

## Insights

# AVOIDING NEGLIGENCE PER SE CLAIMS FOR NON-COMPLIANCE WITH SOCIAL DISTANCING ORDERS IN THE U.S.

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## SUMMARY

The measures implemented by state and local governments in response to the spread of COVID-19 vary widely, from suggested guidelines to mandatory shelter-in-place orders. The more extreme measures generally require the closure of non-essential businesses and a reduction in operations for essential businesses. For example, municipalities ranging from [Atlanta](#) to [Washington, D.C.](#) and states like [Michigan](#) and [Wisconsin](#), among others, have all adopted substantially similar orders that largely close non-essential businesses (except, in some cases, for “minimum basic operations”) and require essential businesses or infrastructure to comply with various social distancing requirements “to the greatest extent feasible” or “possible.” Many of these orders are enforceable through the threat of criminal penalties, including fines and incarceration.

Among other things, the social distancing provisions generally include maintaining at least six feet of distance between employees and members of the public, including when customers are standing in line. Some orders, such as Wisconsin’s order, mandate that essential businesses “shall, to the greatest extent possible,” avoid in-person meetings through virtual conferences and telecommuting. Others require compliance with guidelines issued by federal agencies, including the Department of Homeland Security and the Center for Disease Control and Prevention, or limit the number of employees that can work in the same building at a given time. For instance, Georgia’s statewide order prohibits any gathering of more than ten people in a single location if they are not separated by at least six feet.

As the number of COVID-19 cases rises across the United States, state and local governments continue to adopt new measures to encourage social distancing and stem the virus’s spread. Thoughtful, well documented compliance with social distancing requirements and recommendations will not only prevent enforcement actions, but also will help reduce businesses’ potential liability for negligence and other tort claims over the coming weeks and months.

While the social distancing provisions of the state and local orders vary from jurisdiction to jurisdiction, many orders—even including the most restrictive “shelter-in-place” orders—allow “essential businesses” to continue limited in-person operations.

Generally, these exceptions allow essential businesses to continue operations even if non-essential businesses are required to close. Nevertheless, essential businesses are still often encouraged, or even required, to implement certain social distancing measures in the workplace “to the extent feasible” or “possible.” In light of these requirements, businesses should document their determinations regarding the feasible level of social distancing and the measures taken pursuant to those determinations, as doing so will mitigate the risk of liability stemming from claims that the businesses failed to comply with the social distancing orders.

## **Brief Overview of Current Orders**

The measures implemented by state and local governments in response to the spread COVID-19 vary widely, from suggested guidelines to mandatory shelter-in-place orders. The more extreme measures generally require the closure of non-essential businesses and a reduction in operations for essential businesses. For example, municipalities ranging from [Atlanta](#) to [Washington, D.C.](#) and states like [Michigan](#) and [Wisconsin](#), among others, have all adopted substantially similar orders that largely close non-essential businesses (except, in some cases, for “minimum basic operations”) and require essential businesses or infrastructure to comply with various social distancing requirements “to the greatest extent feasible” or “possible.” **Many of these orders are enforceable through the threat of criminal penalties, including fines and incarceration.**

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## **The COVID-19 Orders as Potential Standards for Negligence Liability**

Although some provisions are couched in terms of “feasibility” and “possibility,” orders like those highlighted above still require some level of compliance based on each business’s individual circumstances. That level of compliance may vary from business to business, but failing to comply, or merely maintaining a business-as-usual posture, poses a risk of future civil liability under the doctrine of “negligence per se,” which is followed in most United States jurisdictions as well as general negligence. Here, we focus on negligence per se, which is generally easier to prove. However,

that does not mean that plaintiffs will ignore ordinary negligence claims if orders and federal, state and local guidance is not followed. See Various Alerts at [bclpemergent.com](https://bclpemergent.com).

Although the application of negligence per se varies, the main thrust of the rule is that, unlike with standard negligence claims, defendants cannot avoid liability by arguing that their actions were “reasonable” under the circumstances. Instead, because the law sets the standard for “reasonable” behavior, the only questions left for juries with respect to liability are whether the defendant violated the applicable rule or statute and whether someone was injured as a result. If the answer to both questions is “yes,” then the defendant is liable regardless of whether a reasonable person would have behaved in the same way.

This means that essential businesses might face liability for failing to shut down their businesses or failing to implement the mandated social distancing measures. For example, if an individual becomes sick after visiting an essential business that failed to regularly sanitize frequently touched surfaces as required by a state order or to space customers out while queueing, when such measures were clearly “feasible” or “possible,” then a court might find that the business was liable under a negligence per se theory, even if the business were able to prove that its preexisting sanitation efforts were “reasonable” prior to the issuance of the order. There are, of course, other issues that could affect liability, such as whether plaintiffs could prove that the business’s failure to comply with the standards is what caused them to get sick. Proving such causation will be a high hurdle in the current environment. That said, under a negligence per se theory, plaintiffs are generally relieved from proving that they owed a duty to the plaintiff and that they breached that duty, which is standard in ordinary negligence cases.

Further, to the extent these claims are advanced by employees of the essential business, some states might bar such claims based upon workers compensation or worker occupational illness acts. Still, essential businesses’ willful disregard of mandated operational instructions under COVID-19 orders could potentially provide plaintiffs an opportunity to plead around workers compensation or worker occupational illness act limitations.

## **Avoiding Negligence Claims Based On COVID-19 Orders**

While the orders directly affecting a business’s facilities may allow for some business continuation, they generally do not allow for business as usual. Instead, they impose obligations on businesses to exercise social distancing in day-to-day operations. To protect against not only adverse regulatory action, but also potential civil liability, we suggest even “essential businesses” take the following steps to insure they are complying with their social distancing obligations and that they can prove such compliance, if necessary, at a future date:

- Be familiar with the requirements of the orders that apply to each of your physical locations (both state and local) and follow all social distancing requirements and recommendations.

- Review employees' roles/functions to determine which employees, if any, can effectively work remotely without undue impact on the business.
- Conduct an internal analysis of your operations and processes to determine how best to implement the social distancing requirements (e.g., six feet of spacing between employees whenever possible) without effectively stopping business operations.
- To the extent six feet of spacing cannot be maintained at all times and in all parts of the operation, formally make that determination and document the reasons supporting said determination in a memorandum.
- Identify any other precautions that can be implemented, including cleaning measures, relative to the well-being of the business's employees and the community in accordance with current CDC, OSHA and state and local guidance. Note that this guidance continues to evolve. CDC updated certain guidance for businesses on April 2, 2020.
- Based on the internal analysis, develop a set of concrete steps to implement and enforce the social distancing measures that have been identified as possible (i.e., sending email notifications and creating signage reminding employees to maintain spacing, placing reflective tape on the floor to designate separate work areas, etc.).
- Implement the action plan and provide training to management and staff regarding the same. Reinforce the seriousness of the measures, and work to develop a safety-focused culture at all levels of the organization.
- Ensure that all insurance policies are up to date and, if you receive any type of claim, report it to the insurance company immediately.
- Ensure that new contracts with independent contractors are vetted by attorneys and take into account the unique issues surrounding the current situation.
- Document each step of the process above, including the internal analysis and the reasons for the conclusions reached, the concrete measures the business decides to implement, and the steps taken to execute the action plan.

By following these steps, businesses can reduce their exposure to potential claims arising from the COVID-19 orders, and can also further protect their employees and customers while those orders remain in place.

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