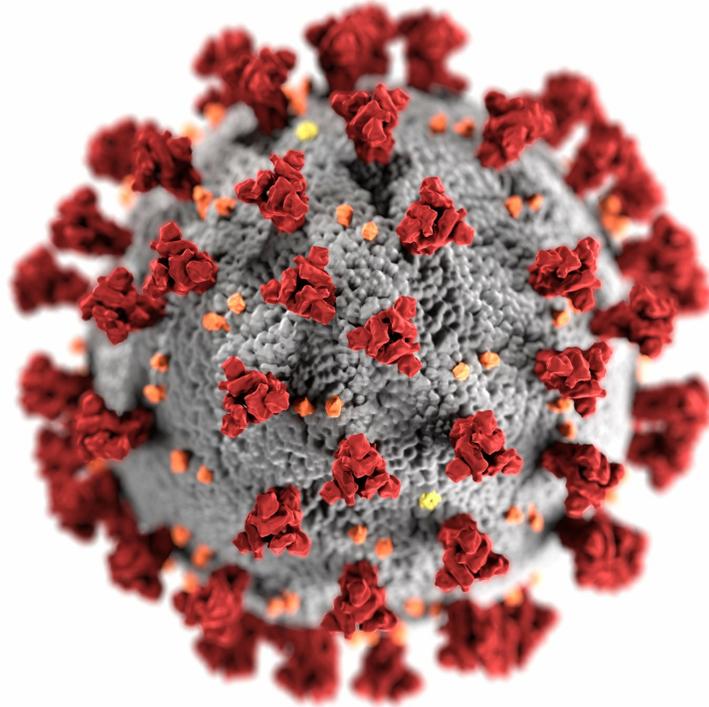


Enforcement of the Governor's Executive Order during a State of Emergency — OMAG

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March 25,
2020



On March 24, 2020, Governor Stitt issued the “Safer at Home” Executive Order which imposes certain restrictions on individual and business activities. This blog post will address the enforceability of the Safer at Home Executive Order by municipal Law Enforcement. That will include a discussion of each restriction that is contained in the Executive Order.

Please note: this blog post is current only through 3/25/2020. The Safer at Home Executive Order was actually the Fourth Amended Executive order. It is expected that the Governor will further amend the Executive Order over the coming days, weeks and months. OMAG strongly recommends that you check the Secretary of State’s website for new versions of the Executive Order.

Governor’s Authority to Issue the Executive Order

Under the Oklahoma Constitution, Art. 6, Sec. 2, the Supreme Executive Power of the State is vested in the Governor. The Legislature enacted the 1968 Oklahoma Riot Control and Prevention Act (ORCPA), 21 O.S. §1321.1-1321.10, to authorize and empower the Governor

to declare States of Emergency, 21 O.S. §1321.3, and to create legally binding (and enforceable) restrictions on activities during a State of Emergency, 21 O.S. §1321.4(A). Additionally, The Oklahoma Emergency Management Act of 2003, 63 O.S. §683.1 *et seq.*, and/or the Catastrophic Health Emergency Powers Act, 63 O.S. §6101 *et seq.*, also contain enabling provisions that grant broad powers to the Governor during Emergencies. For the purposes of this post, the analysis will rely on the provisions of the ORCPA.

Enforcement of the Executive Order

Pursuant to 21 O.S. §1321.4, the Governor is empowered to issue certain restrictions that are legally enforceable during a State of Emergency. The restrictions can apply State-wide or can apply to specific areas of the State as outlined in the Order. Governor Stitt's Executive Order contains both State-wide restrictions and restrictions that currently apply in 19 counties.

The ORCPA contains 3 criminal provisions that apply and may be utilized by Law Enforcement:

- **21 O.S. §1321.6**: this Statute makes it a misdemeanor for any person to violate a restriction contained in the Executive Order.
- **21 O.S. §1321.7**: this Statute makes it a felony for any person to maliciously destroy any real or personal property or to maliciously injure any person. It also makes it unlawful for any person to cause an otherwise innocent or irresponsible person to engage in such conduct or for any person to intentionally promote or facility a commission of such offense by way of 1) soliciting, requesting, commanding, importuning, or otherwise attempting to cause the other person to commit the crime, or 2) aiding, counseling, or agreeing or attempting to aid the other person in planning or committing the crime, or 3) failing to make a proper effort to prevent the commission of the crime by someone who has a legal duty to prevent the commission of the offense.
- **21 O.S. §1321.8**: this statute provides for criminal penalties for those involved in a riot during a State of Emergency.

Many of the actions which could be punishable under these statutes are also addressed by other criminal Statutes or Ordinances. The ORCPA makes clear that, when the provisions of State law or City ordinances are **less restrictive** than the restrictions in the Executive Order, then the restrictions in the Order apply. 21 O.S. §1321.5(A). Where the restrictions in State law or City ordinances are **more restrictive** than the restrictions in the Executive Order, the more restrictive laws . 21 O.S. §1321.5(B). As such, if your municipality has

imposed restrictions that are more restrictive than the Governor's, then your restrictions would control. If your municipality has no restrictions or has less strict restrictions, then the Governor's will control.

Section 1321.6 would be the statute local Law Enforcement would rely upon if charging someone with violating the terms of the Executive Order. Additionally, to the extent the Executive Order is considered to be an Order of the Oklahoma Department of Emergency Management, 63 O.S. §683.23(C) could also be used and makes such a violation a misdemeanor. Because the violation is a misdemeanor and the offense would qualify as a "public offense", officers may arrest violators who commit the offense in the presence of an Officer pursuant to 22 O.S. §196(A)(1). There is no legal mandate that the person must be arrested, so officers could exercise discretion to either cite-and-release the person or to submit the matter to the District Attorney's office and allow prosecutors to decide whether to file charges out of custody.

The Restrictions Contained in the "Safer at Home" Executive Order

The "Safer at Home" Executive Order contains several restrictions which will each be discussed below. This will include a discussion of whether the restriction applies State-wide or to a limited area, the legal authority for the issuance of the restriction, and a discussion about the scope of the restrictions.

Restriction #1: "Adults over the age of sixty-five (65) and people of any age who have serious underlying medical conditions, collectively referred to as 'vulnerable individuals,' shall stay in their home or place of residence except for working in a critical infrastructure sector, as more particularly described herein, and the conduct of essential errands. Essential errands shall mean those errands which are critical to everyday life and includes obtaining medication, groceries, gasoline, and visiting medical providers. The vulnerable population is encouraged to use delivery and/or curbside services whenever available."

Applies: State-wide.

Authority to Issue: 21 O.S. §1321.4(A)(1).

Discussion: The restriction would apply to those who meet the age threshold (people over the age of 65) or those who have a "serious underlying medical condition". There is no guidance in the order as to what conditions constitute a serious underlying medical condition. The CDC has guidance on those who are at higher risk for severe illness

resulting from COVID-19 which includes those persons 65 and older, those living in a nursing home or long-term care facility, those with high risk conditions (such as chronic lung disease, moderate to severe asthma, serious heart conditions, those who are immunocompromised including those going through cancer treatment, and those with severe obesity), and those who are pregnant. The CDC guidance is not expressly incorporated into the order, and is therefore only guidance and not a legal mandate.

The restriction is that those persons that qualify as “vulnerable individuals” must stay at their residence and can only travel to conduct “essential” errands. Those errands are defined somewhat generically as those which “are critical to everyday life” with a list of examples provided. The list is not exhaustive, so there may be errands that are not expressly listed that would nevertheless qualify. If the errand fits one of the expressly enumerated example, then it would be considered essential.

The final sentence contains an encouragement which is not a legal mandate. As such, it would not be unlawful for a person to obtain food other than by delivery or curbside services.

Restriction #2: “Oklahomans and medical providers in Oklahoma shall postpone all elective surgeries, minor medical procedures, and non-emergency dental procedures until April 7, 2020.”

Applies: State-wide.

Authority to Issue: 21 O.S. §1321.4(A)(1) & (8).

Discussion: The restriction applies to both Oklahoma residents and to medical providers who perform surgeries and procedures in Oklahoma. It does not expressly apply to non-residents who are in Oklahoma, though it is likely that this restriction could be interpreted more expansively by a Court. Even if a Court found it was not applicable to the non-resident, the restriction would still apply to the medical provider that the non-resident was seeking out to perform a surgery or procedure.

The restriction makes it unlawful for elective surgeries, minor medical procedures and non-emergency dental procedures to be performed until on or after April 7, 2020. It is likely that this date could get extended by future Executive Order and you are encouraged to check the Secretary of State’s website for new versions of the Executive Order.

Restriction #3: “Social gatherings of more than ten people are prohibited. Businesses within a critical infrastructure sector, as more particularly described herein, shall take all reasonable steps

necessary to comply with this Order and protect their employees, workers, and patrons.”

Applies: State-wide.

Authority to Issue: 21 O.S. §1321.4(A)(1), (2), (5), (6), (7) & (8).

Discussion: This restriction prohibits gatherings of more than 10 people. It appears to qualify the restriction to only apply to those gatherings that are social in nature. As such, this restriction would not, itself, appear to restrict gatherings for non-social purposes (e.g. shopping, work, etc.). Those gathers are addressed in Restriction #4, discussed below.

The restriction also requires businesses within the “critical infrastructure sector” to take reasonable steps to comply with the Order. It also requires such businesses to take reasonable steps to protect their employees, workers and patrons. The issue of what qualifies as a business in the “critical infrastructure sector” will be discussed below under Restriction #4. This business restriction would make it unlawful for a business to allow social gatherings of more than 10 citizens (which would not appear to include employees of the business, since their participation in the gathering would not be social in nature). This business restriction would also make it unlawful for the business to fail to take “reasonable” steps to protect their employees and patrons. Given the ambiguity in what constitutes “reasonable” steps, the restriction would largely be enforceable only as to clear and obvious failures to protect.

Finally, and importantly, the business restriction would not appear to apply to businesses that are not in the “critical infrastructure sector”. Restriction #4 would apply to all businesses that are not in the “critical infrastructure sector” that are located in a more narrow area of the State. For that are not in the “critical infrastructure sector” and are not in the area applicable to Restriction #4, there would not appear to be restrictions on operations.

Restriction #4: “Effective at 11:59 p.m. on March 25, 2020, all businesses not identified as being within a critical infrastructure sector as defined by the U.S. Department of Homeland Security and located in a county experiencing community spread of COVID-19, as identified by OSDH on its website, shall close. Additional sectors may be designated as critical by Executive Order or Memorandum. Nothing in this provision shall prevent restaurants and bars from providing pick-up, curbside, and delivery. This shall be effective until April 16, 2020.”

Applies: Counties in Oklahoma that have had a positive COVID-19 case. As of the issuance of the Order, there were 19 Counties with a positive COVID-19 case (Canadian, Cleveland, Custer, Garvin, Grady, Jackson, Kay, Logan, Mayes, McClain, Muskogee, Noble, Oklahoma, Pawnee, Payne, Pontotoc, Tulsa, Wagoner, and Washington). As written, the Executive Order will extend automatically to other counties once they are listed on the [Department of Health's website](#). As of this posting, there are now 27 Counties with a positive COVID-19 case (Adair, Bryan, Carter, Creek, Delaware, Osage, Pottawatomie, and Stephens have been added). Please continue to check the DOH website if your County is not included in this list as the list of Counties is likely to expand.

Authority to Issue: [21 O.S. §1321.4\(A\)\(1\), \(2\), \(5\), \(6\), \(7\) & \(8\)](#).

Discussion: During his [press conference](#), Governor Stitt referred to "essential" and "non-essential" businesses. Following his press conference, [Governor Stitt tweeted at 3:57 p.m. on March 24, 2020](#), that the definition of what is an essential business or critical infrastructure will be based on [CISA guidance](#). CISA is part of the U.S. Department of Homeland Security, so this guidance is incorporated into the Executive Order.

The CISA guidance is broken down by industry: Healthcare / Public Health Law Enforcement, Public Safety, First Responders, Food And Agriculture, Energy, Water And Wastewater, Transportation And Logistics, Public Works, Community-Based Government Operations And Essential Functions, Critical Manufacturing, Hazardous Materials, Financial Services, Chemical, and the Defense Industrial Base. Each industry has lengthy bullet points identify what type of job duties would qualify.

Further, Governor Stitt's Order indicated that he may expand the scope beyond the CISA guidance by Executive Order or Memorandum. [On 3/24/2020, Governor Stitt issued such a Memorandum](#) which added additional duties which would qualify in the areas of Healthcare/Public Health, Law Enforcement, Public Safety and First Responders, and Community-Based Government Operations and Essential Functions.

Under the 3/24 Memo, government workers (such as municipal employees) can be considered "critical" if they are so defined by their government employer. The Memo states that such definition should be consistent with the government employer's Continuity of Operations Plans and Continuity of Government plans. But this guidance largely leaves the decision to the discretion of the government employer.

This restriction would not apply to the food and beverage industry. As such, grocery stores, restaurants and liquor stores located in the designated area could stay open. That being said, this Restriction is in addition to the other restrictions that apply State-wide, such Restrictions #1-3. Therefore, just because a restaurant is open does not mean that it could allow social gatherings in excess of 10 patrons due to Restriction #3.

This restriction would apply to Churches. The Governor's 3/24 Memo allows Churches to provide faith-based services through streaming or other technology. This would mean that, as entities, Churches could continue to operate with staff that would be needed to effectuate the provision of such services. But this would not appear to extend to allow in-person gatherings of parishioners.

Ultimately, this Restriction would prohibit businesses that are non-critical under CISA guidelines (and the expansion in the Governor's Memo) from operating. The Restriction applies regardless of whether the business services customers on site and further applies regardless of the number of customers that the business may allow on the premises at a given time. The Restriction applies to the business, and therefore any Criminal Charge would have to be filed under 21 O.S. §1321.6 against the business and/or the owner.

Aiding and Abetting charges could also arguably be filed against other individuals such as employees or customers, but OMAG urges Law Enforcement to carefully consider whether such charges are appropriate. As to customers, one question Officers should ask themselves is whether the customer knew or should have known that the business they were patronizing could not lawfully operate. As to Employees, Officers should ask themselves whether the employee was freely chose to work at a business that could not lawfully operate or whether the employee was compelled to do so (e.g. under threat of termination from employment if they failed to report).

Finally, the State has setup a website for businesses to apply to have their business added to the list of critical infrastructure.

Restriction #5: "Visitors are prohibited from entering and visiting patients and residents at nursing homes, long-term care facilities, and retirement homes."

Applies: State-wide.

Authority to Issue: 21 O.S. §1321.4(A)(1), (2), (7) & (8).

Discussion: This Restriction applies to citizens who enter a nursing home, long-term care facility or retirement home to visit patients or residents of those facilities. The restriction does not apply to employees at the facility nor to residents at the facility. Arguably the facility and/or its workers could be charged with aiding and abetting if they assisted a visitor in entering and visiting a patient or resident.

Guns & Ammo - Off Limits

There is one area where the Governor is prohibited from imposing restrictions - guns and ammo. 21 O.S. §1321.4(B) states: "neither the Governor nor any official of a municipal or state entity shall prohibit or suspend the sale, ownership, possession, transportation, carrying, transfer and storage of firearms, ammunition and ammunition accessories during a declared state of emergency, that are otherwise legal under state law." This language was added in 2012 by way of Senate Bill 1760. This prohibition would extend to any government action attempting to close or suspend gun/ammo sales or ownership including municipal restrictions.