

Texas Business Continuity During Shelter-In-Place Orders

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On March 21, 2020, Dallas County was the first Texas jurisdiction to issue "shelter-in-place" orders. Unlike prior orders issued across Texas, a "shelter-in-place" order expressly restricts all activity outside one's residence other than "essential activities", the performance of "essential governmental functions," or for the operation of "essential businesses" or "critical infrastructure."

Who has power to impose shelter-in-place orders?

Under the Texas Disaster Act¹ (the "TDA"), the governor, county judges, and city mayors have been delegated power to control activity in a disaster area. Unlike typical governmental actions, these orders may be imposed directly by the governor, county judge, or mayor without approval by the city council or commissioner's court. In the event of conflicting orders from proper authorities, those of a county judge control over a mayor, and those of the governor control over a county judge.

What Texas jurisdictions have imposed shelter-in-place or similar orders?

On March 19, Governor Greg Abbott has ordered statewide closures of schools, restaurants, gyms, bars, and massage parlors.² The Governor has also ordered that "every person in Texas shall avoid social gatherings in groups of more than 10."

[Click here](#) for a current list of orders imposed by highly populated cities and counties in Texas. Several shelter-in-place orders have already been emplaced in a number of highly populated jurisdictions. Other jurisdictions have imposed lesser restrictions limiting business activities and establishing guidelines designed to prevent the spread of COVID-19. We expect more jurisdictions to impose shelter-in-place orders as the virus continues to spread.

What business operations may continue during a shelter-in-place order?

All shelter-in-place orders issued to date authorize the continued operation of critical infrastructure. While state law does not expressly define "essential business" or "critical infrastructure", most orders issued in Texas and across the United States refer to the definition of "critical infrastructure" provided under the USA Patriot Act of 2001: "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."³

The Cybersecurity & Infrastructure Security Agency ("CISA"), a division of the Department of Homeland Security, has identified [16 critical infrastructure sectors](#). On March 19, CISA published a memorandum specifically identifying key critical infrastructure workers within these 16 sectors during the COVID-19 outbreak.⁴ The definition of "critical infrastructure" is defined broadly enough to include a wide range of stakeholders who directly or indirectly enable the functionality of infrastructure systems.⁵ Therefore, if your business provides support to members of a critical infrastructure sector, it may be deemed as critical infrastructure or essential business, absent any express orders to the contrary.

What if I am not sure if my business is an "essential business" or "critical infrastructure"?

Because the COVID-19 pandemic is unprecedented, very little legal guidance exists as to how these terms apply to specific business operations. As a starting point, you should look to any orders imposed in your jurisdiction for express language that may apply to you. If the orders are unclear, please reach out to us for further guidance.

What precautionary measures should I be taking if my business is still permitted to operate?

Most orders include guidelines (mandatory or voluntary) for businesses to follow during continued operations. These guidelines include the screening of employees upon arriving to work, practicing social distancing, and implementing telecommuting options wherever possible. To the fullest extent possible, these guidelines should be followed in all cases wherever imposed, in order to limit legal liability and to prevent the further spread of the virus.

If shelter-in-place orders have been imposed, CISA has advised that businesses should limit their exempt activities to "maintaining the businesses and services that enable continued economic and social vitality" and not on "maintaining business as usual" or sustaining non-critical businesses.⁶

What are the consequences of violating a lawfully imposed order?

The TDA states that in times of disaster, each person in the State of Texas has an affirmative obligation to conduct themselves and keep and manage their affairs and property in ways that will reasonably assist and will not unreasonably detract from the ability of the state and the public to successfully manage emergencies. This obligation includes appropriate restrictions on the use of property.

Failure to comply with the TDA or a rule or order imposed under the TDA could result in a fine up to \$1,000 and confinement in jail for up to 180 days.

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¹ Tex. Gov't Code Ch. 418 (West 2020).

² Tex. Exec. Order No. GA-08 (Mar. 19, 2020), available at, https://gov.texas.gov/uploads/files/press/EO-GA_08_COVID-19_preparedness_and_mitigation_FINAL_03-19-2020_1.pdf.

³ 42 U.S.C. §5195c(e).

⁴ Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, Christopher C. Crebs, Director, Cybersecurity & Infrastructure Security Agency (Mar. 19, 2020); available at https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_508C_0.pdf.

⁵ CISA, Identifying Critical Infrastructure During COVID-19, Frequently Asked Questions, No. 4, <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>

⁶ Id., No. 12.