

Reopening America – Network Webinar Memo

MAY 26, 2020

On Thursday, May 28, Network – Western Region Director James G. Hodge, Jr., JD, LL.M., and Western Region Senior Consultant Sarah Wetter, J.D., M.P.H., presented the Network webinar, **COVID-19: Navigating Legal Responses Underlying Re-opening State/Local Economies**. The session focused on law and policy challenges related to re-opening strategies at the federal, state, tribal, and local levels. This supporting memo provides additional information related to the session classified within major legal controversies as follows:




Federal v. State

In April 2020, the White House released a [three-phase approach](#) to reopening the U.S. economy and sought state and local adherence. During a White House debriefing to address COVID-19, President Trump stated that his authority is [“total,”](#) which he later rescinded facing state resistance to his [alleged capacities to force states to relax](#) their social distancing policies. New York Governor Cuomo called President Trump’s [claim to ultimate power “absurd,”](#) further commenting that the U.S. “does not have a king.”

The President later indicated that the federal government will intervene if it does not agree with states’ reopening efforts. In a conference call with state governors, President Trump clarified that the governors are free to act, but that the [national government will respond](#) to adverse decisions. Governor Cuomo threatened to take legal action against federal government if it tries to force the state to reopen too soon. President Trump tweeted that if Governor Cuomo is looking for independence, [“That won’t happen!”](#) likening some governors to mutineers. Later Governor Cuomo agreed to work with the federal government to craft a plan to reopen the state. As of May 20, [7 out of 10](#) NY regions began a phased reopening process.

President Trump also criticized Pennsylvania’s Governor Tom Wolf for moving too slowly to reopen the state. In one tweet, the [President urged the governor to “liberate”](#) PA citizens from the current stay-at-home order, accusing Governor Wolf of keeping the order in place to further a Democratic agenda.



Governor Wolf has since adopted a phased reopening approach. Still, President Trump stated on May 11 that PA is [“making ‘no effort’ to reopen its economy.”](#) In reality, [37 PA counties](#) have relaxed their restrictions as of May 15, with the 30 remaining counties under stay-at-home orders presumably until June 4.

Additional partisan accusations have arisen in Michigan. Through tweets, President Trump encouraged protests in the state and threatened to withhold funding (if MI moves forward with its plan to offer broader absentee voting which the President alleges are [“illegal” and “fraudulent”](#)). After widespread protests calling for the rescission of MI’s stay-home order, the President urged Governor Whitmer in a tweet to give the people [“their lives back.”](#) On May 21, President Trump visited MI to tour a Ford Motor Co. plant recently reconfigured to produce ventilators. Seen touring the plant without a mask, the President disregarded a [letter](#) from MI Attorney General Dana Nessel who insisted he wear a mask consistent with company policy and [state law](#).

Later, on May 22, President Trump called a [White House debriefing](#) during which he identified houses of worship as essential and called on state governors to open them immediately. He also claimed that if governors oppose the order, he will [override](#) them. CDC concurrently released a set of [recommendations](#) to make religious services safer during the COVID-19 outbreak. While the recommendations encourage religious leaders to defer to state officials, President Trump has not acknowledged such leniency.

Divisive policies are also perpetuated by the federal Department of Justice (DOJ). On April 27, Attorney General (AG) William Barr released a memorandum [threatening to take legal action](#) against states if their reopening policies infringe upon individuals’ rights. In Mississippi, DOJ filed a [statement of interest](#) for Temple Baptist Church in a lawsuit after one of its drive-in services was closed because of public gathering restrictions. [The church argued that there was no violation](#), pointing to its adherence with CDC guidelines and the state’s designation of religious services as essential. DOJ suggested in its filing that local authorities had [“singled churches out as the only essential service ... that may not operate despite following all CDC and state recommendations.”](#) As of May 14, the case is on the docket to be heard by a federal district court in Mississippi.

On May 19, DOJ sent a [letter](#) to California Governor Newsom warning that the state’s stay-at-home order and reopening plans are unfairly prejudicial to religious entities. The letter refers to DOJ’s statement in the MS case, reaffirming that state [policies](#) may not infringe upon religious liberty even in times of crisis. Specifically, in CA’s phased approach, schools, malls, and restaurants are authorized to reopen before churches, even though those businesses have not been classified as essential. The letter characterizes this discrepancy as contrary to Supreme Court [jurisprudence](#). Governor Newsom [confirmed that the letter was received](#) and has [released guidelines](#) allowing houses of worship to reopen in limited capacity since being deemed essential by President Trump.

On the same day that President Trump made such determination, DOJ filed a [statement of support](#) in a lawsuit challenging the constitutionality of Illinois’s stay-at-home order extension. Illinois Governor J.B. Pritzker is sued by the state’s Republican Representative Darren Bailey for exceeding his emergency powers granted by the state legislature. In the statement of interest, DOJ again highlighted that even in times of crisis, “[s]tates must follow the legal processes they have established to protect their people’s ... rights.” The case is scheduled for 2 hearings on May 26 to address possible remand to state court and Bailey’s request for expedition.



State v. Local

Addressing mayors and local officials, NIH's NAID Director, Dr. Anthony Fauci, [recently stated](#) that “the success of how we respond as a nation to this outbreak is in your hands.”

However, across the country, state and local feuds over coronavirus responses have erupted as some local officials refuse to comply with governors' orders, invoking “[home rule](#)” (i.e., a locality's “right to self-government, including the powers to regulate for the protection of the public health, safety and welfare”). Tensions have emerged where home rule permits localities to act in the best interests of their constituents [contrary to governors' actions](#). Several examples illustrate how these types of issues play out against the backdrop of states' reopening after stay-home orders expire.

In Pennsylvania, Governor Tom Wolf has [threatened](#) to withhold federal COVID recovery funds from multiple counties refusing to comply with state reopening restrictions. The Coronavirus Aid, Relief, and Economic Security ([CARES](#)) Act gives governors wide discretion to distribute portions of the \$150 billion relief fund. Governor Wolf further threatened that businesses that reopen could lose liquor and health [licenses](#). Mayor James Curry of Middleton, PA, responded that his borough's police would not enforce Governor's Wolf's shutdown against non-essential businesses absent [mayoral approval](#). Similar local threats to fail to enforce state orders are occurring nationally. After one Colorado restaurant opened its doors on Mother's Day, Governor Jared Polis [suspended](#) its liquor license.


Conversely, where governors have approved more aggressive reopening strategies, some local officials have chosen to continue to enforce local restrictions. In Georgia, several mayors [expressed disbelief](#) at Governor Brian Kemp's executive order to fully reopen. Governor Kemp's order [explicitly preempts](#) all contrary local orders. In Texas, Attorney General Ken Paxton threatened litigation against Dallas County (and [other municipalities](#)) for orders imposing restrictions on houses of worship. AG Paxton called the county's public health order [unconstitutional](#) and unenforceable, citing a state-level executive order that “supersedes any conflicting order by local officials.” Lieutenant Governor of Texas Dan Patrick also denounced a local official's executive order requiring Harris County constituents to wear face masks, calling the order “[the ultimate government overreach](#).”

Reopening nonessential businesses has raised other rifts between governors and mayors. In Nevada, Governor Steve Sisolak [condemned](#) Las Vegas' Mayor for her plans to reopen the city's casinos and restaurants, claiming Nevada residents must not be “used as a control group.” Still, Las Vegas casinos are scheduled to open soon under specific social distancing restrictions. The New Mexico Supreme Court [ruled](#) against the local mayor of Grants, NM, ordering him to follow state health orders and refrain from reopening nonessential businesses.

After Wisconsin's Supreme Court rejected the legislature's stay-home order as unconstitutional in *Wisconsin Legislature v. Palm*, several local mayors refused to comply with the high court's ruling. Madison Mayor Satya Rhodes-Conway released a [statement](#) that her counties' “safer at home” guidelines would remain in place, despite the court's decision. Mayor Tom Barrett also ordered the Milwaukee Health Department's stay-home order to [remain in effect](#).

State v. Tribal

States and tribal nation clashes over reopening efforts are particularly complex due to the sovereign status of these governmental entities. In South Dakota, the Cheyenne River Sioux Tribe and Oglala Sioux Tribe [established checkpoints](#) along roads to regulate traffic in and out of their reservations to control the



spread of COVID-19. A [memo](#) from the director of the Bureau of Indian Affairs (BIA) on April 8, 2020 detailed guidance for tribes temporarily restricting access to tribal lands over roads owned by entities other than the tribe. BIA directed that tribes should consult and reach agreement with road owners and alert the public regarding restrictions. State legislators whose districts include tribal land argued in a [letter to South Dakota Governor Noem](#) that the state lacks jurisdiction over the checkpoints, citing Fort Laramie Treaties from [1851](#) and [1868](#), as well as an 8th Circuit Court of Appeals [ruling from 1990](#).

Governor Noem [responded](#) on May 8, asserting that BIA's memo supports the position that tribally-established checkpoints on state and federal highways are illegal and subject to litigation. Governor Noem also sent a [letter](#) to President Trump on May 20, 2020, stating that the federal government has interests in the transportation of essential infrastructure goods, critical services, protecting travelers from discrimination, and the free flow of interstate commerce.


On May 1, NM Governor Lujan Grisham invoked emergency powers under the state's Riot Control Act to shut down the City of Gallup to mitigate the spread of COVID-19. In the [executive order](#), Governor Grisham enacted a curfew, closed roads accessing Gallup, restricted the number of individuals allowed to travel in vehicles together, and provided more guidance on sheltering in place. Although the order [expired on May 10th](#), the city remains cautiously quiet. Gallup is a gateway to the Navajo Nation and is often frequented by tribal members as a proximal source of food and other essentials. Jonathan Nez, President of the Navajo Nation, thanked Governor Grisham [in a press release](#) and expressed full support for the protective measures. Yet, constitutional questions grounded in rights to travel and equal protection arise from disproportionate affects on individuals belonging to a specific cultural background.

Conversely, in North Country New York, the St. Regis Mohawk Tribe [remains closed](#) even as the state's economy begins to slowly reopen. In a [press release](#), the Council expressed concerns that the state's regional reopening plan insufficiently protected community members and visitors. The tribe will review state guidance and data to develop and monitor reopening plans. To date NY State has not pushed back directly on the tribe's decision to remain closed.

In Connecticut, the Mashantucket Pequot and Mohegan tribes [have announced](#) phased reopening plans for their casinos against Governor Ned Lamont's directives. Governor Lamont is urging businesses to wait until late June to reopen and characterized the tribes' decisions as "risky" for workers and patrons. Mohegan Tribe representative Chuck F. Bunnell [expressed](#) the tribe's desire to work with the Governor. Each tribes' casino will reopen in compliance with state recommendations regarding protective equipment and social distancing. Governor Lamont [recognized](#) the tribes' sovereignty and is not actively attempting to halt the casinos' reopening, but has pleaded with the tribes to recognize the impacts of their decisions on state partnerships and public health and [threatened](#) to take away the casinos' liquor licenses.

County health officials in California [stated](#) that local public health orders extend to tribal nations. Tribal casinos near San Diego [reopened this week](#) with new, extensive protective equipment installed and requirements for masks and social distancing. County health officials [denounced](#) the decision and are working with CDC to find some way to close the casinos.

In Michigan, some tribal casinos sought to reopen [on May 16](#) even though the state's stay-home order extended [until May 28](#). On May 5, Michigan Attorney General Dana Nessel sent a [letter](#) to the Hannahville Indian Community, reminding Kenneth Meshigaud, the tribal chairperson, that Governor Whitmer's executive orders applies to all employees of the tribe who are non-Indians, Indians who are not enrolled members of the tribe, and enrolled members of the tribe residing outside of the reservation. She warned that such employees could be subject to civil and criminal penalties for violating Michigan state orders



and requested that the tribe limit operations due to COVID risks. The tribes are [waiting until June 1](#) to reopen, heading off a potential legal showdown with the state.

Public v. Private

Governments are issuing violations against an array of private businesses defying stay-home orders. Several private businesses have legally challenged these orders on varied grounds. On [May 9](#), Tesla Inc. sued Alameda County, CA. Tesla founded, Elon Musk, resumed factory production on [May 10](#), in accordance with Governor Newsom's reopening guidance issued on May 7, allowing resumed operations of manufacturers. The guidance allowed local governments to keep more restrictive rules intact. Alameda County extended its stay-home order until May 31. The extended order did not alter or remove closure rules for manufacturing. Tesla claimed the County violated principles of (1) due process by "fail[ing] to give reasonable notice to persons of ordinary intelligence of what is forbidden under the law" and (2) equal protection because it "continues to insist...that what is permitted in a neighboring county will endanger the public health if permitted to also occur within Alameda County borders." Alameda consistently declares businesses like Tesla "essential" while requiring those businesses to remain closed. On [May 20](#), Tesla withdrew its claims after Alameda County agreed to allow it to do "[Minimum Basic Operations](#)" until a plan could be implemented in accordance with the Order. On [May 16](#), Washington State Attorney General Bob Ferguson filed identical lawsuits against gyms defying Governor Inslee's stay-home order. The first suit was filed against Michael Jellison, owner of Arlington's Power Alley Fitness. Defendant opened the gym for business on May 11 while gyms were still considered "non-essential." The AG's complaint states the plaintiff's actions endanger the public's health and violate the state Consumer Protection Act. A second suit, alleging the same violations was filed against Puyallup's Northwest Fitness Co. On [May 20](#) both gyms closed after receiving cease-and-desist letters, and, one day later on [May 21](#), filed a lawsuit claiming the Governor has acted unconstitutionally by "suspending liberty interests." In Victorville, CA, "[The Gym](#)" reopened on May 1 against Governor Newsom's executive order. The Gym prominently displays a banner of the U.S. Constitution on its front windows and tags the Governor on social media platforms challenging him to shut them down. Gym owners, Lewis and Lyons, sued the County of San Bernadino after receiving a letter on May 6 threatening jail time or a fine.

On [May 5](#), 9 businesses sued Oregon Governor Kate Brown, contending that closing their businesses without "a constitutionally-adequate opportunity for a hearing to present plaintiff's cases for why their businesses should not be shut down" violates due process, equal protection, and a taking. As to the latter claim, they assert their property was unreasonably seized by the Governors' orders "shuttering" their businesses. On [May 19](#), U.S. District Judge Michael J. McShane denied the businesses' motion for emergency injunction, noting how the U.S. Supreme Court "has distinctly recognized the authority of a state to enact quarantine law and health law of every description."

On Memorial Day weekend, Poopy's Pub and Grub, billed as the largest biker destinations in the state, located in Savanna, Illinois threw a Memorial Day weekend party in violation of Governor J.B. Pritzker's stay-at-home order. Owner Keven Promenschenkel filed suit on [May 11](#) against Governor Pritzker after the business received a [cease-and-desist letter](#) from the state mandating that nobody could eat or drink on the premises. He points out that curbside pickup doesn't work for "bikers, [who] obviously can't eat on a motorcycle." The suit alleges the Governor did not have the unilateral authority to extend the stay-at-home order and "[Pritzker has no constitutional authority to forcibly close the business.](#)" Hundreds of bikers attended the event thrown to support the lawsuit and "in part stick it to the governor."



Employer v. Employee

Please see the forthcoming Network blog, *Reopening America: Protecting Employees as They Return to Work During COVID-19*, by Sarah Wetter and Elyse Pendergrass for more information on this portion of the webinar.

SUPPORTERS



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