

MEMORANDUM

To: Governors' Offices

From: National Governors Association

Date: March 23, 2020

Re: Overview of State Actions on Business Closure and Personal Movement Restrictions in Response to COVID-19

Executive Summary

As the number of COVID-19 cases increases, governors are taking action to limit the spread of this disease. Business closures, designations of “essential” businesses, and restrictions on movement (e.g., stay at home/shelter in place orders, curfews, etc.) are measures that can be taken at the state or local level to protect individuals from public health threats while ensuring continuity of essential functions and critical workforces.

Governors possess significant powers and authority relating to the implementation of business closures, designations of businesses, and personal movement restrictions during emergency periods. Still, legal challenges to business closures may arise, especially as the duration of closure continues. Issues may also emerge based on inconsistent designations and/or enforcement of essential versus nonessential businesses. In addition, restrictions on movement may also give rise to a number of legal considerations. While courts have not specifically addressed legal challenges in each of these aforementioned areas within the context of COVID-19, states should be prepared to proactively consider these issues.

The purpose of this memo is to share information about how governors are addressing freedom of movement in their states in response to COVID-19. Given these exigent circumstances and shifting dynamics, NGA recommends that governors, their advisors, and other state officials work closely with legal counsel and private sector partners when:

- 1) Considering and implementing business closure orders and personal movement restrictions;
- 2) Classifying “essential” businesses and/or personnel;
- 3) Coordinating with federal partners on guidance;
- 4) Collaborating with local partners on state-supported and locally implemented closures, where appropriate; and
- 5) Coordinating and collaborating with stakeholders upon the lifting of closures and designations.¹

¹ NGA would like to extend our thanks and appreciation to the Network for Public Health Law (NPHL) - Western Region Office, Professor James G. Hodge, Jr., of Arizona State University Law, and Professor Polly Price of Emory Law for their consultations and writings in support of this memorandum. This memorandum draws from their respective analyses and conclusions.

Background

Under the 10th Amendment of the U.S. Constitution, states retain “police powers” to act in the interests of health, safety, and general welfare of their citizens.² Additionally, when facing compelling hazards, states have a history of implementing either state-driven or state-supported, locally-led policy actions to protect the public and balance individual (and other) liberties.

The purpose of this memorandum is to share information about how governors are addressing freedom of movement in their states in response to COVID-19—particularly regarding business closures and mandates to stay home (e.g., stay at home/shelter in place orders, curfews, etc.). As business operations and personal movement are adjusted, governors can ensure that measures they impose to protect people are narrowly tailored and are taken with sufficient justification.

This memorandum is structured accordingly: **Part I** provides an overview of state actions on business closure and personal movement restrictions, as well as core components of these orders. **Part II** reviews issues for states to consider in making these orders, including defining “essential” business and partnering with the private sector. **Part III** reviews relevant business closure and shelter in place case law. In addition, **Appendix I** provides a list of State and Local Designations of Essential Businesses (including links to executive actions). **Appendix II** provides considerations for certain vulnerable populations during restrictive movement periods. Please note there is a supplemental **Reference Chart** that accompanies this memorandum which includes specific “essential business” language from states with business closures orders currently in place in response to COVID-19.

In addition to conducting legal research and analysis, NGA also vetted and/or consulted with leading legal experts when developing this memorandum.³ This memorandum is not intended to provide legal advice. States should consult their legal counsel and Attorney General’s office and reference relevant statutes and case law for state-specific procedures and guidance.

I. Overview of State COVID-19 Administrative Orders for Business Closure and Personal Movement Restrictions

As the number of COVID-19 cases increases, governors are taking action to limit the spread of this disease. Business closures, designations of “essential” and/or “nonessential” businesses, and restrictions on movement are measures that can be taken at the state level to protect individuals from public health threats while ensuring continuity of essential functions and critical workforces.

As of March 23, 2020, at least thirty-seven governors have taken action to close or recommend closure of nonessential businesses.⁴ At least twenty-four governors have taken formal executive action to implement statewide business closures that designate essential businesses.⁵ In addition, at

² U.S. CONST. amend. X; See also, Elizabeth Joh, *Yes, States and Local Governments Can Close Private Businesses and Restrict Your Movement*, POLITICO, (Mar. 18, 2020), available at <https://www.politico.com/news/magazine/2020/03/18/states-police-power-coronavirus-135826>.

³ NGA consulted with Professors Hodge and Price in developing this memo. James G. Hodge, Jr., is the Peter Kiewit Foundation Professor of Law at the Sandra Day O'Connor College of Law and Director of the Center for Public Health Law and Policy at Arizona State University. Polly Price is a professor at Emory University School of Law and specializes in global health.

⁴ Please see NGA’s state tracker on *Statewide Closure of Non-Essential Businesses* accessed here: <https://www.nga.org/coronavirus/#glance>. This list is updated as orders are issued.

⁵ Please see Appendix I for a list of states, links to executive orders, and date of orders. The Reference Guide that accompanies this memo includes language from orders defining “essential business.”

least twenty states have already taken or announced imminent executive action to formally require residents to stay home in response to COVID-19.⁶ This is a quickly evolving landscape, and governors continue to announce executive action in these areas.

These statewide orders issued by governors vary by state, but generally require residents to avoid all nonessential outings, group gatherings, and public settings. Some orders mandate business closures and restrictions on personal movement; others focus solely on either business closures or stay at home orders. Orders also differ on how they define essential or nonessential businesses. The following section outlines core components (or “themes”) of these orders and provides an overview of state implementation and enforcement efforts.

a. Core Components

Governors possess significant powers and authority relating to the implementation of business closures, the designations of businesses, and restricting movement during emergency periods. During emergency conditions, governmental entities are empowered to delineate the continuity of essential functions and critical workforces in certain communities. Such delineation is implemented through administrative actions (e.g., executive order, agency directives), including directives on:

- Stay at home (or place of residence) or work from home orders:
 - Exceptions for individuals leaving home for health and safety, necessary supplies and services, for outdoor activity, to take care of others, etc.
- Social distancing guidance/limits on public gatherings:
 - Reinforce the current state operating position on the number of individuals allowed to gather in one place (e.g., President Donald Trump’s Administration’s guidance to avoid gatherings of 10 or more people).
- Business closure decisions:
 - Exceptions for ensuring continuity of operations and/or certain types of work;
 - Incorporating by reference the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency’s Memorandum on Identification of Critical Infrastructure Workers During COVID-19 Response;
 - Acknowledgment of any controlling local “essential” business classification;
 - Flexibility for additional services or operations to be added at a later time; and

⁶ As of March 23, 2020, at least 20 states have either announced plans to implement or already implemented statewide orders for residents to stay home. [California](#) issued a Stay at Home Executive Order on March 19, 2020. [Connecticut](#) issued a "Stay Safe, Stay Home" executive order directing all non-essential workers statewide to work from home, effective March 23rd. [New York](#) issued the New York State on PAUSE on March 20, 2020. [Illinois](#) issued a Stay at Home Order on March 20, 2020. [Oregon](#) Announced a Stay Home, Stay Healthy Order on March 20, 2020, but has not released a formal order. [New Jersey](#) issued a Stay at Home Order on March 21, 2020. [Ohio](#) issued a Department of Health Director’s Stay at Home Order on March 22, 2020. [Louisiana](#) issued an Additional Measures for COVID-19 Stay at Home order on March 22, 2020. [Delaware](#) issued a Stay at Home Order on March 22, 2020. [Indiana](#) issued a Stay at Home Order on March 23, 2020. [Massachusetts](#) issued a Stay at Home Advisory on March 23, 2020. [Michigan](#) issued a Stay Home, Stay Safe Order on March 23, 2020. [Ohio](#) issued a Stay at Home Order on March 23, 2020. [Pennsylvania](#) issued a Stay at Home Order for certain counties on March 23, 2020. [West Virginia](#) issued a Stay at Home Order on March 23, 2020. [Georgia](#) issued a shelter in place order for certain individuals with increased risk for complications from COVID-19 on March 23, 2020. [Washington](#) also issued a Stay Home Stay Healthy Order on March 23, 2020. States that have announced implementation of stay at home guidance include [Hawaii](#), [New Mexico](#), and [Wisconsin](#). A number of localities have also issued orders for residents to stay home, including San Francisco, St. Louis, New Orleans, San Miguel County (CO), Athens-Clarke County (GA). Please note this list is not exhaustive.

- Continuing to encourage essential workers to employ social distancing practices.

These directives also include the following:

- Timelines for when the directive goes into effect;
- Timeline for how long such order will stay in effect, if appropriate;
- Statutory references for authority;
- Reference to enforcement mechanisms in other statutes; and
- Satisfying any public notice or administrative requirements (which may look different under emergency declarations).

As noted above, some orders include both business closure and stay at home provisions, while others address those issues in separate actions (or have issued an order for one and not the other). Some specifically delineate essential activities, essential government functions, and essential business operations, while others define what constitutes nonessential services. In addition to drafting variances, some outline considerations for homeless populations, vulnerable (e.g., elderly, infirm) individuals, domestic violence concerns, prohibited activities, continued social distancing requirements, and enforcement. Some orders have been issued with joint statements from state legislative leadership and local leaders (e.g., mayors, county commissioners).

b. Implementation and Enforcement

States are exercising their police powers to reduce social interaction by encouraging or placing restrictions on movement. As mentioned above, these restrictions may include social distancing, business closures, shelter in place/stay at home orders, curfews, limiting the number of individuals at a social gathering, isolation/quarantine, among others. With the unprecedented emergency actions taken by 55 states and territories for COVID-19, it is important to understand these social distancing tools, how these orders are enforced, and potential legal considerations. This section briefly discusses implementation and enforcement of business closures, shelter in place orders, and curfews broadly.

Governors have taken a number of actions affecting businesses in their state, including temporarily closing establishments where mass gatherings take place (e.g., gyms, some retail stores, bars, restaurants), and thereby signaling or requiring a distinction between essential and nonessential businesses across their states. States that have outlined essential businesses designations to date have, in their orders, generally allowed for potential addition to the initial list of essential businesses and workers as the situation continues to evolve. Incorporating this type of flexibility provides the opportunity for governors and state leaders to actively engage their business community in feedback and dialogue on what constitutes essential business in their state. Governors can continue to work with localities and private sector partners on clearly communicating business closure information.

For the purpose of this memo, the terms shelter in place and stay at home will be used in conjunction. Shelter in place orders for residents to stay in their current locations for a set period of time are often used during weather-related events (e.g., tornadoes, hurricanes, snowstorms), biological, chemical, radiological incidents, and security threats.⁷ Such measures have been shown to be effective in reducing morbidity and mortality during chemical spills. Models reveal their

⁷ James G. Hodge et al., *Efficacy in Emergency Legal Preparations Underlying the 2014 Ebola Outbreak*, 2 TEX. A&M L. REV. 353, 376 (2015).

efficacy in preventing exposure to airborne agents during biological events.⁸ Shelter in place orders have been the historical mechanism for urging residents to stay put, but in response to COVID-19, many governors have issued orders to stay at home. Other governors continue to call on residents to voluntarily stay home. These orders to stay home or shelter in place are intended to work in tandem with other calls for social distancing and limitations on social gatherings.

Curfews are another social distancing tool. Currently, most curfews in response to COVID-19 are locally implemented and apply either to all ages or are limited to juveniles.⁹ Some states have encouraged residents to follow a voluntary curfew, while one territory has implemented a mandatory curfew.¹⁰ Localities vary in their use of police to enforce curfews. Most jurisdictions have not specifically stated what the penalty is for failure to comply, although some have stated that individuals could face penalties of a misdemeanor charge or fine.¹¹

Enforcement issues arise concerning business closure and stay at home/shelter in place orders. Statutory penalties for violating administrative orders may include civil penalties (e.g., fines) or criminal penalties (e.g., imprisonment). Specific to COVID-19 business closures, some states have allowed for mandatory closures for businesses that do not comply with policy. Some local law enforcement has noted that educating and informing the public of these orders is their main priority (as opposed to enforcing civil or criminal penalties).¹² As such, voluntary compliance is essential. Communication will continue to be key, as well as consistency of that communication.

To amplify this message, governor's offices can remind the public to comply with police and rescue personnel in order to protect their health. Without voluntary compliance, police resources are not well used and endanger officers who have to issue citations or otherwise interact with people who are defying a stay at home/quarantine/gathering ban. Some local law enforcement has also noted that they have increased police presence to ensure high visibility—allowing more opportunity to educate residents and protect businesses from possible looting.¹³ States should continue to coordinate with their state law enforcement agency as well as local law enforcement to ensure that enforcement efforts are clear and consistently applied.

II. State Considerations around Essential Business Designations During COVID-19

To help mitigate the spread of COVID-19, governors have taken a number of actions affecting businesses in their state, including, but not limited to, closing establishments where mass gatherings take place (e.g., gyms, some retail stores, bars, restaurants), and thereby signaling or requiring a

⁸ *Id.*

⁹ Curfews have been implemented in a number of localities including Gadsden Etowah County, AL, Little Rock, AR, Miami, FL, Palm Beach, FL, Laurens County, GA, Kauai, HI, Portland, ME, Binghamton, NY, Hoboken, NJ, Monroe, NC, and Columbia, SC. Please note this is not an exhaustive list.

¹⁰ [New Jersey](#) issued a voluntary statewide curfew on March 16 from 8 p.m. to 5 a.m. with the exception of essential travel. This is in effect until the foreseeable future. [Puerto Rico](#) enacted an island-wide overnight curfew from 9 p.m. to 5 a.m. through March 31. Violators could face a fine of up to \$5000 or six months in jail.

¹¹ *Vicksburg mayor announces curfew, other measures amid COVID-19 concerns*, WAPT.com (Mar. 20, 2020), <https://www.wapt.com/article/vicksburg-mayor-announces-curfew-coronavirus/31882653#>.

¹² Haaziq Madyun, *Alameda sheriffs explain how they will enforce shelter-in-place*, KRON 4 NEWS (posted: Mar 17, 2020 / 05:59 PM PDT), <https://www.kron4.com/news/bay-area/alameda-sheriffs-explain-how-they-will-enforce-shelter-in-place/>.

¹³ Zachary Clark, *Enforcement of shelter-in-place order not a priority*, THE DAILY JOURNAL, (Mar 17, 2020 Updated Mar 18, 2020), https://www.smdailyjournal.com/coronavirus/enforcement-of-shelter-in-place-order-not-a-priority/article_47c32262-6803-11ea-ae2a-eb865645a309.html.

distinction between essential and nonessential businesses across their states. Federal and state governments have issued guidance and/or orders to address such distinctions. In addition, private sector partners are flagging potential clarifications that may assist efforts to suppress the spread of COVID-19 while ensuring continuity of essential operations. Given the dearth of case law on essential versus nonessential business designations, NGA recommends that governors, their advisors, and other state officials work closely with legal counsel when considering and implementing business designations. State officials may also want to consult with private sector partners to fully anticipate secondary and tertiary impacts of the designations. Communicating clear and consistent guidance around essential and nonessential business designations at the outset of the order may help mitigate potential issues down the road.

a. Federal Guidance and Jurisdictional Classification of Essential Workers

Delineating essential workers that conduct a range of operations and services that are essential to continue critical infrastructure viability is a crucial determination for governor's offices. As discussed below, federal officials have supported defining critical infrastructure through guidance, which certain states have acted on.

Federal officials have sought to support states through official guidance from the Department of Homeland Security (DHS). The Cybersecurity and Infrastructure Security Agency (CISA) executes the Secretary of Homeland Security's responsibilities as assigned under the Homeland Security Act of 2002 to provide strategic guidance, promote a national unity of effort, and coordinate the overall federal effort to ensure the security and resilience of the country's critical infrastructure. On March 19, 2020, CISA promulgated a Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, which contains Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response.¹⁴ The guidance contains considerations for states and identifies a list of essential critical infrastructure workers, developed in coordination with other federal agencies and the private sector, as a guide to help state policymakers ensure continuity of essential functions and critical workforces when implementing COVID-related restrictions in certain communities (e.g., shelter in place).

CISA identifies the following 14 sectors as essential critical infrastructure:¹⁵

1. **Healthcare/Public Health** (e.g., physicians, nurses, pharmacy, workers providing testing/clinical research, medical equipment/PPE manufacturers, funeral homes, food shelters, community public health workers, etc.)
2. **Law Enforcement, Public Safety, and First Responders** (e.g., police, 911, corrections, fusion center, digital emergency service operators, etc.)
3. **Food and Agriculture** (e.g., groceries, restaurant carry-out, farm workers, workers essential for food assistant programs, agricultural equipment manufacturers, etc.)
4. **Energy** (e.g., electricity, nuclear plants, petroleum workers, gas stations, truck stops, natural and propane gas workers, etc.)
5. **Water and Wastewater** (e.g., water authorities, wastewater treatment facilities, chemical disinfectant suppliers, etc.)

¹⁴ Memorandum from Christopher C. Krebs, Director, Cybersecurity and Infrastructure Security Agency (CISA) On Identification Of Essential Critical Infrastructure Workers During Covid-19 Response (Mar. 19, 2020) available at <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>.

¹⁵ *Id.*

6. **Transportation and Logistics** (e.g. maintenance and repair technicians, truck and rest stop workers, mass transit workers, truck drivers, maritime ports, etc.)
7. **Public Works** (e.g., dams, bridge workers, water and sewer main breaks, plumbers, electricians, exterminators, waste removal etc.)
8. **Communication and Information Technology** (e.g., maintenance of public/private communications infrastructure, radio, television, media service, customer service, information technology command centers, cybersecurity staff, janitorial/cleaning personnel, etc.)
9. **Other Community-based Government Operations and Essential Functions** (e.g., security staff, elections personnel, weather forecasters, digital systems infrastructure, educators, hotel workers where hotels are used for COVID-19 mitigation, etc.)
10. **Critical Manufacturing** (manufacturing of materials and products needed for medical supply chains, transportation, energy, communications, food and agriculture, chemical manufacturing, nuclear facilities, the operation of dams, water and wastewater treatment, emergency services, and the defense industrial base)
11. **Hazardous Materials** (e.g., nuclear, medical waste, hazardous material response/clean up, maintenance of digital systems, etc.)
12. **Financial Services** (e.g., workers that process and maintain systems for processing financial transactions and services, ATMs, financial operations, security operations centers, etc.)
13. **Chemical** (e.g., chemical and industrial gas supply chains, workers who support transportation of these materials, maintenance of facilities, etc.)
14. **Defense Industrial Base** (e.g., U.S. military/subcontractors including aerospace, mechanical and software engineers, manufacturing/production workers, IT support, security staff, security personnel, intelligence support, aircraft and weapon system mechanics, etc.)

Such a list can also inform critical infrastructure decision-making at the state level to determine the sectors, sub-sectors, segments, or critical functions that should continue normal operations, appropriately modified to account for the Centers for Disease Control (CDC) workforce and customer protection guidance.

Given the dynamics of this fast-moving issue, Appendix I (“State and Local Designations of Essential Businesses”) highlights each state to date that NGA has been able to identify as having defined essential businesses in their orders. The Reference Guide that accompanies this memo includes specific language from orders defining “essential business.” In addition to states, localities have also sought to identify essential workers. For a more comprehensive list of essential designations from sample cities, please see Appendix I.

b. State and Local Coordination

As noted previously, localities may implement business closure orders absent state-wide mandates.¹⁶ The special powers municipalities and counties have during emergencies are usually specified in state statutes. County and municipal attorneys will likely need help where business closures are only “recommended” by the governor, leaving local jurisdictions to make their own decisions. For example, a resident may travel to different parts of the same metropolitan area to find some restaurants under restrictions on limited/indoor dining and others not. This may compel

¹⁶ Legal experts note that overlapping authority and confusion about lines of authority within a state can potentially hinder any state-wide action plan.

confusion among local officials, restaurant owners, and patrons as businesses within the city limits may be affected disproportionately to adjacent areas. The same confusion may be applied for locally implemented shelter in place/stay at home orders.

Legal experts note that a state-wide, uniform policy provides political cover for local jurisdictions. In the absence of state-wide orders, governors may consider providing uniform rules for metro areas above a certain population. The needs of rural areas might be different and could be addressed by limiting closure orders based on population density. This may help local government leaders with their jurisdictional needs and decisions. As noted, state officials should continue to coordinate and communicate with local leadership on this issue.

c. Private Sector Partnership

States are seeking opportunities to collaborate with private sector partners when 1) considering and implementing business closures; 2) classifying “essential” and/or “nonessential” businesses; and, eventually, 3) coordinating and collaborating with stakeholders upon the lifting of closures and designations when it is determined in the public interest to do so.

In collaborating on implementing business closures and classifying essential businesses or sectors, private sector entities seek clarity, require as much business certainty as realistically possible, and can be valuable partners in ensuring the continuity of essential functions and critical workforces. In addition to the above CISA guidance, the following entities can be valuable partners in identifying businesses or sectors to classify as essential, given their deep knowledge of essential functions across sectors, and in efficiently and effectively communicating and implementing business closure policies:

- State Economic Development Agency
- State Economic Development Organization(s)¹⁷
- Chambers of Commerce
- State Workforce Board Private Sector Membership

States that have outlined essential businesses designations to date have, in their orders, allowed for potential additions to the initial list of essential businesses and workers as the situation continues to evolve. Incorporating this type of flexibility provides the opportunity for governors and state leaders to actively engage their business community in feedback and dialogue on what constitutes essential business in their state. It is advised that governor’s offices partner with their state economic development organizations’ leadership to develop statewide essential business designations in accordance with the CISA guidelines. What constitutes essential business may differ based on the industry mix, resources, and other economic factors unique to each state; the state’s economic development organization leaders are well-positioned to identify any additional business sectors that ought to be deemed essential in addition to those outlined in the CISA guidelines.

Governors can then establish a feedback loop with business leaders on essential business designations via chambers of commerce and the private sector members of the state and local

¹⁷ A number of states have, in addition to the state agency, an existing public-private partnership for economic development (e.g., [Delaware](#), [New Jersey](#), [North Carolina](#), [Virginia](#), [Wisconsin](#)). In many of those (e.g., [Florida](#), [Indiana](#)), the governor already chairs or co-chairs with a private leader the partnership, which may be labeled a variety of ways including as an “ED authority” or “ED corporation”.

workforce boards. Through these entities, the private sector can provide feedback on the comprehensiveness of essential business designations proposed by the state and identify any gaps, such as missing entities that are critical to the supply chain for a designated essential good or service. For example, as transportation occupations are recognized as essential to the transport of food and healthcare supplies, support functions for transportation workers will need to also be deemed essential, such as rest stops for long-haul truck drivers. Private sector feedback on essential business designations should be immediately sought and quickly incorporated should additional needs for designated essential businesses be identified.

Throughout the crisis response period and particularly in the event of significant limitations to or closures of business operations, the governor's office and state economic development organization will need to clearly communicate regulations and available relief resources to impacted businesses. Several states quickly stood up websites that lay out current regulations and direct businesses to a variety of local, state and federal resources that can support impacted businesses and workers.¹⁸ Through these platforms and other public communication channels, governors should encourage small businesses in their state to seek available federal resources such as US Small Business Administration Economic Injury Disaster Loans (EIDLs).¹⁹

Governors may also consider offering state-funded no- or low-interest loans for impacted businesses through their state economic development organizations. It is important that governors ensure the clear communication of available resources through the state economic development organization and through private sector partners in chambers of commerce and industry associations, including resources that are leveraged through private business and nonprofits.^{20 21} As such a list is developed, any businesses or nonprofits able to provide such relief must, in turn, be added to the list of designated essential businesses if they are not already included, and should be prioritized for financial relief, as well.

During the crisis response period, governors may also establish public-private partnerships that lay the groundwork for a strong economic recovery as closures and designations are lifted. One way governors can foster public-private partnerships for the provision of resources and leverage expertise to response and recovery efforts is by establishing a State Disaster Relief Fund (DRF). Through this type of fund, private funds are resourced in order to meet unmet needs. Governors may wish to publicly appoint a recognized business leader to chair this fund in order to bring credibility, executive experience, and stewardship to the recovery effort. This fund also offers external and internal donors to a single resource for financial contributions, to maximize effective

¹⁸ For example, in [California](#), [Maryland](#), [New Jersey](#), and [New York](#), the state's economic development organization set up online information pages for the business community and contact points for questions. [New Hampshire](#) and [Washington State](#) have additionally required state insurance offices to address business insurance questions on their websites, to improve transparency of information available to impacted businesses.

¹⁹ United States Small Business Administration Disaster Loan Assistance, (accessed Mar. 23, 2020) available at <https://disasterloan.sba.gov/ela/Information/EIDLLoans>.

²⁰ For example, [Massachusetts](#) established a \$10 million Small Business Recovery Loan Fund offering up to \$75,000 per business, and [New Mexico](#) established a COVID-19 business loan guarantee program and zero interest business loans from the New Mexico Economic Development Department.

²¹ For example, in Washington, the governor's webpage on COVID-19 resources for businesses and workers notes that "the state is working to compile a larger list of local bankers, financial associations, telecoms, utilities and major employers that may be able to provide relief." COVID-19 Resource List for Impacted Washington Businesses and Workers (accessed Mar. 23, 2020) available at <https://www.governor.wa.gov/issues/issues/covid-19-resources/covid-19-resources-businesses-and-workers>.

stewardship of funds. This individual, as well as private sector leadership from chambers of commerce and workforce boards, should also be partners in the development of a long-term community recovery plan, to ensure that such a plan accurately assesses the long-term impacts of COVID-19 on businesses; coordinates volunteer goods and services, including those provided by the private sector; and coordinates to meet the unmet needs of businesses affected by COVID-19 that may be ineligible or insufficiently supported via state or federal resources.²²

III. Relevant Case Law

Governors possess significant powers and authority relating to the implementation of business closures, the designations of businesses, and personal movement restrictions during emergency periods. Still, legal challenges to business closures may arise. Issues may also emerge based on inconsistent designations and/or enforcement of essential v. nonessential businesses. In addition, restrictions on movement (e.g., stay at home/shelter in place orders, curfews) may also give rise to legal considerations. Legal experts note that in addition to the case law referenced in this section, legal challenges in this area may also include the following: equal protection concerns, due process issues, regulatory takings, right to travel violations, local home rule v. state police powers debates, dormant commerce clause issues, etc. While courts have not specifically addressed legal challenges in these aforementioned areas within the context of COVID-19, states should be prepared to proactively consider these issues.

a. Business Closure Precedent

Businesses may eventually seek to litigate to remain open, but limited case law would suggest that, depending on the entity, they are likely to be rejected by courts upholding justifiable community restrictions.²³ Case law and expert consultation suggest that potential shorter-term rights violations resulting from business closures would not likely outweigh government interests in health and safety through closures.^{24, 25} While modern incidents of mandated business closures at the state and local level are unprecedented, the legal foundation of business closures for public health interests derives from older nuisance laws. Limited case law has generally upheld state interests in closures during other exigent public health moments. In fact, according to our understanding, litigation to maintain business functions against such executive orders in public health emergency contexts is rare.²⁶

As stated, the legal foundation of business closures is historically grounded in police powers and nuisance theory.²⁷ Police powers have been addressed in previous NGA memoranda and are not the focus of this memorandum.²⁸ Nuisance is divided into two types: private nuisance and public

²² International Economic Development Council, *Leadership in Times of Crisis: A Toolkit for Resilience and Recovery* (March 2015) available at <https://gonm.biz/uploads/documents/IEDC-Leadership-in-Times-of-Crisis-Toolkit.pdf>.

²³ Memorandum from The Network for Public Health Law, Western Region on Social Distancing and Other Legal Issues Re: COVID-19 to the National Governors Association (Mar. 20, 2020).

²⁴ *Id.*

²⁵ Lawrence O. Gostin et al., *Pandemic Influenza: Ethics, Law, and the Public's Health*, 59 ADMIN. L. REV. 121, 164 (2007).

²⁶ Memorandum from The Network for Public Health Law, Western Region *supra* note 23.

²⁷ *Id.*

²⁸ Memorandum from the National Governors Association on Overview of State Isolation and Quarantine Authority and Enforcement Powers to Governors' Offices (Mar. 16, 2020).

nuisance.^{29, 30} As applied to exigent public health circumstances, courts have held that so long as government follows statutory or regulatory procedures, it may use nuisance theory in interests of protecting the community's health.³¹ For example, in *Summit County Board of Health v. Pearson*, the court held that the county health board has the authority to declare a public health nuisance and order a closure as long as its supported by sufficient evidence. In this case, the county board's administrative hearing with testimony from health department inspectors and witnesses was enough to meet that threshold. Additionally, the court noted that members of county health boards are considered to have a degree of expertise in making these decisions by virtue of their appointment to the health board.

In other exigent public health situations, businesses in vulnerable geographical areas have been ordered or encouraged to close, with individuals either sheltered in place or evacuated. For example, in hurricanes, earthquakes, wildfires, floods, snowstorms, and riot situations, business operations are disrupted and potentially suspended for days or weeks, resulting in closures until the situation has resolved and restrictions are lifted.³² However, neither NGA nor consulted legal experts have identified case law within hurricane, flooding, wildfire, earthquake, riot settings, etc., which suggests litigation to maintain business functions is rare historically.

While business challenges to restrictions during emergencies are historically rare, other exigent public health circumstances have raised challenges. During the height of the HIV/AIDS epidemic, certain jurisdictions limited and/or closed bathhouse operations to help address the spread of HIV.³³ In response, bathhouse operators filed suit, arguing that such measures violated patrons' rights to associate for social, recreational, and political reasons, which courts largely rejected.³⁴

Additionally, not only businesses, but restricted residents may also challenge closure measures. For example, during the 1918 Spanish Flu epidemic, in Arizona, residents sought to restrain and enjoin the local city board of health and city officers from enforcing a health order to close schools and other gathering places" for an undeterminable amount of time.³⁵ The regulation found that, during the time of emergency, those places of business were a public nuisance, and also made it unlawful for gatherings for two or more persons in post offices, banks, stores, meat market or other business houses, etc. in the city and surrounding vicinity.³⁶

²⁹ Richard Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*. THE JOURNAL OF LEGAL STUDIES Vol. 8, No. 1 (Jan., 1979), pp. 49-102, available at <https://www.jstor.org/stable/724047?seq=1>.

³⁰ A public nuisance is when a person unreasonably interferes with a right that the general public shares in common. A private nuisance is when the plaintiff's use and enjoyment of her land are interfered with substantially and unreasonably through a thing or activity. There are several defenses to this tort, including contributory negligence, assumption of risk, coming to the nuisance, or statutory compliance. The typical remedy for nuisance (either public or private) is damages. Courts may grant injunctive relief if the legal remedy is not adequate. See also, *Nuisance*, Legal Information Institute, (accessed Mar. 23, 2020) available at <https://www.law.cornell.edu/wex/nuisance>.

³¹ *Summit County Board of Health v. Pearson*, 809 N.E.2d 80 (Ohio Ct. App. 2004). See also, Memorandum from The Network for Public Health Law, Western Region *supra* note 23.

³² Memorandum from The Network for Public Health Law, Western Region *supra* note 23.

³³ Jeffrey Bean, *Bathhouses, City Await Ruling: Public Concern Wanes Pending Test of Ordinance*, LOS ANGELES TIMES, (March 11, 1989), available at <https://www.latimes.com/archives/la-xpm-1989-03-11-me-889-story.html>.

³⁴ *City of New York v. New St. Mark's Baths*, 168 A.D.2d 311, 311 (New York 1990).

³⁵ *Globe Sch. Dist. v. Board of Health*, 20 Ariz. 208, 210, 179 P. 56 (Arizona 1919).

³⁶ *Id.*

Subsequently, the Supreme Court of Arizona upheld local authority to exercise such powers after the city determined that an emergency existed, noting that the “necessity is the law of time and place, and the emergency calls into life the necessity ... to exercise the power to protect the public health.”³⁷ The court found that the city’s measure was a valid, enforceable order and regulation for the purpose of reasonably protecting the public health and binding so long as such epidemic continued in such form.³⁸

b. Essential v. Nonessential Business Precedent

There is an absence of litigation around business designations of “essential” versus “nonessential,” thereby requiring analysis of other case law addressing designations. The closest analogy that can be made is a case upholding closures based on distinctions between essential and nonessential functions.³⁹ In 2008, a federal court in Michigan permitted government closures of “nonessential” roads in national forests to reduce environmental erosion and preserve wildlife habitats.⁴⁰ The court emphasized that smaller, primitive road closures maintained management access to forested areas and therefore furthered an important public interest.⁴¹ By extension, one could envision a court upholding a classification of either essential or nonessential provided it furthered an important public interest.

Given the dearth of case law on essential versus nonessential business designations, NGA recommends that governors, their advisors, and other state officials work closely with legal counsel when considering and implementing business designations. State officials may also want to consult with private sector partners to fully anticipate secondary and tertiary impacts of the designations. Communicating clear and consistent guidance around essential and nonessential business designations at the outset of the order may help mitigate potential issues down the road.

c. Shelter in Place Precedent

Shelter in place order restricts individual movement. Further, orders much consider how supplies continue to reach institutions and residents in affected areas. Although the courts have not addressed issues of shelter in place in the instance of a pandemic, case law related to shelter in place orders in response to natural disasters (e.g., hurricanes, fires) and other hazards (e.g., chemical/gas/oil explosions) has arisen. Courts generally have recognized government’s short-term authority to exercise shelter in place orders, and limit liability due to the greater need to protect the public health.

Longer duration shelter in place orders related to COVID-19 implicate greater challenges for vulnerable populations. Courts have recognized the legality of shelter in place orders, even when balanced against the rights of vulnerable populations. For example, a New York district court upheld New York City’s 72-hour shelter in place order, noting that this timeframe is consistent

³⁷ *Id.*

³⁸ *Id.*

³⁹ Legal experts note that one aspect of the Stafford Act may be marginally significant. The Act allows federal contracts with private entities as well as financial assistance to nonprofit organizations, suggesting some “nonprofit organizations” may need to be exempted from closure orders. In addition, food banks, meals provided by religious organizations, and so forth may have questions about “inside dining” restrictions if these are not clearly communicated. Email conversation with Professors Hodge and Price *supra* note 3.

⁴⁰ *Anglers of the Au Sable v. U.S. Forest Service*, 565 F.Supp.2d 812, 837 (E.D. Michigan 2008). *See also*, Memorandum from The Network for Public Health Law, Western Region *supra* note 23.

⁴¹ *Id.*

with advice from FEMA and the Red Cross.⁴² It held further that the order did not violate the Americans with Disabilities Act because it applied to all residents equally. Although people with disabilities have special needs, the order was “simply ... guidance that people should be prepared for the possibility that assistance within [72] hours will not be available.”⁴³ Due to the unknown duration of shelter in place or other personal movement orders in response to COVID-19, states should pay special attention to the needs of vulnerable populations. For state considerations for certain vulnerable populations in relation to stay at home/shelter in place orders, please see Appendix II.

Litigation around lost wages due to shelter in place orders has also arisen. Following a 2012 train derailment involving a “dangerous substance” spill, residents in the affected area (an entire municipality) were ordered to either evacuate or “shelter in place.”⁴⁴ Residents sued the railroad to recover lost wages. The federal district court acknowledged that government was authorized to issue the order but questioned how to assess damages. It “cannot simply assume that each business organization with an address in a specified geographic area suffered income loss as a result of not being able to have its doors open to the public or to employees for a period of three days.”⁴⁵ Experts note that additional litigation related to business damages or losses post COVID-19 may follow, although state and local sovereign immunity provisions may potentially protect government officials.⁴⁶

Private entities have also imposed shelter-in-place measures. During Hurricane Katrina, a nursing home issued a shelter in place order to its residents instead of evacuating.⁴⁷ Children of the residents sued, alleging wrongful death and medical malpractice. The Louisiana appellate court upheld the decision, noting that the nursing home’s decision not to evacuate due to an emergency was an administrative decision not subject to medical liability, partly because the decision was made with respect to the entire facility and was not based on individual assessments.⁴⁸ Similarly, another Louisiana appellate court upheld a facility’s shelter-in-place order following an explosion and fire.⁴⁹ To hold otherwise would “put a chilling effect on facilities in calling and shelter in place.”⁵⁰

Ultimately, courts recognize government’s authority to exercise shelter in place orders and limit liability due to greater need to protect the public health. However, judicial assessments of prior orders are of limited geographic applicability and relatively short duration. It remains to be assessed whether judicial challenges against COVID-19 large-scale shelter-in-place orders may succeed. Explicit or implicit shelter-in-place orders should balance the restriction of individual movement into nonessential establishments while ensuring that necessary supplies continue to reach institutions and residents in affected areas.

⁴² Brooklyn Center for Independence of Disabled v. Bloomberg, 980 F.Supp.2d 588, 623 (S.D. New York 2013).

⁴³ *Id.*

⁴⁴ *In re Paulsboro Derailment Cases*, 2014 WL 4162790 (August 20, 2014).

⁴⁵ *Id.*

⁴⁶ Legal experts note that a few states have job protections for persons under quarantine, including New Jersey (N.J.S. 26:13-16) and New Mexico (N.M.S. 12-10A-16). Although this issue is untested, experts note that shelter in place/stay at home orders may qualify under such statutes (although context seems clear that they were not designed for mass quarantine situations and likely are displaced by emergency declarations). Email conversation with Professors Hodge and Price *supra* note 3.

⁴⁷ *Montalbano v. Buffman, Inc.*, 90 So.3d 503, 511 (La. App. 4 Cir. 2012).

⁴⁸ *Id.*

⁴⁹ *Brown v. Georgia Gulf Lake Charles, LLC*, 104 So.3d 730, 734 (La. App. 3 Cir. 2012).

⁵⁰ *Id.*

Conclusion

As with any sensitive and complex legal situation, state officials should review their state statutes and emergency powers with their legal counsels. Recent business closure and restrictions on movement in the United States highlight certain issues that states should consider when operationalizing their response to COVID-19. Coordination between all levels of government may minimize potential lawsuits, which disrupt the government's response and erode public trust. Communication among all levels of government and between governments and the public will minimize the risk of missteps and bolster public confidence that any government measures that are essential to the public welfare.

Appendix I:
State and Local Designations of Essential Businesses
(as of March 23, 2020)

Jurisdiction	Date Issued	Designations of Essential Businesses
1. Arizona	March 23, 2020	Executive Order 2020-12
2. California	March 19, 2020	Executive Order N-33-20
	March 16, 2020	*San Francisco, CA Public Health Order Requiring Residents Stay at Home Except for Essential Needs
3. Connecticut	March 20, 2020	Executive Order 7H
4. Delaware	March 22, 2020	List of essential and nonessential businesses
5. Hawai'i	March 17, 2020	Gov. Ige Announces State Actions To Slow The Spread Of COVID-19
6. Illinois	March 20, 2020	COVID-19 Executive Order No. 8
7. Indiana	March 23, 2020	Executive Order 20-05
8. Kentucky	March 22, 2020	Executive Order 2020-246
9. Louisiana	March 22, 2020	Proclamation Number 33 JBE 2020
10. Maine	March 18, 2020	Governor Mills Takes Further Steps to Respond to COVID-19, Protect Health and Safety of Maine People
11. Maryland	March 23, 2020	Executive Order 20-03-23-01
12. Massachusetts	March 23, 2020	COVID-19 Essential Services
13. Michigan	March 23, 2020	Executive Order No. 2020-21
14. Nevada	March 17, 2020	Nevada Health Response Covid-19 Risk Mitigation Initiative
15. New Mexico	March 23, 2020	State enacts further restrictions to stop spread, including stay-at-home instruction
16. New Jersey	March 16, 2020	Executive Order No. 104
17. New York	March 20, 2020	Executive Order No. 202.6
18. Ohio	March 22, 2020	Director's Stay At Home Order
19. Oregon	March 23, 2020	Executive Order 20-12
20. Pennsylvania	March 19, 2020	Wolf Administration Updates Businesses on Guidance for COVID-19 Mitigation Efforts
	March 22, 2020	*Philadelphia, PA Emergency Orders on Business Activity and Congregation
21. Virginia	March 23, 2020	Governor Northam Orders Statewide Closure of Certain Non-Essential Businesses, K-12 Schools
22. U.S. Virgin Islands		Governor Bryan Advises Residents to Stay at Home
23. West Virginia	March 23, 2020	Executive Order No. 9-20
24. Washington	March 24, 2020	Governor's Stay at Home, Stay Healthy Order

*A city that has designated essential businesses.

Appendix II
State Considerations for Vulnerable Populations during Restrictive Movement Periods

The following are suggestions from disability rights organizations around best (or promising) practices for supporting the needs of children and adults with disabilities during shelter in place and restricted movement periods, including:

- Partner with federal government to plan for “retainer/stimulus payments” for community service providers who have the primary mission of service job seekers with disabilities.
- To the extent possible, ensuring that there is not disruption in state benefits or services for individuals with disabilities.
- Partner with business community to target specific strategies to support emerging surge demands with distribution, delivery, and food service to support vulnerable clients who need in-home supportive services for daily functioning (e.g. organize meal deliveries, staff hotlines remotely, and keep open long-term care ombudsman programs).
- Work with provider and family stakeholders to thoughtfully relax state administrative mandates that distract from direct services (unnecessary data reporting requirements, etc.) This may include relaxing state standards and adapting state rules for the provision of home and community-based services (e.g. relaxing rules on background checks for volunteers to be able to recruit younger, healthy people to assist in the provision of vital services like meal and grocery delivery, as well as temporarily waiving rules on nutrition standards for the time being).
- Consider retention strategies that include flexibility within the vocational rehabilitation program to support people who may be shifting from a workplace to homebased employment setting. For example, this could include quickly responding to needs for equipment and assistive technology.
- Maximizing availability of extended prescription refills and delivery services for individuals who are homebound or at particularly high risk due to health conditions and may lack adequate supports at this time.
- Consider the essential role of personal care aides, home health workers, and other professionals offering life sustaining services to individuals who are homebound and their personal protective equipment and testing needs to keep themselves and their clients safe. In addition, many home health and personal care aids are independent contractors and will not benefit from the additional benefits (e.g. 2 weeks paid sick leave) included in the federal stimulus package.
- Recognize that social connections can be critical for health and wellbeing, especially for those who are already experiencing mental health issues and/or may not have a strong support system. Therefore, focusing more on the concept of physical distancing as opposed to social distancing and adopting creative means to maintain connectedness (e.g., via online or tele-options where possible).
- Ensure that legislation, regulation, and program policies are inclusive of considerations for services and support needs of individuals with disabilities.
- Work with business partners to set aside shopping times specifically for people with disabilities at grocery stores and pharmacies (including staff assistance with shopping and securing parking while limiting to the maximum extent possible the need for individuals who mobility issues do not need to leave their cars).
- Remember the diversity of your audience. To the extent possible, try to make sure that briefings provided by the state and supports (e.g. help with applying for unemployment) are sensitive to those who may have a limited understanding of what is being explained

or other challenges effectively navigation the social services systems. For example, continue to provide information and communication in alternate formats which include but are not limited to interpreters, captions, braille, language appropriate materials (particularly for those with limited language comprehension) so that everyone understands policy in a rapidly changing environment. Simplify processes where possible and take advantage of any administrative or regulatory flexibility.