

Analysis of Wisconsin's Safer at Home Order

Mar 25 2020

On March 24 the Wisconsin Department of Health Services ("DHS") issued Emergency Order #12 – Safer at Home Order (the "Order") pursuant to Executive Order #72. The order includes an overarching directive for Wisconsin residents to stay at home or their place of residence and mandates that non-essential business and operations must cease. However, the Order allows individuals to leave their homes or residences (1) for essential activities, (2) for essential government function, (3) to operate essential businesses and operations, (4) to perform non-essential minimum basic operations, (5) for essential travel, and (6) for special situations, which includes healthcare and public health operations, human service operations, and essential infrastructure.

Minimum basic operations is defined as "[t]he minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or for related functions, including where these functions are outsourced to other entities."

Importantly, if an industry is not included in the Order as essential, the Wisconsin Economic Development Corporation ("WEDC") is providing a form which may be completed to essentially request an "essential" designation.

The justification for the increased restrictions appears based on the concern that "at the current growth in the number of people infected, the number of people needing medical care due to COVID-19 will significantly exceed the amount of available healthcare resources." In addition, the Order references concern that despite prior emergency orders banning mass gathering and because social distancing is the only effective means of slowing the rate of infection, "the rates of infection continue to drastically increase necessitating additional measures to slow the rate of infection and save lives."

The Order is explicitly based on the authority provided to DHS by Executive Order #72. It took effect at 8:00 a.m. on Wednesday, March 25 and will remain in effect until 8:00 a.m. on Friday, April 24 "or until a superseding order is issued." Executive Order #72, which declares a public health emergency under Wis. Stat. § 323.10, expires on May 10 and may only be extended by Joint Resolution of the Legislature. Therefore, any desire on the part of the Governor to extend the terms of the Order beyond May 10 would require coordination with the Legislature.

The Order supersedes any local order that is in conflict. In addition, the Order remains enforceable by any local law enforcement official, including county sheriffs.

Stay at Home Order and Other Prohibitions

Overall, all individuals present within the State of Wisconsin are ordered to stay at home or at their place of residence. Family members in a single living unit or household members do not need to maintain social distancing. Homes or residences are defined to include hotels, motels, shared rental units, dormitories, shelters, and similar facilities.

Non-essential business and operations “with a facility in Wisconsin” are required to cease all activities located within Wisconsin. However, “minimum basic operations” may continue as well as activities performed from one’s own home or residence. Door-to-door solicitation is expressly prohibited, even for essential businesses or operations.

All public and private gatherings of **any** number of people that are not part of a single household or living unit are prohibited. This would appear to supersede the previous definition of “mass gathering” articulated in DHS Emergency Order #8, which allowed mass gatherings of less than ten individuals.

Public and private K-12 schools and public libraries remain closed, except for facilitating distance learning or virtual learning. Places of public amusement and activity are closed, whether indoors or outdoors, and includes playgrounds, country clubs and gyms/fitness centers. Salons and spas, previously prohibited by DHS Emergency Order, remain ordered closed.

Exceptions to the Order

While the above provisions of the Order seem wide-ranging, the order exempts (1) entire industries under special situations, (2) essential activities, (3) essential governmental functions, (4) essential businesses and operations, (5) minimum basic operations (defined above), and (6) essential travel. It is important that businesses, government agencies, and other service-related industries understand what is allowed to continue under the Order to maintain basic services.

Special Situations. Three core industries are completely exempt under the Order – healthcare and public health operations, human services operations, and essential infrastructure. Healthcare and public health operations “shall be broadly construed to avoid impediments to the delivery of healthcare.” Areas that are specifically exempted that may not be self-apparent include (1) manufacturers, technicians, logistics, and warehouse operators and distributors of medical equipment (including testing materials, laboratory supplies, cleaning, sanitizing disinfecting or sterilization supplies, and tissue and paper towel products); (2) dental offices; (3) biotechnology companies (including operations, research and development, manufacture, and supply chain); (4) healthcare information technology companies; (5) eye care centers, including those that sell glasses and contact lenses; and (6) entities that transport and dispose of medical materials. In addition, broad language is included exempting “other healthcare facilities and suppliers and providers of any related or any ancillary healthcare services.” Veterinary care is specifically included within the healthcare exception.

Human service operations is also broadly defined, with the intent of being construed “broadly to avoid any impacts to the delivery of human services.” Long-term care and assisted living facilities, residential settings and shelters for adults, seniors, children, victims of domestic abuse, transitional facilities, home-based settings, adult day care, field offices that provide and help to determine eligibility for basic needs, and adoption agencies are all included within human services.

Essential infrastructure “shall be construed broadly to avoid any impacts to essential infrastructure” and includes food production, distribution, fulfillment centers, storage facilities, marinas, sales, building management and maintenance, airport operations, operation and maintenance of utilities, distribution centers, oil and biofuel refining, roads, highways, railroads, and public transportation, ports, cybersecurity operations, flood control, solid waste and recycling collection and removal, and internet, video and telecommunications systems.

Construction is listed and includes, *but is not limited to*, construction in response to the public health emergency and construction relating to public works, schools, essential business and operations, and housing (except that optional or aesthetic construction should be avoided).

Essential Activities. Individuals may leave their home or residence to perform tasks essential to their health and safety or to the health and safety of their family, household members, or pets. They may also leave to obtain necessary services or supplies or to deliver those services or supplies to others. What one may leave to obtain is broadly defined as “any other household consumer products, and products necessary to maintain the safety, sanitation, and essential operation of residences.” Outdoor activities are permitted, including visiting public and state parks. Finally, individuals are permitted to “care for a family member, friend, or pet in another household.”

Essential Governmental Functions. These functions are defined as “all services provided by the State, tribal, or local governments needed to ensure the continuing operation of the government body and provide and support the health, safety, and welfare of the public.” Importantly, “[e]ach government body shall determine its Essential Government Function, if any, and identify employees and contractors necessary to the performance of those functions.” The Wisconsin Supreme Court maintains the authority to “limit or adjust” court functions and the Wisconsin Legislature is allowed to continue to meet or conduct business. Government bodies are encouraged to follow the Wisconsin Department of Justice’s guidance allowing virtual meetings for purposes of conducting most board business.

Essential Business and Operations. While the industries listed below are exempt from the Order, it nevertheless requires compliance with Social Distancing Requirements and, to the greatest extent possible, are encouraged to “use technology to avoid meeting in person.”

In addition to the above categories, the following industries are considered “essential”:

- CISA List. Any business identified in the U.S. Department of Homeland Security Agency ("CISA") memorandum on identification of essential critical infrastructure workers during COVID-19 response. The full CISA memo can be found [here](#).
- Stores that sell groceries and medicine (including grocery stores, bakeries, pharmacies, farm and produce stands, supermarkets, food banks and food pantries, convenience stores, and other establishments engaged in the retail sale of "any other household consumer products"). However, the section does not apply to a business that is otherwise closed but is engaged in the ancillary "sale of food or beverage," e.g. the cafeteria at a museum.
- Food and beverage production, transport, and agriculture (including animal shelters, boarding, rescues, kennels, and adopting facilities, and farm and agriculture equipment, supplies and repair services).
- Restaurants. May remain open for food take-out or delivery service only. Customers may enter the above establishments only for the purpose of ordering, pickup and paying for food or beverages.
- Bars (including breweries, brewpubs, wineries, distilleries, and alcohol beverage retailers). While carryout sales are allowed, delivery of alcohol beverages to retail customers is prohibited. Wineries holding direct wine shippers' permits may continue making deliveries.
- Child care settings. DHS Emergency Order #6 remains in effect, limiting the number of children on site to 50 and the number of employees to 10. Such settings are required to prioritize care for "tier 1" families, which include employees, contractors, and other support staff working in health care.
- Charitable and social services.
- Weddings, funerals, and religious entities, including funeral establishments (provided a gathering does not exceed 10 or more people in a room or confined space).
- Media (including newspapers, television, radio, and other media services).
- Gas stations and businesses needed for transportation (including gas stations and auto supply, repair, and sales).
- Financial institutions and services.
- Hardware and supplies stores.
- Critical trades (including plumbers, electricians, carpenters, laborers, sheet metal, iron workers, masonry, and "other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences").
- Mail, post, shipping, logistics, delivery, and pick-up services (including businesses that ship or deliver "groceries, food, beverages, goods or services to end users or through commercial channels").
- Laundry services.
- Supplies to work from home.
- Supplies for essential businesses and operations and essential governmental functions (defined as "[b]usinesses that sell, manufacture, or supply other Essential Businesses and Operations and Essential Governmental Functions with the support or supplies necessary to operate").
- Transportation (including airlines, taxis, and transportation network providers, such as Uber and Lyft).
- Home-based care and services (including nanny services).
- Professional services. While professional services such as legal, accounting, insurance, and real estate are exempted, the Order includes a directive that such services shall, to the greatest extent possible, use technology to avoid meeting in person.
- Manufacture, distribution, and supply chain for critical products and industries (including pharmaceutical, technology, biotechnology, healthcare, chemicals and sanitation, waste pickup and disposal, agriculture, food and beverage, transportation, energy, steel and steel products, petroleum and fuel, mining, construction, national defense, communications, and products used by other Essential Governmental Functions and Essential Businesses and Operations).
- Critical labor union functions.
- Hotels and motels (swimming pools, hot tubs, and exercise facilities must remain closed and guests are prohibited from congregating in lobbies or other common areas).

areas).

- Higher educational institutions (only for purposes of facilitating distance learning, performing critical research, or performing essential functions as determined by the institution).
- WEDC designated businesses. Businesses may apply to WEDC requesting a designation as “essential.”

Essential Travel. The following is permitted under the Order: (1) any travel related to the above essential services; (2) travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons; (3) travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, or any other related services; (4) travel to return to a place of residence from outside the jurisdiction; (5) travel required by law enforcement or court order, including to transport children pursuant to a custody agreement; and (6) travel required for non-residents to return to their place of residence outside Wisconsin.

At this time, DHS is not requiring that those engaged in essential travel carry “papers” for purposes of proving the essential nature of travel. However, employers may consider preparing such documentation in the event such proof is required.

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