

BENEFITS OF PROVIDING EMPLOYEES “ESSENTIAL SERVICES LETTERS”

State governors across the nation have issued executive orders aimed at containing the spread of the coronavirus (COVID-19) at a torrid pace during the month of March. Although these “stay at home,” “shelter in place,” or “healthy at home” orders are not all identical, most of them require certain businesses to close their doors and wait for further order before re-opening. As a result, many employees are unable to go to work. In Kentucky, however on-site, residents employed in “Life-Sustaining Business,” and, in Indiana, those employed in “Essential Businesses and Operations,” are exempted under executive orders. Ky. Exec. Order No. 2020-257 (Mar. 25, 2020); Ind. Exec. Order No. 20-08 (Mar. 23, 2020), respectively. In both states, businesses that are in the Critical Infrastructure Segments (defined under federal standards) are also exempted from closure and, even if a business is closed to the public, they are allowed to maintain “Minimum Basic Operations,” as explained in the orders.

To maintain operational continuity, it is important for employers to identify which employees are exempted from state and local restrictions and notify employees of their status. Some employers are choosing to provide employees “essential services letters” that the employees can carry with them in case they are questioned whether they are “essential” and entitled to continue working.

Identifying Which Essential Employees are Exempted from State and Local Restrictions.

Kentucky Governor Andy Beshear’s Executive Order No. 2020-257 states that the following residents are employed in “Life-Sustaining Business” and, therefore, exempt from certain state and local restrictions:

- All businesses operating in the federal critical infrastructure sectors, as outlined [here](#).
- Life sustaining retail, including: (i) hardware stores and businesses that sell electrical, plumbing, and heating material; (ii) agricultural supply and equipment stores; (iii) medical product supply and equipment stores; and (iv) stores that supply first responders and other critical government and healthcare workers.
- Food, beverage, and agriculture.
- Organizations that provide charitable and social services.
- Media.
- Gas stations and businesses needed for transportation.
- Financial services.
- Housing, buildings, and construction.
- Mail, post, shipping, logistics, delivery, and pick-up services.
- Laundry services.
- Restaurants for consumption off-premises.
- Supplies for Life-Sustaining Businesses.
- Transportation.
- Home-based care and services.
- Professional services, such as legal services, accounting services, insurance services, and real estate services.
- Manufacture, distribution, and supply chain for critical products and industries.
- Critical labor union functions.
- Hotels and motels.
- Funeral services.

The full text of the Governor Beshear's Executive Order No. 2020-257 can be found [here](#).

Indiana Governor Eric Holcomb's Executive Order No. 20-08 states that the following residents are employed in "Essential Businesses and Operations," and, therefore, exempt from certain state and local restrictions:

- All businesses operating in the federal critical infrastructure sectors, as outlined [here](#).
- Stores that sell groceries or medicine.
- Food, beverage, and agriculture.
- Organizations that provide charitable and social services.
- Religious entities.
- Media.
- Gas stations and businesses needed for transportation.
- Financial and insurance institutions.
- Hardware and supply stores.
- Critical trades.

- Mail, post, shipping, logistics, delivery, and pick-up services.
- Educational institutions.
- Laundry services.
- Restaurants for consumption off-premises.
- Supplies to work from home.
- Supplies for Essential Businesses and Operations.
- Transportation.
- Home-based care and services.
- Residential facilities and shelters.
- Professional services.
- Manufacture, distribution, and supply chain for critical products and industries.
- Critical labor union functions.
- Hotels and motels.
- Funeral services.

The full text of Governor Holcomb's Executive Order No. 20-08 can be found [here](#).

In both states, even if an employee does not fall into the categories enumerated above, he or she still may be exempt from state and local restrictions if he or she is necessary to a business's "Minimum Basic Operations." Kentucky defines "Minimum Basic Operations" as "the minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, facilitate telecommuting, and other related functions." Indiana adopts this same definition, but expands the definition to include "minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences." These definitions of "Minimum Basic Operations" appear expansive and, to a degree, within an employer's discretion.

Essential Services Letters

If an employee is identified as “essential,” he or she may continue to report to work under the Kentucky and Indiana orders. But this situation nevertheless presents practical challenges for both an employer and employee. Indeed, employers asking their employees to physically report to work during the COVID-19 pandemic may be confronted with employees who are uncertain about whether they should still continue working on-site. Additionally, employees who continue reporting to work may not know whether it is appropriate for them to come on-site.

To quell this dilemma, employers might consider issuing to employees “essential services letters” which inform the employees that they are still entitled to work on-premises at the employer’s place of business. *Although these letters are not required at this time in most areas*, they may provide peace of mind for employers and employees who desire the employee to continue working on-site. And in the unlikely event an employee is confronted by law enforcement or a governmental entity questioning whether the employee is entitled to work, employees can present these “essential services letters” as legal justification for why the employee continues to work on-premises. Such letters should contain: (i) a brief statement of the employee’s name and job title; (ii) a brief statement that the employee falls under one or more of the categories of “Critical Infrastructure Segments,” “Life-Sustaining Business,” “Essential Businesses and Operations,” the employer’s “Minimum Basic Operations,” or any other essential service deemed operational in accordance with the executive orders of the employee’s state of residence; (iii) a statement that the employee is exempt from state and local restrictions such as curfews, shelter-in-place orders, and other travel and mobility restrictions when

reporting to, returning from, or performing his or her work functions (to the extent applicable); and (iv) a request that local law enforcement or a reviewing government entity allow the individual to continue working in the interest of the continued function of essential employment services.

Sharon L. Gold
Wyatt Tarrant & Combs, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507
859-288-7443
sgold@wyattfirm.com

Jacob N. Eldemire Smith
Wyatt Tarrant & Combs, LLP
400 West Market Street, Suite 2000
Louisville, KY 40202
502-562-7138
jeldemiresmith@wyattfirm.com