), Kansas (Douglas, Johnson, Leavenworth, & Wyandotte Counties), Maine (the OceanView retirement community of Falmouth), Mississippi (Tupelo), Missouri (Kansas City), Pennsylvania (Philadelphia), Tennessee (Nashville & Davidson County), Texas (Waco & Dallas & McLennan Counties), & Utah (Navajo Nation). This list is as of 2 pm on March 25.

[3] This article will only broadly speak of the categories of businesses determined to be "essential businesses and operations" under the Wisconsin Order. For more guidance on what specific businesses would be a part of each category and determining whether your business meets one of those categories, please see our article "Are You an 'Essential Business' in Wisconsin Under the Safer At Home

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Order?” which was published on March 24, 2020.

[4] The full order includes: “Building and Construction Tradesmen and Tradeswomen, and other trades including but not limited to plumbers, electricians, carpenters, laborers, sheet metal, iron workers, masonry, pipe trades, fabricators, finishers, exterminators, pesticide application, cleaning and janitorial staff for commercial and governmental properties, security staff, operating engineers, HVAC, painting, moving and relocation services, forestry and arborists, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, Essential Governmental Functions, and Essential Businesses and Operations.”

[5] The chart is a summary of the broad types of businesses deemed essential and is not meant to encompass every possible “essential business or operation.” For questions about whether a specific business or operation is “essential” under a specific order, you must consult the language used in the particular order.

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