

Reopening economies – which level of government has the last word?

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As states begin to work together to reopen the economy, companies in all industries will soon have to wrestle with a new wave of federal, state, and local orders. These orders may conflict at times, vary in application, or have differing effective dates. Determining which order to abide by and which orders can safely be ignored will be vital decision points for businesses. Hogan Lovells is here to help clients navigate these issues.

Federal government or state governments – who has the power?

As it did with the guidance for closing businesses and ordering individuals to stay home, the federal government seems poised to recommend to the states when and how the states should reopen their economies. But issuing recommendations is all the federal government can do. In our federal system, it is the states – not the federal government – that command authority over public health and safety. The Constitution makes clear that the federal government can only exercise certain enumerated powers, and the 10th Amendment confirms that all other powers remain with the states. That is true even during a federally designated state of emergency. The president has no inherent authority to reopen local economies, and no Act of Congress empowers the president to reopen businesses.

State governments or local governments – who to follow?

It is the states, then, that will lead the way in reopening. But as was the case at the beginning of this crisis, townships, cities, and counties will also likely issue their own orders. Companies and business owners will have to grapple with how to proceed when a state order conflicts with a local order. Some companies may find themselves allowed to reopen under a city order, but not under the state order. Others might be in the reverse position. And nationwide businesses will find themselves blanketed by patchwork orders from various states and/or local authorities. What should a company do, for example, when faced with:

- A county order that requires businesses to remain closed longer than the state's order does?
- A city order that allows businesses to open in the face of a state order requiring them to remain closed?
- A county order that allows businesses to open under specific restrictions that are not required by a city's reopening order?

Hogan Lovells can help clients navigate those layers of conflicting obligations. These orders sometimes contain specific "preemption" language that makes clear which order governs. But when they do not, Hogan Lovells is here to advise clients on the best path forward.

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