COVID-19 Team: Texas Developments (Updated April 7, 2020)

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Frost Brown Todd's Coronavirus Response Team continues to closely monitor state-by-state actions that significantly restrict business and personal activities to suppress the spread of COVID-19. As more state and local governments weigh "shelter in place" orders in an effort to combat the spread of the virus, many businesses across the country are asking what constitutes an "essential" business and what to do if you don't make the cut. The answers are not always clear or consistent, but there are steps you can take to be prepared. What do "essential business" and "shelter in place" now mean in Texas?

While it is ultimately up to each city, county or state to make these decisions, there are some businesses that will generally be considered to be essential. These will not need to close unless specifically ordered, and include any business involved in healthcare, first responders, food production and delivery, medical supply, public utilities, communications and information technology, grocery stores, and gas stations. Companies that supply the operations of these exempted businesses may also be considered "essential." If your company supplies businesses that clearly fall into the "essential" category, there's a good argument that your business is "essential" as well. The Governor of Texas has currently issued a less restrictive state-wide order than the State's largest counties and cities.

I. Texas: statewide order regarding essential services, religious services, restaurants, bars, and gyms, nursing home visits, and schools, but no "shelter-in-place."

On March 31, 2020, Texas Governor Gregg Abbott issued Executive Order GA-14, which relates "to statewide continuity of essential

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services and activities during the COVID-19 disaster." The Executive Order, which replaces the Executive Order that the Governor issued on March 19, 2020, is not a "shelter-in-place" order for the State of Texas.

Instead, the Executive Order contains the following principal provisions, which apply on a "statewide basis":

- "[E]very person in Texas shall, except where necessary to provide or obtain essential services, minimize social gatherings and minimize in-person contact with people who are not in the same household."
- "Essential services" is defined to "consist of everything listed by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0." Essential services are also listed with the Texas Division of Emergency Management. People and businesses providing or obtaining essential services are urged to take protective measures, such as hygiene and social distancing, in accordance with federal guidelines.
- "Essential services" also includes "religious services conducted in churches, congregations, and houses of worship." The Executive Order states that essential services "should be provided through remote telework from home," but if "religious services cannot be conducted from home or through remote services, they should be conducted" in accordance with the federal guidelines.
- The Executive Order states that people "shall avoid eating or drinking at bars, restaurants and food courts," though "the use of drive-thru, pickup, or delivery options for food and drinks is allowed and highly encouraged." People should also avoid gyms, cosmetology salons, tattoo and piercing studios, and massage establishments.
- "[P]eople shall not visit nursing homes, state-supported living centers, assisted living facilities, or long-term care facilities unless to provide critical assistance as determined through guidance from the Texas Health and Human Services Commission."

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- Schools "shall remain temporarily closed to in-person classroom attendance and shall not recommence before May 4, 2020."
- The Executive Order permits "essential daily activities, such as going to the grocery store or gas station," exercising outdoors, visiting parks, and hunting and fishing, "so long as the necessary precautions are maintained."
- A violation of the Executive Order "is an offense punishable by a fine not to exceed $1,000, confinement in jail for a term not to exceed 180 days, or both fine and confinement."
- The Executive Order also contains a significant preemption provision. The Order "shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts essential services allowed by this executive order or allows gatherings prohibited by this executive order."

The preemption provision is notable because legal disputes have already arisen regarding different degrees of restriction imposed by Texas governmental entities. For example, Collin County, Texas, issued an order declaring all businesses to be "essential," while the City of McKinney (the county seat of Collin County) issued a much more restrictive "stay-at-home" order. A resident of McKinney sued to enjoin the City's order based on this conflict, but on March 31, 2020, a state district court denied the plaintiff's request for a temporary restraining order. The court explained that because the McKinney city council had passed an ordinance replacing the mayor's order, the ordinance was valid. Interestingly, after Governor Abbott issued his March 31 Executive Order, Collin County Judge Chris Hill rescinded his own order, deferring to the State's definitions of "essential businesses."

Governor Abbott issued the Executive Order pursuant to his powers under the Texas Disaster Act of 1975, Tex. Gov. Code § 418.001 *et seq.* The order has "the force and effect of law." *Id.* § 418.012. The Order took effect on April 2, and will remain in effect through April 30, 2020, subject to further extension. Review the Executive Order here.

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II. Shelter-in-place: Dallas County

Dallas County has issued a "shelter in place" order for "all individuals anywhere in Dallas County." First issued on March 22, 2020, the Order has subsequently been amended multiple times and will remain in effect until 11:59 p.m. on April 30, 2020, or until it is either rescinded, superseded, or amended.

As amended, the Order contains the following principal provisions:

- "All individuals currently living within Dallas County are ordered to shelter at their place of residence," except to perform "Essential Activities," to provide or perform "Essential Government Functions," or to operate "Essential Businesses."
- "All businesses operating within Dallas County, except Essential Businesses . . . are required to cease all activities at facilities located within the County," except to perform "Minimum Basic Operations." The Order states that "businesses may continue operations consisting exclusively of employees or contractors performing activities at their own residences (i.e. working from home)."
- "Employees of Essential Businesses, whose physical presence at the workplace is not essential to operations, are directed to use telecommuting to the fullest extent possible."
- No public or private gatherings of any number outside a single household or living unit, subject to other provisions of the Order.
- "All elective medical, surgical, and dental procedures are prohibited anywhere in Dallas County."

"Essential Business" includes a number of categories:

- Essential Healthcare Operations (most healthcare services; this exemption "shall be viewed broadly to avoid any impacts to the delivery of healthcare")
- Essential Governmental Functions (services provided by local governments for public health, safety, and welfare)
- Essential Critical Infrastructure (utilities; roads and highways; public transportation; waste and recycle collection and

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removal; oil refining; defense and national security)

- Stores that Sell Groceries and Other Essential Supplies (supermarkets; big-box stores; convenience stores; liquor stores, etc.)
- Restaurants (no in-person service; take-out, delivery, or drive-through services only; also applies to microbreweries and wineries)
- Food Cultivation (includes farming, fishing, and livestock)
- Delivery of Groceries and Essential Supplies (shipping or delivery of food, hygiene, and other essential supplies to residences or essential businesses)
- Transportation (operation, maintenance, and repair of airlines, taxis, rideshare services, and others necessary for essential travel and activities)
- Gas Stations and Businesses Needed for Transportation (gas stations, auto supply stores, etc.)
- Critical Trades (plumbers, electricians, exterminators, janitors, etc. necessary to maintain safety, sanitation, and essential operations of residences and business; no discretionary maintenance or additions)
- Construction (public works, residential, commercial, and schools; no elective additions or maintenance)
- Professional Services (includes legal and accounting services, "when necessary to assist in compliance with legally mandated activities or services necessary to avoid imminent harm to a client"; real estate closings and title work permitted, but no showings or open houses)
- Financial Institutions (banks, credit unions, insurance companies, title companies, payroll and accounting services; does not apply to "[n]on-depository institutions (such as payday lenders)")
- Information Technology Services/Telecommunication Services (IT, IT services, and essential vendors; telecommunications and internet providers)
- Essential Retail (laundry, hardware stores, firearm and ammunition suppliers and retailers "for purposes of safety and

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security")

- Hotels and Motels (for lodging, as well as food carry-out/delivery)
- Providers of Basic Necessities to Economically Disadvantaged Population
- Essential Services Necessary to Maintain Essential Operations of Residences or Other Essential Businesses (mail, shipping, and delivery services; warehouse/distribution and fulfillment; storage; moving, janitorial, laundry, computer, audio-visual services; sanitary and medical equipment)
- Supplies to Work from Home
- Public and Private Education (only for distance learning and essential services)
- News Media
- Childcare Services
- Animal Care Services
- Religious and Worship Services (services only by audio, video, or teleconference)
- Funeral Services

Non-essential businesses may engage in "Minimum Basic Operations":

- "The minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, or for related functions"
- "The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences"

The Order contains a number of exhibits, which provide rules for Essential Retailers; the Construction Industry; Manufacturers and Distributors; Financial Institutions (including check-cashing businesses and pawn shops); Common Carriers, Shipper, Delivery Services, and Related Companies; and Real Estate Agents. Entities or persons failing "to strictly comply" with these rules "can be removed from the essential business list and prohibited from operating in Dallas County."

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The Order requires all laboratories operating within Dallas County to notify Judge Jenkins' office and the Dallas County Health and Human Services Director of the number of COVID-19 tests performed and the number of positive COVID-19 tests every day.

The Order contains a number of other definitions and provisions, including lifting restrictions on the hours of delivery of food; prohibiting "price-gouging" on high-demand items like groceries, toilet articles, and medical supplies; and ordering the suspension of eviction hearings for at least 60 days.

The Order states that the Dallas County Sheriff's Office, the Dallas County Fire Marshal's Office, "and other peace officers" are authorized to enforce the Order. Violations of the Order are misdemeanors, subject to civil or criminal enforcement and "punishable by a fine not to exceed $1,000 and/or confinement in jail for a term not to exceed 180 days."

The full text of the latest amended Order can be found here.

Dallas County has also prepared a FAQ about the Order.

III. Shelter-in-place: City of Dallas

The City of Dallas has issued emergency regulations that largely adopt Dallas County's shelter-in-place order. The regulations apply to the parts of the City of Dallas that are located in counties other than Dallas County.

On March 30, 2020, the City of Dallas expanded these regulations by requiring that laboratories report to city officials each day the number of COVID-19 tests performed and the number of positive tests. The City will also now require that hospitals within Dallas report daily the following to city officials:

- patient beds and patient beds occupied;
- Intensive Care Unit patient beds and Intensive Care Unit patient beds occupied; and
- ventilators that are available and ventilators being used by patients.

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The City regulations also assess penalties for individual violators of the regulations including civil fines of not less than $50 and not more than $2,000.

The full text of the City's amended regulations can be found here.

The City of Dallas has also provided its own interpretation of the Dallas County Order. This interpretation, which was last revised on March 30, 2020, provides a detailed list of the types of businesses that qualify as essential services, essential healthcare operations, essential government functions, essential infrastructure, critical trades, and providers of basic necessities to economically disadvantaged populations. It also identifies the types of businesses that are "non-essential." Further, the City's interpretation provides guidance for stores and restaurants; construction projects and workers; professional, financial, and technical services; childcare; animal care; hotels and motels; religious and worship services; news media; and funeral services. The interpretation of the Dallas Country Order can be found here.

Harris, Travis, Bexar, Tarrant, Williamson, Brazos, Fort Bend, McLennan, Denton, San Jacinto, and El Paso counties, along with the major cities of Austin, San Antonio, Fort Worth, Waco and El Paso have also adopted "shelter in place" orders. Collin County had issued a slightly less restrictive order (until such order was rescinded as noted above), while other counties and cities continue to follow the Governor's state-wide order.

FBT will continue to update this information as orders are issued, modified and enforced.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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