

DHS Orders and Shelter-in-Place Update

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Practice Area: Business and Corporate Law & Government Law

Late Friday the Wisconsin Department of Health Services (“DHS”) issued Emergency Order #8, which supersedes the Mass Gathering Ban previously defined in Emergency Order #5. After Governor Evers issued Executive Order #72 declaring a public health emergency on March 12, DHS issued Emergency Order #5 prohibiting “mass gatherings” of 10 or more people in the state. Included in the list were numerous exceptions which apply to businesses, non-profits, and government entities. Because there was ambiguity as to the proper application of certain exemptions, DHS provided additional clarification by superseding Emergency Order #5. The new Order maintains the prohibition of “mass gatherings” of 10 or more people in the state but offers clarity regarding certain exemptions. Included in the Emergency Order was a directive prohibiting hair salons, day spas, nail salons, barbershops, tattoo parlors, body art establishments and tanning facilities from remaining open to the public, effective 5:00 March 20. At roughly the same time, Illinois Governor J.B. Pritzker issued a shelter-in-place order late Friday for Illinois residents, raising concerns that a similar order may be imminent in Wisconsin.

This *Legal Update* reviews DHS Emergency Order #8 and attempts to provide insight as to which services would be considered “essential” in the event Governor Evers were to issue a shelter-in-place Executive Order.

DHS Emergency Order #8

As summarized in our previous legal update, DHS Emergency Order #5 prohibited “mass gatherings” of 10 or more people in the state but then exempted numerous businesses and non-profit entities. DHS Emergency Order #8 supersedes the previous order, leaving in place many of the exemptions but providing more specificity.

The new Order immediately addressed the issue of enforcement. The Order is enforceable by any local law enforcement official, including county sheriffs. Punishment for a violation remains up to 30 days imprisonment, up to a \$250 fine, or both. The term “enclosed spaced” within the definition of “mass gathering” was clarified to include “whether inside or outside.” Voluntary cancellation, closure, or limitations on the size of gatherings beyond the requirements of the Order are not only permitted, but under the new Order are “encouraged.”

The following clarifications were provided regarding specific closures:

- **Schools** – the closure directive was tightened to specify that all public and private schools in the state of Wisconsin must close for “pupil instruction and extracurricular activities.” Schools may be used for other purposes, including school board meetings, polling locations and food distribution.
- **Salons** – hair salons, barber shops, nail salons, day spas, tattoo parlors, body art establishments, and tanning facilities were ordered closed, effective 5:00 pm on Friday, March 20.

The following clarifications were provided regarding exemptions to the prohibition on "mass gatherings." Exemptions include all activities and functions "directly related" to an exempted entity.

- **Commercial and Non-Profit Entities** – office spaces (such facilities shall implement social distancing, including **having employees work remotely, as much as practicable**); manufacturing, processing, distribution, and production facilities; job centers; shelter facilities; prevocational group supportive employment; providers of veterinary care for animals.
- **Construction** – construction sites and projects, including public works and remodeling projects.
- **Energy and Telecom Infrastructure** – utilities and all entities necessary for energy production, distribution, and maintenance; telecommunication companies; Wisconsin Home Energy Assistance, Low Income Home Energy Assistance Program, and Public Benefits Energy Assistance Program offices, customer service centers, and public intake centers.
- **Financial Institutions and Services** – banks, credits unions and other depository institutions; licensed financial service providers; personnel necessary to perform essential functions at broker dealers and investment advisor offices.
- **Food Production and Distribution** – activities necessary to cultivate and distribute food including farming, livestock, and fishing; food pantries and food banks; services, supply, packaging and other providers who are necessary to maintain the safety, sanitation, and essential operation of food production; retail establishments and auctions that sell animals for production agriculture, animal feed, and agricultural equipment and parts.
- **Retail Establishments** – including gas stations and laundromats, 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 must remain closed.
- **Retail Food Establishments** – including bakeries, grocery stores, convenience stores, produce stands engaged in the retail sale of food, certified farmers' markets, and pet supplies, 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 (except for grocery stores) prohibit customers from self-dispensing all unpackaged food.
- **Breweries, Brewpubs, Wineries, Distilleries, and Alcohol Beverage Retailers, including Bars** – carryout sales of alcoholic beverages and food are allowed; customers may enter an establishment only for the purpose of ordering, pick-up and paying for food or beverage; no seating may be provided and food and drink may not be consumed on premises; delivery of alcoholic beverages to retail customers is prohibited, unless the customer first comes to the licensed or permitted premises to make payment in person, face to face; wineries holding direct wine shippers' permits may make deliveries of wine in accordance with their permit.
- **Restaurants** – remain open for **take-out or delivery service only**; customers may enter an establishment only for the purpose of ordering, pick-up and paying for food or beverage; no seating may be provided and food and drink may not be consumed on premises; must preserve social distancing of six feet between customers during pick up.
- **Transportation** – Airports, as long as restaurants comply with the restrictions for food establishments; automobile service, repair, and sale facilities; mass transportation systems, including buses, bus stations, bus stops, railroad stations, trains, and similar facilities, regardless of whether such facilities are public or private; freight rail and other transportation systems that distribute and deliver goods; taxi and private transportation services.
- **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); new Order expanded to exempt group homes, shelter care facilities, runaway homes, residential care centers for children and youth, crisis stabilization centers, secured residential care centers for children and youth, Type 2 residential centers for children and youth, juvenile correction facilities, and Type 1 and Type 2 juvenile correction facilities.
- **Lodging** – hotels and motels, as long as restaurants comply with the restrictions for food establishments and guests do not congregate in lobbies or other common areas.
- **Military and National Guard Facilities.**
- **Government and First Responders** – all first responder facilities and functions

- **Government and First Responders** – all first responder facilities and functions, including law enforcement, EMS, and firefighters; any facility or function necessary to respond to a disaster or public health emergency; all local, state and federal government facilities and functions, including, but not limited to, criminal justice and correctional facilities and functions, such as jails, secured juvenile detention facilities, Huber facilities, municipal lock-ups, state correctional institutions, and other similar facilities.
- **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).
- **Residential Buildings** – including all residential buildings, shared rental units, homeless shelters, or other similar facilities where a person usually sleeps.
- **Healthcare** – All health care facilities, including hospitals, medical facilities, home health agencies, personal care agencies, hospices, allied health providers, acupuncturists, massage therapists, chiropractors, adult family homes, dentists, blood drives and blood banks, and pharmacies (cafeterias and food service in health care facilities may remain open for staff and authorized visitors only); 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 applicable Centers for Disease Control recommendations; detoxification and alcohol or drug treatment programs and facilities; adult day care, adult day services, and supportive home care.
- **Media** – media and news organizations.
- **Voting Facilities** – except for long-term care and assisted care facilities, any location or facility used as a polling location or in-person absentee voting is exempted. If such a location or facility is prohibited elsewhere in the Order, the location or facility may remain open solely for the purpose of serving as a polling location or in-person absentee voting location.

Essential Services in the Event of Shelter-in-Place Order

As the COVID-19 situation continues to develop in Wisconsin it is also possible that the Governor may issue a "Shelter in Place Order" similar to those seen in other states (e.g., Illinois, California, and New York). Like the Governor's previous emergency orders, Shelter in Place Orders are issued at the state level and, therefore, the contents of Shelter in Place Orders will vary from state to state. Typically, a Shelter in Place Order will restrict people from all "unnecessary" gatherings. This generally means that residents are only permitted to leave their homes to go to grocery stores, pharmacies, or gas stations, and to take walks outside, so long as they follow social distance measures. However, businesses and other operations essential to the economy and public health and safety are permitted and/or required to remain operational and open for business. What is "essential" must be determined directly by the Governor and set forth in such an order, left to the decision of local governments, or a combination thereof.

While what is "essential" is left to the discretion of individual states, the Department of Homeland Security Cybersecurity and Infrastructure Agency ("CISA") has issued guidance to assist states in determining essential critical infrastructure workforce. Importantly, CISA's guidance is not binding and is merely advisory. However, CISA offers the guidance and assistance to state and local governments because "[p]romoting the ability of such workers to continue to work during periods of community restriction, access management, social distancing, or closure orders/directives is crucial to community resilience and continuity of essential functions."

According to CISA, "Essential Critical Infrastructure Sectors" include:

1. Healthcare/Public Health
2. Law Enforcement, Public Safety, First Responders
3. Food and Agriculture
4. Energy
5. Water and Wastewater
6. Transportation and Logistics
7. Public Works
8. Communications and IT
9. Other community-based government operations and essential functions
10. Critical Manufacturing
11. Hazardous Materials
12. Financial Services
13. Chemical
14. Defense Industrial Base

Even though CISA recommends that such industries remain open and operational for the duration of the COVID-19 public health emergency, CISA recommends that employees work remotely whenever possible, follow guidance from the CDC, as well as State and local government officials, regarding strategies to limit disease spread, and to follow or put in place business continuity and pandemic plans. The full report from CISA can be found [here](#).

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