

COVID-19: NORTH CAROLINA EXECUTIVE ORDER 121 - STAY AT HOME ORDER AND STRATEGIC DIRECTIONS FOR NORTH CAROLINA

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U.S. Policy Alert

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On March 27, 2020, North Carolina Governor Roy Cooper issued a mandatory emergency executive order (the "Executive Order") in response to the increasing number of COVID-19 cases in North Carolina. The Executive Order requires that, among other things, all non-essential businesses and operations in North Carolina cease (except for minimum basic operations) beginning **Monday, March 30th, at 5 p.m. through April 29, 2020** unless revised or extended.

The Executive Order balances the State's desire to reduce instances where individuals interact with each other in a manner inconsistent with social distancing requirements set forth in the Executive Order with the need for "certain businesses, essential to the response to COVID-19, to the infrastructure of the State and nation, and to the day-to-day life of North Carolinians" to remain open. The Executive Order designates the business, not-for-profit organizations and educational institutions that are "Essential Businesses and Operations" and may remain open.

COVID-19 Essential Businesses and Operations

The list of Essential Businesses and Operations in the Executive Order includes businesses that can meet certain social distancing requirements both between and among its employees, and between and among its employees and customers (except at the point of sale or purchase). The list also includes the 14 critical infrastructure sectors the Federal Cybersecurity and Infrastructure Security Agency identified in its Guidance on the Essential Critical Infrastructure Workforce (issued on March 19, 2020, and updated on March 23, 2020) (the "CISA Guidance"), as well as additional services and functions that Governor Cooper deemed essential. Examples of some of the additional Essential Businesses and Operations under the Executive Order are listed below. However, we recommend reading the Executive Order, which describes these and a few other categories in more detail.

- "Healthcare and Public Health Operations"
- "Human Services Operations"
- "Essential Infrastructure Operations"
- "Essential Government Operations"
- "Stores that sell groceries and medicine"
- "Food, beverage production and agriculture"
- "Organizations that provide charitable and social services"

- "Financial and insurance institutions"
- "Home improvement, hardware and supply stores"
- "Mail, post, shipping, logistics, delivery, and pick-up services"
- "Restaurants for consumption off-premises"
- "Professional services"
- "Manufacture, distribution, and supply chain for critical products and industries"
- "Defense and military contractors"

Even though the Executive Order permits Essential Businesses and Operations to remain open, they must, to the maximum extent possible, direct their employees to work from home or telework. Essential Businesses and Operations must also maintain social distancing requirements to the extent practicable.

Treatment of Non-Essential Businesses

Under the Executive Order, all other businesses and operations in the State are considered "non-essential businesses and operations" and must cease all activities except for "Minimum Basic Operations". In addition, all businesses and operations that were required to close pursuant to prior Executive Order Nos. 118 and 120 must remain closed. Minimum Basic Operations are the minimum activities necessary to: (1) maintain the value of the business's inventory, preserve the condition of its physical plant and equipment, ensure security, process payroll and employee benefits or related functions; and (2) facilitate employees of the business being able to work remotely from their residences.

A non-essential business can apply through the website of the North Carolina Department of Revenue (the "Department") to be designated as essential under the Executive Order. Under the Executive Order, a non-essential business that has made a request to the Department to be defined as an essential business may continue to operate until that request is acted upon by the Department. Companies should take note, however, in a press release issued about the Executive Order on March 27, 2020, the NC Department of Health and Human Services stated that "[u]ntil your exemption is reviewed, you may operate as long as your business can accommodate social distancing in your workplace." This statement appears to be inconsistent with the Executive Order, which would deem a business meeting social distancing requirements as essential. We expect that clarification will be forthcoming for businesses seeking relief from the Department.

County and Municipal Orders

To the extent that a North Carolina county or municipality has issued a more restrictive order than the Executive Order, the more restrictive requirements will apply. For example, unlike the Executive Order, the orders of counties and municipalities may not treat all businesses that can meet social distancing requirements as essential. Therefore, North Carolina businesses and operations should review the Executive Order and any applicable local orders carefully to ensure compliance at all levels.

Some Things for North Carolina Businesses to Think About

The Executive Order has broadly defined Essential Businesses and Operations, and provided a process for a non-essential business to get on added to the essential list. In addition to the Executive Order and any applicable county or municipal orders, in evaluating whether to stay open in North Carolina most companies have other

additional factors to consider that are particular to their customers, supply chain, workforce, culture and brand. An executive team should meet to evaluate the best operational approach, bring in appropriate outside advisors and present to their boards for sound oversight of any decisions, including a plan and timing for re-evaluation of decisions as circumstances develop.

Communications to key stakeholders about a company's operational decisions related to COVID-19 need to be transparent, consistent, truthful and clear. For example, the communication you send to a supplier should be consistent with the communication you are sending to a customer or an employee. Be careful about making promises about what will happen next or following "best practices" unless you know that the best practices are actually being followed by your workforce. The emphasis on "tone at the top" is important now more than ever—telling the workforce of an essential business to follow social distancing requirements and then holding a lunch meeting for 20 members of the sales team does not send a good message about expectations.

If you are an Essential Business and Operation or a non-essential business maintaining Minimum Basic Operations, consider issuing the employees coming to work a letter on company letterhead citing the sections of the Executive Order and any relevant county or municipal orders that allow them to travel to the workplace. In the coming days, it is possible that more individuals may be stopped by law enforcement who are empowered to enforce these government orders and, although the Executive Order does not mandate documentation of a reason for someone to travel, a supporting letter will likely help your employees in such a situation. For such employees, provide them training with on how to deal with situations in which they are questioned about the appropriateness of their travel to the workplace. You should also ensure that employees know that they would be prohibited from using a supporting letter in circumstances other than when they are working or traveling to and from the workplace.

Media coverage of the impact on businesses is likely. Consider carefully whether your business should electively participate in any media inquiries, as there is some media coverage attempting to inappropriately portray all workplaces as flouting government orders and putting employees at risk. Employees should be reminded to direct any media questions to the designated company spokesperson. Distributing your company social media policy to your workforce as well is a good reminder at this time.

While shifting to a remote workforce will help ensure compliance with the Executive Order, managing such a remote workforce also has some challenges. Companies are encountering more viruses and ransomware attacks and use of non-company electronics, potentially exposing confidential or sensitive information. Some work simply cannot be done from a household, particularly work that is subject to OSHA safety and health requirements. These challenges are factors that companies should consider as they decide how to move ahead in light of the Executive Order.

Helpful Links

K&L Gates is advising clients on the parameters of the Executive Order, managing their legal and business risks in the current environment and continuing to monitor COVID-19 developments. We've touched on just a handful of the issues that companies in North Carolina have been handling during the COVID-19 crisis. Set forth below are some helpful links for North Carolina businesses related to this alert (current as of the date of this alert).

The Executive Order with the entire list of Essential Businesses and Operations that can continue to operate in North Carolina can be found [here](#).

Frequently Asked Questions on the Order Issued by North Carolina can be found [here](#).

The CISA Guidance can be found [here](#).

Non-essential businesses or operations that want to be designated as essential may apply online [here](#).

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