

Update: Maine Essential Business Orders

March 25, 2020

On Tuesday, March 24, 2020, Governor Mills issued an Order Regarding Essential Business and Operations, which covers every private entity in Maine and defines which Maine business types are essential businesses and operations. The Governor ordered essential businesses and operations to remain open, and ordered non-essential businesses and operations to cease most activities. The order provides that all businesses use best efforts to implement and actively enforce social distancing requirements.

Additionally, a number of Maine cities and towns have issued emergency proclamations and ordered the closure of non-essential businesses. This update summarizes Governor Mills March 24 Order and recent orders by the City of Portland, the City of Bangor and the Town of Brunswick. At Appendix A is a list of Maine municipalities that have issued orders affecting business operations and activities, which may not be complete.

Be aware that there are some inconsistencies between some of the municipal orders and the Governor's executive order. Because of the pace of developments, we also anticipate that Governor Mills may amend or augment her latest order and that municipalities throughout the state may issue new or amended orders. Businesses should review each municipality in which they operate to determine whether it has issued an order.

Inhabitants of the City of Portland are currently the only people in Maine subject to a non-medical stay-at-home order.

This update is intended to provide an initial overview of the latest governmental orders. Any specific business must determine the impact of these orders as applied to its particular circumstances and facts. Therefore, this is a general guide. We are available to respond to any questions.

Governor Mills' March 24, 2020 Order

The March 24 Order Regarding Essential Business and Operations took effect at 12:01 a.m. on Wednesday, March 25, 2020 and terminates at 12:00 a.m. on April 8, 2020 unless earlier amended, rescinded or renewed. The order covers all businesses in Maine, whether for-profit or not-for-profit, but does not include public entities. The order may be enforced by law enforcement or any governmental department or official that regulates licenses, permits or any other authorization to operate a business or occupy a building. Penalties may be assessed for violations.

March 25, 2020
Page 2

Essential Business and Operations

The March 24 Order directs that **Essential Business and Operations shall continue their activities** consistent with the guidance on social distancing. The order defines Essential Business and Operations to encompass 1) businesses that are identified in a U.S. Dept. of Homeland Security memorandum that identified essential critical infrastructure workers, and 2) an additional list of business types specific to Maine.

The U.S. Department of Homeland Security Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response identifies about 130 categories of workers who conduct operations and services that are essential to continued critical infrastructure viability in a number of industries: healthcare and public health; law enforcement, public safety and first responders; food and agriculture; energy; water and wastewater; transportation and logistics; public works; communications and information technology; other community-based government operations and essential functions; critical manufacturing; hazardous materials; financial services; chemical; and, the defense industrial base. While the DHS Memorandum is advisory, the Governor's March 24 Order made it mandatory in Maine. In addition, Governor Mills' Order's definition of Essential Business and Operations includes the following industries:

food processing and agriculture; fishing and aquaculture; industrial manufacturing; construction and maintenance of essential infrastructure; trash collection and transfer stations; grocery and household goods (including convenience stores); forest products; essential home repair, hardware and auto repair; pharmacy and other medical, psychiatric, and long-term care facilities; group homes and residential treatment facilities; biomedical, life science, behavioral health, health care, dental care, and long-term services and supports providers and organizations; child care providers; post offices and shipping outlets; banks and credit unions; gas stations and laundromats; veterinary clinics, animal welfare and animal feed and supply stores; truck delivery and distribution of goods; public transportation; legal, business, professional, environmental permitting and insurance services; hotel and commercial lodging; and all utilities such as electricity, water, wastewater, and telecommunications.

Even though the list of essential businesses is quite specific, businesses may find business continuity decisions to be challenging. For example, the state Order does not include "construction" as an essential business, but it does include "construction and maintenance of critical infrastructure" and "essential home repair". Similarly, the business of many online merchants may include both essential and non-essential components. As a general rule, if the broader business of a merchant is in an essential industry, then its various component operations would also be essential. If not, then the business should operate in accordance with the guidelines established for non-essential businesses.

March 25, 2020

Page 3

If your business is not listed as an **Essential Business and Operations** in the March 24 Order, but you believe it performs an essential service or function, it a business may request designation as an essential business at this website:

<https://appengine.egov.com/apps/me/essentialservicerequest>

Activities of Non-Essential Business and Operations

The March 24 Order **orders Non-Essential Business and Operations to cease activities** if 1) the businesses are public facing, which includes contact with vendors in addition to customers; or, 2) the worksite requires more than 10 workers to convene in a space where social distancing is not possible.

A Non-Essential Business and Operation may continue activities that meet neither of the two conditions above if they can be performed by the maximum extent practicable by employees working remotely. Such permitted activities may include taking orders by phone, email or other remote means and preparing such orders by delivery; maintaining the value of the business's inventory; preserving the condition of the business's physical plant and equipment; ensuring security; and, processing payroll, employee benefits and related functions.

The March 24 Order renews and extends a March 14, 2020 order, which ordered restaurants and bars to close their dine-in facilities. In addition, the order specifies the following non-exclusive list of Non-Essential Business and Operations: shopping malls, theaters, casinos, fitness and exercise gyms, spas, barber shops, hair salons, tattoo and piercing parlors, parlors, massage facilities, nail technicians, cosmetologists and estheticians, electrolysis services, laser hair removal services, and similar personal care and treatment facilities and services.

Social Distancing Requirements for All Businesses

All businesses to the extent permitted to remain open, **shall make all best efforts to implement and actively enforce social distancing requirements** in and around their facilities including but not limited to:

1. Maintain six-foot social distancing for employees at all times, including by designating with signage, tape, or by other means six-foot spacing;
2. Designate with signage, tape, or by other means six-foot spacing for customers in line to maintain appropriate distance;
3. Have hand sanitizer and sanitizing products readily available for employees and customers;
4. Implement separate operating hours for elderly and vulnerable customers; and,

March 25, 2020

Page 4

5. Post online whether a facility is open and how best to reach the facility and continue services by phone or remotely.

The Governor issued additional guidance on how to implement social distancing requirements:

1. For stores with a physical retail space of more than 5,000 feet, limiting customers to no more than 100 at any one time;
2. Enhancing their curbside pick-up and delivery services;
3. Closing fitting rooms;
4. Cautioning customers against handling merchandise they are not purchasing;
5. Staggering break times for employees and require frequent hand-washing; and,
6. Frequently sanitizing high-touch areas, such as shopping carts.

Office of Governor Janet T. Mills, *Governor Mills Orders Further Steps to Protect Public Health*, March 24, 2020, available at <https://www.maine.gov/governor/mills/news/governor-mills-orders-further-steps-protect-public-health-2020-03-24?fbclid=IwAR0wQvj6NbhA5SfnCf5EvCGIeKeLhzvaJYdsES80fyIzaP2rOBQH9hFGTeA>.

Issues Presented by Municipal Actions

At least three Maine municipalities have issued emergency orders regarding business activities. On March 22, 2020, before the Governor issued her most recent order, the City of Bangor issued an order which 1) ordered specific businesses to close; 2) issued requirements on delivery and take-out restaurants that are consistent with, but more specific than, the Governor's March 14, 2020 order; 3) allowed businesses providing essential goods and services to remain open; 4) allowed businesses not providing essential goods and services to continue operations if the continued operations consisted entirely of employees tele-working; and, 5) allowed businesses not providing essential goods and services to continue to have a single employee at an establishment to perform necessary business functions that do not involve in-person contact with others. The Bangor order includes an Appendix A that itemized 29 essential business and organizations.

On March 23, 2020, the Town of Brunswick issued an Emergency Proclamation and Order that was effectively identical to Bangor's order.

On March 24, 2020, the City of Portland issued a Proclamation Declaring Continued State of Emergency and Requirement to Stay At Home. In addition to ordering individuals living in Portland to stay at home other than to access COVID-19 Essential Services, it orders "all businesses with a facility in the City of Portland that do not provide COVID-19 Essential

March 25, 2020
Page 5

Services, shall close their physical workspaces and facilities to workers, customers, and the public.” Portland defines COVID-19 Essential Services by incorporating an Exhibit A that is very similar to the lists issued by Bangor and Brunswick though Portland’s list includes two additional types of businesses.

On March 24, 2020, after the Governor’s Order, at least seven Maine municipalities acknowledged the Governor’s order and encouraged residents to heed it.

In some instances, municipal orders are inconsistent with the Governor’s order—either more restrictive or less restrictive. In Maine, municipalities have broad home rule powers, but lack the authority amend or opt-out of state-enacted provisions. As a practical matter, if a business is located in a town or city that has an order in place that is more restrictive than the Governor’s order, that business should assume that it must comply with the more restrictive local requirements. In instances where the Governor’s order is more restrictive, a business should assume that it must comply with the Governor’s order. In an environment of real-time change in legal requirements, business should also reach out proactively to seek guidance from municipal or state officials on any specific concerns.

Brann & Isaacson is issuing periodic legal updates to help Maine businesses and citizens respond to the COVID-19 pandemic. If you found this update helpful, please email us at LegalUpdates@brannlaw.com to be added to our mailing list.

March 25, 2020
Page 6

Appendix A

Partial List of Maine Municipalities’ Orders Affecting Business Operations and Activities

| <u>Municipality</u> | <u>Issuance Date</u> | <u>Link</u> |
|---------------------|----------------------|---|
| City of Portland | March 24, 2020 | https://www.portlandmaine.gov/DocumentCenter/View/27535/Portland-Emergency-Stay-at-Home-Proclamation |
| City of Bangor | March 22, 2020 | https://bangormaine.gov/filestorage/422/EMERGENCY_REGULATION_BUSINESSES_%28revised3%29.pdf |
| Town of Brunswick | March 23, 2020 | https://www.brunswickme.org/DocumentCenter/View/2227/COVID-19-Proclamation-and-Order |

Partial List of Other Maine Municipalities’ Responses to the Governor’s March 24 Order

| <u>Municipality</u> | <u>Issuance Date</u> | <u>Link</u> |
|---------------------|----------------------|---|
| Town of Hallowell: | 03/17/2020 | City Manager’s Order (link re issuance , link re extension): “No person shall be in or remain in any business establishment within the City, including, but not limited to, restaurants, bars, museums, music venues, retail shops, and any other business establishment where individuals gather in groups or are in close contact with one another, beginning March 18, 2020, and effective daily from 8:00 PM to 2:00 AM. Take-out service is not prohibited by this order.” |
| City of Lewiston | March 24, 2020 | Statement from Mayor Cayer (link) also supports Governor Janet Mills’ 3-24-20 Executive Order mandating that all non-essential businesses and operations in Maine close their physical locations that are public facing, meaning those that allow customer, vendor or other in-person contact. ... If social distancing does not occur in Lewiston, a “shelter in place” order will be issued. This order will require individuals to stay at their residence |

March 25, 2020

Page 7

| <u>Municipality</u> | <u>Issuance Date</u> | <u>Link</u> |
|---------------------|----------------------|--|
| | | unless seeking necessities such as food or medical assistance. Please help us stop virus transmission.” |
| City of Auburn | March 24, 2020 | Statement from Mayor Levesque (link), read, in part: “I strongly urge all residents of Auburn to take to heart and adhere to the Executive Order issued today by Governor Janet Mills... The closure of non-essential businesses will have an impact, but be assured that essential facilities and services, such as health care, pharmacies, grocery stores, banks, gas stations, etc. will remain operational to meet needs and allow access to supplies.” |
| City of Biddeford | March 24, 2020 | Statement from the Town (link) explains the steps that it has taken and indicates that “Our team will be meeting in the morning to discuss additional changes to existing protocols given the Governor’s latest Order.” |
| City of Brewer | March 24, 2020 | Statement on the Town’s website (link) reiterates Governor Janet Mills’ 3-24-20 Executive Order mandating that all non-essential businesses and operations in Maine close their physical locations that are public facing, meaning those that allow customer, vendor or other in-person contact. |
| City of Bath | March 24, 2020 | The Town’s website provides a link to the website of the Office of Governor Janet T. Mills. |
| City of Belfast | March 24, 2020 | Statement from the Town (link) explains the steps that the Town has taken in its operation as a result of the “recommendations from our Governor.” |
| City of Eastport | March 24, 2020 | An update posted to the Town’s website (link) specifically highlights Governor Mills’ language in her 3-24-20 Executive Order mandating that all non-essential businesses and operations in Maine close their physical locations that are public facing. |