

April 21, 2020

VIA HAND DELIVERY

The Honorable Brian Kemp  
Governor's Mansion  
391 West Paces Ferry Rd NW  
Atlanta, GA 30305

RE: Executive Order 04.20.20.01 (264.89 KB) (the "Executive Order")

Dear Governor Kemp:

You and I have met a few times through the Georgia Bar and other organizations. As Secretary of State you had someone help me deal with a Registered Agent service that was operating illegally in the state. In fact, I made the decision to move to Georgia five years ago over Los Angeles from Washington, D.C., because of the state's business climate while you were Secretary of State.

For the reasons set forth in this letter, I implore you to reconsider the decision to reopen businesses as early as April 27, 2020, contained in the Executive Order. The financial impact of opening businesses will be as negative as keeping them closed, if not more because of exposure to additional liability. Businesses will have to absorb the extra expenses required to comply with the Executive Order as well as the expenses I set out below.

There is no question that the shutdown in response to Covid-19 has taken a financial hit on businesses. However, it is a temporary situation for which there are a number of solutions. While the first round of economic stimulus from the Federal government was less than effective, they are addressing the failings in the second round. The Federal response will continue even after the next round of stimulus.

Additionally, there are contractual, and even statutory, remedies available to businesses. Most contracts include a Force Majeure clause which addresses situations where a party is unable to perform due to circumstances beyond either party's control. Where there is either not a Force Majeure clause or it is inadequate for the situation, Georgia has a longstanding "Act of God" statute that provides:

If performance of the terms of a contract becomes impossible as a result of an act of God, such impossibility shall excuse nonperformance, except where, by proper prudence, such impossibility might have been avoided by the promisor.

O.C.G.A. § 13-4-21 (2010)

Here, case law supports that both Covid-19 and the government enforced shutdowns would qualify as an Act of God in Georgia.

Once the state reopens for "business" all the solutions available for those who either cannot or will not open go away. A landlord who may have been willing to compromise on rent will not have the incentive to do so because the tenant could "technically" be open for business. Banks will not feel

compelled to extend forbearance on loans and mortgages. It will not matter whether a business can comply with the Executive Order, it just matters that the Executive Order exists.

Businesses with less than 500 employees that reopen will be subject to provisions of the Families First Coronavirus Response Act (the "FFCRA"). The FFCRA requires employers to offer PAID sick leave and extended family and medical leave through December 30, 2020 to covered employees who contract Covid-19, need to care for a family member who has, or has children home because schools or daycares are closed. While there are tax credits available to businesses who incur such expenses, the impact on personnel management will be incalculable. A business without employees cannot operate.

I appreciate that the FFCRA does provide a potential exemption from its requirement for employers with less than 50 employees. However, the United States Department of Labor has not issued any guidance on what parameters will exempt an employer. Why should a receptionist at a business with 49 employees not have access to the same benefits a receptionist at a business with 51 employees has? Therefore, it is likely the exemptions will be narrowly drawn to avoid such disparate impact.

Significantly, a business that opens needs customers and clients to support their efforts. A recent poll by the Wall Street Journal found 60% of Americans support the stay at home orders to stop the spread of Covid-19. A business that reopens will not be able to survive financially if they only serve 40% or fewer of the customers they historically have served. When a business that is open as a result of the Executive Order fails, they will not be able to rely on any remedies they may have had had they stayed closed due to a government shutdown.

For the reasons set forth herein, I implore you to reconsider the Executive Order as neither the science nor the economics supports reopening at this time. Please do not hesitate to reach out to me with any questions about the issues I have raised in this letter. I can be reached at 404-220-8123 or [nprager@pragerlaw.us](mailto:nprager@pragerlaw.us).

Respectfully,



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