

Defying Governors Order is a Risky Proposition

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Non-life-sustaining businesses that reopen in Pennsylvania counties not yet moved to the "yellow" or "green" phase of the state's reopening plan face a number of risks, both legally and financially.

In the wake of Gov. Tom Wolf's extension of the state's stay-at-home order until June 4 to address the COVID-19 pandemic, a number of local, elected representatives have asserted they will allow businesses to reopen as early as May 15, contrary to the governor's order. While to date, no county or municipality has taken official action to defy the Governor's order, statements by local elected representatives have resulted in confusion for many business owners who are now uncertain about whether they can legally reopen.

Under the governor's orders, Pennsylvania has a colored-coded system related to business closures. In the red phase, only life-sustaining businesses can operate. Large gatherings are also prohibited. Once a county moves into the yellow phase, most businesses can reopen, but are subject to some restrictions and must comply with guidance from both the Centers for Disease Control and Prevention and the Pennsylvania Department of Health. In addition, gatherings of more than 25 individuals are prohibited. Once in the green phase, businesses, including restaurants and gyms, may return to normal operations. Southcentral Pennsylvania counties currently are in the red phase.

The Pennsylvania Supreme Court has upheld the governor's closure order, and it remains the law of the state. Counties and local municipalities do not have the authority to supersede the governor's order or to make decisions as to when and how businesses are allowed to reopen.

Pennsylvania business owners opting to reopen in defiance of the governor's orders face significant risks. While the risk of criminal prosecution may be low, businesses with state licenses and permits face potential revocation or suspension if they reopen while their county is in the red phase. Agencies such as the Pennsylvania Liquor Control Board, Pennsylvania Department of Health and Pennsylvania Gaming Control Board have the authority to enforce the governor's order by revoking or suspending liquor licenses, health department certificates, certificates of occupancy and other state-issued certifications. Wolf also stated that counties that defy the order could be risking their discretionary CARES Act funding and other COVID-19 state funding that could be distributed to schools and public agencies.

Additionally, businesses that reopen illegally face the possible loss of insurance coverage, both for losses related to the COVID-19 pandemic and for coverage under their commercial general liability policies. Pennsylvania Insurance Commissioner Jessica Altman on Monday warned that many insurance policies contain provisions that exclude coverage for businesses or individuals engaging in illegal acts or conduct, which could result in denied insurance claims for noncompliant businesses defying the state's business closure order. These exclusions are not limited to COVID-19 related claims, but may also apply to property coverage, liability coverage, advertising injury coverage and a host of other essential coverages. While the precise language of each policy must be analyzed, standard language

excludes coverage for losses which the business "contributed to" through illegal activity. Insurers likely will take the position that any claim, from a slip-and-fall in the store to a theft during business hours was "contributed to" by the business's decision to open in violation of state law.

Businesses that reopen in defiance of the governor's order also face potential liability if their workers or customers contract COVID-19 as a result of exposure at an illegally reopened business. Additionally, the governor stated on Monday that if a business opts to reopen in defiance of his order, employees of that business who fear for their safety will not be required to report to work and may continue to collect unemployment benefits. Businesses that choose to terminate employees who elect to stay home may face public policy wrongful discharge claims.

The situation related to how and when businesses may reopen remains fluid. Businesses should monitor developments and consult with legal counsel to develop plans to reopen safely and legally. If you have any questions about your business reopening, please contact [any Barley Snyder attorney](#).

WRITTEN BY:



Martin R. Siegel

Counsel

Tel: (717) 718-7581

Email: msiegel@barley.com

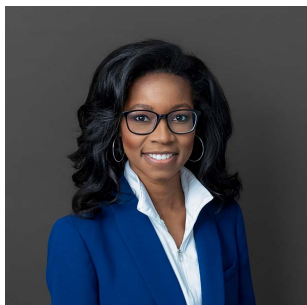


Lindsey M. Cook

Partner

Tel: (717) 399-2160

Email: lcook@barley.com



Erica R. Townes

Associate

Tel: (717) 718-7580

Email: etownes@barley.com

Cody Witmer

Associate

Tel: (717) 208-8843, ext. 8843

Email: cwitmer@barley.com