

MML Webinar on Executive Order 2020-42 Q&A

For COVID 19 is it appropriate to consider the entire state, or should it be more limited to the counties where there are sufficient cases to justify the actions?

This is primarily a political question rather than a legal question. If the EO impacts a fundamental right, the government must demonstrate that it used the least restrictive means available to advance its “substantial” interest. A state-wide regulation will be more difficult to justify as “narrowly tailored” than would a restriction that applies to limited areas where there are a significant number of cases. However, there is no definitive rule that would either allow or prohibit a state-wide regulation.

The enumerated powers of U.S. Constitution trump the Governor's executive orders. Since there is "the right of the people peaceably to assemble," wouldn't the locals be subject to a federal lawsuit if they tried to enforce "Stay at Home"?

The right to peaceably assemble identified in the First Amendment has primarily been construed to refer to protests and rallies. That type of assembly is a fundamental right protected by the First Amendment. Any restriction on that right – especially a prohibition – would be subject to strict scrutiny. Government regulations rarely survive strict scrutiny. Governor Whitmer implicitly recognized that fact when no action was taken to interfere with the protest at the State Capitol. However, not every gathering of people is deemed to be a fundamental right of “peaceable assembly” under the First Amendment. A gathering of friends in someone’s backyard or a block party are not given the same level of constitutional protection. Those gatherings are subject to reasonable restrictions. Preventing the spread of disease would probably be a valid reason to prohibit such gatherings.

What about farmer’s markets as we are being asked here at our city?

A Farmers’ Market is a commercial event and would be treated no differently than a retail store. Since it primarily sells food it would be allowed to operate under the EO but would be subject to the social distancing requirements of the EO that apply to other retail establishments.

Does the Governor’s new order (2020-59) affect video conferencing council meetings, or the opening of city halls to the public?

It is not clear what impact EO 2020-59 has on existing orders related to public meetings. We anticipate clarification will be issued by the Governor on these issues.

Can a small gift store open? They do not sell any groceries.

If the gift shop does not sell groceries or other “essential goods” (medications, sanitary and cleaning products) it is not permitted to open under the current EO.

What happens to all the executive orders if the Legislature does not vote to extend on April 30? The Governor has put orders in place until May 15th but, unless I am mistaken, she doesn't have the authority to extend past April 30?

The Governor asserts she has authority under the original Emergency Authority Act to take action without legislative action extending the state of emergency beyond April 30. If the Legislature does not extend the state of emergency it is likely a lawsuit will be filed to determine the extent of the Governor's authority.

Can sole proprietors work inside their places of business without inviting contractors or employees into the building?

Unless their place of business is their home, they cannot go to their place of business under the terms of the EO unless it is to maintain the business as that is defined in the Order.

Are pet salons or stores that still sell food allowed to just cut a pet's nails if it detrimental to that pet being able to walk preventing it from breaking a leg and then having a more seriously consequence?

It is unclear from the existing orders. If it is an emergency situation necessary to protect the animal's health and safety, it is allowed. However, routine grooming, including nail trimming, is not allowed.

Does this new EO have any impact on use of virtual meetings by cities/villages/townships?

It is not clear what impact EO 2020-59 has on existing orders related to public meetings. We anticipate clarification will be issued by the Governor on these issues.

Are we still in limbo with council meetings? Our next meeting is due May 12th which is after the order expiring the 11th. Our council is from a small village and they do not want a voice conference.

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We would like to know about the protests and how/should be enforced under the new order.

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With regards to enforcement, what do you mean by "entity"? Do you mean municipality?

Yes, essentially – the employing agency. Could be county, city, village—whomever employs the individual officer.

Is there a *de minimis* or trivial threshold for stores to sell groceries, for example, to justify being open?

No. Possibly qualify this by saying a sporting goods store and sell snacks (resale a big package you bought at

Costco) he doesn't think that will allow them to operate. It doesn't matter if food makes up only 10% of your sales – you're still allowed to operate.

How about short-term rentals? Are they allowed?

Section 13 of the EO 2020-59 (issued 4/24/20) states, "No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.

Can you provide a cite to a case that has analyzed the First Amendment right of peaceful assembly, especially when a group gathers in a public or private place open to the public (parking lot)?

The cite is *Harcz v Boucher*, 763 Fed. App'x 536 (6th Cir. 2019)

<https://law.justia.com/cases/federal/appellate-courts/ca6/18-1116/18-1116-2019-02-26.html>

Has anything changed with construction on what is allowed or is not allowed?

There's a new section in EO 59 – section 10 – "resumed" activities. No, construction is not included. That restriction is likely to be lifted on May 7 according to the Governor's office.