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COVID-19: Primer on Executive and Agency Orders

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Guide to Navigating the Evolving COVID-19 Mandates and Guidance Related to Closures and Social Distancing

We are all grappling with what seem to be hour-by-hour adjustments to best practices for conducting business with the spread of the Coronavirus Disease ("COVID-19"). This *Legal Update* aims to delineate the line between government mandates and guidance.

Currently, pursuant to Wisconsin Department of Health Service Emergency Order #5 ("DHS Emergency Order #5"), all gathering of more than 10 people are prohibited. However, there are a number of exemptions. Offices and manufacturing facilities may remain open despite gathering more than 10 people. For offices, DHS Emergency Order #5 provides that office spaces "shall implement social distancing, including teleworking, as much as practicable." At this time, social distancing is not mandated in manufacturing, processing, distribution and production facilities. (Please note carefully that the lack of a mandate does not in any way diminish the utility of social distancing practices whenever it is practical to implement them.) We have listed more details about DHS Emergency Order #5 below for your reference.

We would anticipate, based on responses by governments with more confirmed COVID-19 cases, that there will come a time when more restrictions may be placed on business operations. When such restrictions have been put in place elsewhere, there have been exceptions for essential business to remain open. It will be critical to stay up-to-date with additional orders from DHS, which the von Briesen Government Relations Section is monitoring closely.

The line between mandate and guidance is rooted in state and federal emergency powers law. As a general rule, states have broader emergency powers in dealing with the immediate response to a health crisis. For the State of Wisconsin, all mandates flow from Governor Evers' Executive Order #72. Outside of orders issued pursuant to Executive Order #72, much of what federal agencies and state agencies are sharing with the public is guidance.

Executive Order #72
On March 12, 2020, Governor Evers signed Executive Order #72. The Executive Order serves as the foundation for the Department of Health Services ("DHS") orders that have subsequently been issued. The Executive Order was issued pursuant to the Governor's authority to declare a public health emergency under Wis. Stat. § 323.10. When the Governor determines that a public health emergency exists, he may designate the Department of Health Services as the lead state agency to respond to the health emergency. It is important to understand that the State of Emergency is not indefinite. The DHS website explicitly notes the Order is in effect until May 10, 2020. This sunset is consistent with Wis. Stat. § 323.10, which allows for a State of Emergency to last for 60 days, unless extended by joint resolution of the Legislature.

As part of Executive Order #72 and pursuant to Wis. Stat. § 100.305, Governor Evers also declared that the state was in a period of abnormal economic disruption, in the process directing the Department of Agriculture, Trade, and Consumer Protection ("DATCP") to enforce provisions against price gouging. DATCP may commence actions against companies that increase the price of goods by more than 15% above the average price of the product in the immediate 60 days before the State of Emergency was declared.

DHS Emergency Order #5
On March 17 DHS issued DHS Emergency Order #5, prohibiting "mass gatherings" of 10 or more people in the state (this order superseded the previous day's order which prohibited "mass gatherings" of 50 or more people). A "mass gathering" is defined as "any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 10 or more people in a single room or single confined or enclosed space at the same time." A gathering that brings together, or is likely to bring together, less than 10 people in a single room or confined or enclosed space at the same time must still "[p]reserve social distancing of 6 feet between people, and [f]ollow all other public health recommendations issued by [DHS] and Centers for Disease Control."

What is Closed?
The Order included a non-exhaustive list of locations which are impacted by the Order. It includes, but is not limited to, mass gatherings at:

- Public or Private Schools
- Auditoriums
- Theaters
- Movie Theaters
- Museums
- Stadiums
- Arenas
- Conference Rooms
- Meeting Halls
- Exhibitions Centers
- Taverns
- Indoor Shopping Malls
- Health and Fitness Centers
- Recreations Centers
- Licensed Pools
- Places of Worship
- Religious Gatherings

What Can Remain Open?
There are many industries that remain critical to a functioning society. Thus, many businesses, services, or industry actions have been *exempted* from the prohibition on mass gatherings of 10 or more people, so long as the social distancing and other public health recommendations are followed. Included in the list of exemptions, detailed below, is manufacturing, processing, distribution, and production facilities, retail establishments, retail food establishments (i.e. grocery stores), and office space.

Importantly, while the entities listed below are exempt under the Order, voluntary cancelation, closure, or limitations on size of gathering beyond the requirements of the Order are permitted. In other words, while the prohibition on mass gatherings may not apply to an entity included below, it may nevertheless decide to voluntarily close operations while the Order remains in effect.

Again, even if exempted, an entity must maintain social distancing recommendations and do everything it can to follow public health recommendations issued by the DHS and Centers for Disease Control. The Order exempts:

- Commercial and non-profit entities – Office spaces (such facilities shall implement social distancing, including teleworking, as much as practicable); manufacturing, processing, distribution, and production facilities; utility facilities; and job centers.
- Retail Establishments – Including gas stations and auto-repair facilities, where large numbers of people are present but are generally not within arm's length of one another for more than 10 minutes. Indoor shopping malls shall close.
- Retail food establishments (grocery stores, convenience stores, farmer's markets) as long as the following requirements are followed: close all seating intended for consuming food; cease self-service operations of salad bars, beverage stations, and buffets; and prohibit customers from self-dispensing all unpackaged food.
- Food Establishments – Restaurants may remain open for take-out or delivery service only. No seating may be provided, and food may not be consumed at the restaurant. Restaurants shall preserve social distancing of six feet between customers during pick up.
- Transportation – Airports as long as restaurants comply with the restrictions for food establishments above and mass transportation.
- Educational Institutions – Public, private, and charter schools only for noninstructional purposes, such as medication pickup, childcare services, providing meals, and when operating as polling places.
- Childcare – Childcare locations where no more than 10 staff and 50 children are present at a time (this provision was amended by DHS Emergency Order #6, issued March 18), residential care centers, and group homes.
- Hotels and Motels – As long as restaurants comply with the restrictions for food establishments below.
- Military and National Guard facilities.
- Law Enforcement Facilities – Including jails, secure treatment centers, and correctional facilities, and any facility operated by the Department of Corrections, and any facility used to respond to natural disasters or public health emergencies.
- State and local government facilities – Including government service centers, unless prohibited elsewhere in this order or another order.
- Facilities operated by the Wisconsin Legislature or Wisconsin Court System (while the Wisconsin Court System remains open pursuant to the Order, attention should be given to a March 17 Supreme Court Order impacting court operations and filing deadlines).
- Relief Facilities – Food pantries and shelter facilities, including day centers, for individuals and families.
- Residential Buildings.
- Healthcare – All health care facilities, including hospitals, medical facilities, home health agencies, personal care agencies, hospices, adult family homes, and pharmacies; Long-term care and assisted living facilities, as long the facility follows all current Department of Health Services' Recommendations for Prevention of COVID-19 in Long-Term Care Facilities and Assisted Living Facilities and all Centers for Disease Control recommendations; alcohol and drug treatment centers or similar facilities.
- Voting Facilities – Libraries when operating as polling places.

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