

# PUBLICATION

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## State and Local Enforcement of Executive Orders on the Rise as Businesses Reopen Across America: Be Prepared to Respond

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### Introduction

In the challenging world of COVID-19, state executive orders governing day-to-day business operations across industries have become commonplace. While traditional investigations may have slowed as regulators and investigators are also under stay-at-home orders, robust enforcement efforts by federal, state and local authorities of COVID-19-related executive orders and local public health laws already have begun across the country and are expected to increase as states begin to reopen businesses and modify current restrictions. These enforcement actions typically stem from a company's failure to comply with social distancing and other related requirements in the workplace, and often are brought to the attention of regulators by an employee or competitor complaint. Like other state laws, a violation of an executive order can lead to significant fines, the shutdown of a business or even imprisonment.

As businesses and the economy begin to reopen, a careful review of the governing orders, both state and local, is critical to ensure a strategy for full compliance. Because COVID-19-related compliance continues to evolve, it is critical that businesses stay aware of changes to state executive orders and what they require.

This alert focuses primarily on how to analyze and respond to a government inquiry during this challenging time. As state and local governments consider relaxing or rescinding executive orders, we recommend you also prepare your return-to-work protocols now so when the time comes, you can reopen with confidence that you are complying with applicable rules and regulations to keep your workforce and customers safe. Guidance regarding reopening is available from Baker Donelson's Labor and Employment Group in a webinar available [here](#).

### First, what does the particular executive order really mean?

For any individual provision in an executive order, the first step is to understand what is required or what is prohibited. Does the provision require certain action (create an affirmative obligation) or prohibit it? For example, the provision could relate to general presumptions (i.e., "All activities that involve groups of more than 35 people are prohibited except...") or it could offer conditional approvals (i.e., "Salons may open to offer services to first responders but only one patron is permitted in the salon at a time"). State legislatures and agencies typically provide interpretative guidance on newly issued executive orders, but that sometimes complicates the landscape of compliance. It is critical that individuals and businesses promptly obtain assistance to interpret and understand the full picture, which includes the executive order, any related guidance, and all associated rules and statutes.

### Second, what enforcement tools does the specific provision authorize?

Executive orders may be enforced by all levels of state government. For example, state attorneys general offices can act through their own authority, seek assistance from state law enforcement, utilize the courts and judicial system, and work with state agencies that have particular policy concerns or interests. Also, county governments can enforce these orders by acting through their officials and agencies, such as county health departments and county sheriffs.

The methods by which any particular provision of an executive order can be enforced depends on a number of factors, including whether the provision relates to workplace or first responder safety, health care services, consumer protection, or state revenue collection, or whether it involves federal or state funds. The most common enforcement mechanisms we see are the following:

1. *Request for Information*: May involve an informal letter request, a "drive by" visit, an audit or a subpoena. Responding to any of these in a timely and appropriate manner usually requires legal assistance and is critical to avoiding significant penalties.
2. *Cease and Desist Order*: An administrative or court order that requires a business or individual to discontinue certain behavior or cease operating until the issue is resolved. If issued by a court, these orders carry sanctions such as contempt and monetary fines.
3. *Citation*: Under state law, an agency may have authority to issue citations, much like a speeding or violation notice, imposing a fine on a business or individuals.
4. *Criminal Complaint, Indictment*: Where a state statute creates a criminal enforcement mechanism, misdemeanor and felony charges, including potential imprisonment, may be available.

### Third, how are enforcement actions typically triggered?

Realistically, given the short time frame these orders are in place, enforcement actions are most commonly triggered in one of four ways:

5. *Observation by Law Enforcement or Public Officials*: *Police on patrol noticed a large group of individuals; state inspectors found contraband PPE.*
6. *Reports by Competitors*: *Executive order prohibits anything except carry out packaged liquor; competitor observes bar serving cocktails in a drive thru window.*
7. *Disgruntled Workers*: *Store clerk complains that store is not appropriately regulating the flow of traffic into the store and workers do not have required protective masks.*
8. *Disgruntled Residents/Consumers*: *Patrons and/or residents complain about the lack of available resources due to restrictions.*

### Fourth, what are the options on how to respond?

If faced with an enforcement action, you may have a few options to respond.

Usually the most effective way to respond is to correct the complained of or cited behavior or deficiency and demonstrate that the individual or business has taken appropriate steps to ensure it will not happen again. In the current environment, this is typically accomplished informally, through coordination and a letter response to the particular agency or regulator involved. If a response is compelled by subpoena or other legal process, a more formal response may be necessary.

Alternatively, you may choose to fight the enforcement, which typically is the most difficult path but may be the appropriate one under the particular circumstances. For example, an individual or business may challenge that the particular executive order is being enforced in a manner it was not intended or that the enforcement has an unintentional impact on individual rights.

### Fifth, what penalties and/or other liabilities might an individual or business face?

The specific penalties a business or individual may face as a result of an enforcement action can vary significantly and most often will depend on factors such as the conduct at issue, reasons for non-compliance, scope of the enforcement action, whether there is any risk to the safety and well-being of others, and the potential or actual economic harm to the state. As enforcement actions are on the rise across the country, we have already seen instances of administrative penalties (i.e., seizure of property, closing of businesses), civil penalties (i.e., injunctions and monetary fines), and criminal penalties (i.e., misdemeanor citations and, where particularly serious or harmful, referral for felony charges). A careful analysis of potential risks is critical to any response to an enforcement action.

## **Conclusion**

While state executive orders may seem to be a new or unusual form of governance at the local and state level, the tools used for enforcement and the consequences for failing to comply are anything but new. An appropriate and satisfactory response to enforcement during declared states of emergency require a clear understanding of relevant guidance, an appreciation of the particular area during both times of emergency and standard operations, and the ability to negotiate and reach common sense solution without unnecessary elevation of problems.

If you have any questions on this topic, please contact one of the authors or any member of the [Government Enforcement and Investigations Group](#). Also, please visit the [Coronavirus \(COVID-19\) What You Need to Know information page](#) on our website.