

Insights

U.S. BUSINESSES CHALLENGE GOVERNMENT ORDERS IN ATTEMPT TO CONTINUE OPERATIONS

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Shelter-in-place and social distancing have become the new normal as we try to combat the spread of the coronavirus-19/COVID-19 in the U.S. Many state governments have implemented stay-home or shelter-in-place orders to try to “flatten the curve” and protect citizens’ safety.

But as time passes, businesses are also concerned. Under many such executive orders, a business that is not deemed “essential” or “life-sustaining” may be required to stop in-person operations, and we’re starting to see an uptick in local enforcement, including cease and desist letters and revocation of occupancy permits.

Some shuttered businesses have started to bring their claims to court. Business plaintiffs have filed cases in at least 8 states to date, challenging government action on constitutional grounds. **

Below is a summary of the prominent claims and factual allegations featured in these complaints. *Please note that because these cases were filed just in this past two weeks, the ultimate viability of these challenges is yet to be determined.*

Substantive Due Process and Equal Protection

The most prevalent claim arises under the 14th Amendment of the U.S. Constitution for deprivation of rights and/or property without due process of law. The common allegation is that the applicable government order “*arbitrarily, irrationally or capriciously*” imposes these deprivations, or that the order is “*arbitrary, or conscience shocking, in a constitutional sense*”.

We have seen the following arguments under this cause of action:

- The order is *not rationally related* or *narrowly tailored* because the choice of which businesses to close was arbitrary and/or it takes stricter action than is needed to prevent the spread of the virus. Relatedly, the exceptions/exemptions provided in the order are irrational or improperly tailored;
- The order has been randomly *applied*;

- The order is too *vague* for reasonably informed individuals to understand what is precluded or allowed;
- Our business is, in fact, *essential*;
- Other *similarly situated businesses* don't have to close;
- Our business involves *less contamination risk* than other businesses.

Takings Clause

Another prevalent cause of action has been Government Takings under the 5th Amendment of the U.S. Constitution. Here, a business argues that the economic loss it has sustained constitutes a taking of property by the government for the public good, and therefore the government must compensate the business.

- This argument is often used when the business is **not** claiming to be “essential” or “life-sustaining.” Instead, the plaintiff argues that if its closure is required for the benefit of the public good, it should be compensated.
- Plaintiffs have argued that they've been deprived of the *full value* of their property—both the real property on which the business is located and the tangible property inside, which they may not access.
- We have also seen arguments that, even if it is not a *complete* deprivation, it can still be considered a taking, requiring adequate compensation.

Procedural Due Process

Another 14th Amendment argument involves a business's lack of opportunity to be heard. Plaintiffs have used Procedural Due Process claims to challenge the *enforcement* of an executive order and/or *the order itself*. Under this theory, a plaintiff argues that it was deprived of its property without due process of the law because there is not a proper mechanism for challenging the enforcement action (or the order itself), so the plaintiff has not had an opportunity to be heard.

We've seen plaintiffs allege that there was no meaningful hearing to challenge or appeal the decision that their business is “nonessential.” We've also seen several cases involving challenges to the local enforcement of the orders— for example where local law enforcement has shown up with cease and desist letters, notices, or citations, and the plaintiff claims that the proper enforcement should be a court petition. This cause of action depends largely on the wording of the specific order and state laws at issue.

Injunctive Relief

Many of these initial cases have included a request for a temporary restraining order, temporary injunction, and/or permanent injunction. This request for relief is often based on the constitutional claims identified above.

For example, plaintiffs have requested that the court:

- Declare the local government's action inconsistent with state-level order;
- Declare the plaintiff's business essential; and/or
- Enjoin the local government from enforcing the shut-down order, or otherwise prevent enforcement of a shut-down order.

Other Claims

Preemption – Alleging that a local (e.g. County order) contradicts the State order, and the local order is preempted.

Ultra Vires – Alleging that the order of the governor is in violation of the applicable enabling statute (e.g. Virginia's Emergency Services and Disaster Law).

Contract rights – Plaintiffs have alleged that such orders violate the Contracts Clause of the U.S. Constitution. We have also seen claims of basic interference with business contracts and/or prospective business relations.

Common Factual Allegations

Finally, below are a few of the factual allegations alleged in the complaints:

- **Importance of timing** – details regarding how now is a particularly profitable or crucial time of year for the business, which will be missed if action is not taken immediately
- **Lack of risk** –
 - Why this particular business does not put people in as much risk as other businesses
 - Detailing the ability to follow **social distancing, disinfection**, and other safety guidelines in the workplace
- Why this business is **critical to the health and safety** of the public
- Layoffs that have occurred or will occur as a result, and related damage to business reputation
- The lack of threat of the virus in the **specific geographical area** where the business is located

- How the order is **overbroad**/not narrowly tailored
 - Did it really need to close all operations?
 - Could it have allowed the business to operate in a limited fashion?
 - If the real concern was something secondary (like large gatherings) could there have been alternative enforcement actions taken for that limited concern?

While certain orders may be lifted in the near term, these initial cases highlight some of the issues businesses may want to consider where there remains some uncertainty as to the future of stay-home or shelter-in-place orders.

*** Cases involving claims under the First Amendment and Second Amendment, and certain other constitutional challenges such as a right to abortion, are not included in this round-up of business cases.*

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