

Will COVID-19 Transform The Cannabis Industry?

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Prior to 1996, cannabis was illegal under both federal and state law throughout the United States. While cannabis remains illegal under federal law today, 11 states and the District of Columbia have legalized cannabis for both medicinal and adult recreational purposes.

Now, amid the spread of the coronavirus throughout the United States and the stay-at-home orders issued by state governors and county officials to combat the spread of the virus, many of these states have taken unprecedented steps to ensure that medical and recreational cannabis remains available to their citizens in this time of crisis.

Stay-at-home orders in these states have deemed medical and/or recreational cannabis dispensaries as essential businesses that may continue to operate during the crisis. Designating marijuana as essential goes well beyond mere legalization and highlights the disconnect between federal and state cannabis law.

During the early days of the crisis, the marijuana industry has fared far better in states that have allowed home delivery. Other states have noticed, and have relaxed home delivery regulations in response. Likewise, many states have, for the first time, allowed outdoor, curbside pickup in an effort to enable consumers to continue to receive this essential product. Time will tell whether or not these short-term fixes will become a lasting feature of the industry.

In this article, we summarize which states have, and which have not, deemed marijuana businesses essential. We also discuss altered rules regarding home delivery and curbside pickup, and consider the potential long-term implications of today's emergency rules.

Many States Consider Cannabis an Essential Industry

In response to COVID-19, governors in states where marijuana has been legalized at the state level have been forced to answer a novel question: Is marijuana, which according to federal law has no medical benefit, an essential societal function or need?



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Governors have taken extraordinary measures to mitigate community transmission of the virus through executive and/or emergency stay-and-home orders. Generally, these orders permit only essential businesses or industries to remain open and force nonessential businesses to cease on-site operations.

The federal government has identified 16 critical infrastructure sectors^[1] considered to be “so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.” Because cannabis remains illegal under federal law, the federal government does not consider cannabis as a vital or essential industry.

But governors in the 11 states and the District of Columbia that have legalized marijuana for medical and adult recreational purposes have generally taken a different approach. Seven states (i.e., California, Colorado, Illinois, Maine, Massachusetts, Nevada and Washington) and the District of Columbia have deemed medical and/or recreational marijuana dispensaries as essential businesses that can continue to operate during the pendency of the stay-at-home order.

The other four states that have legalized marijuana for both medical and adult recreational purposes (i.e., Alaska, Michigan, Oregon and Vermont) have not deemed cannabis as an essential industry, but dispensaries in those states are being allowed to continue operating in more limited capacities, for the most part.

Here are the states that have deemed medical or adult recreational marijuana dispensaries (or both) essential:

California

Recreational and medical marijuana dispensaries have been deemed essential in California. Gov. Gavin Newsom on March 19 ordered all Californians “to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.”^[2]

Cannabis retailers and their employees were not exempt from the March 19 order but Governor Newsom reserved the right to identify “additional sectors as critical” and, on March 22, the California State Public Health Officer identified an extended list^[3] of “essential critical infrastructure workers” that included “[w]orkers supporting cannabis retail and dietary supplement retail” in the food and agricultural sector and “cannabis retailers” in the health care/public health sector.

Colorado

Recreational (via curbside pickup only) and medical (via in-store sales and curbside pickup) marijuana dispensaries have been deemed essential in Colorado. Gov. Jared Polis has ordered “Coloradans to stay at home ... subject to certain limited exceptions” and all businesses not considered critical business under the prior-issued Public Health Order 20-24 to temporarily cease operations.^[4]

Under Public Health Order 20-24,^[5] “[m]arijuana dispensary (only for the sale of medical marijuana or curbside delivery pursuant to Executive Order D 2020 011)” were deemed critical businesses. Per Executive Order 2020 011,^[6] Polis “temporarily suspend[ed] prohibition on retail marijuana store online sales of retail marijuana and retail marijuana products ... to facilitate pick up by consumers” age 21 and up for a period of 30 days.

Illinois

Recreational and medical marijuana dispensaries have been deemed essential in Illinois. Gov. J.B. Pritzker issued a stay-at-home Executive Order No. 8[7] on March 21, which requires individuals to stay at home and permits only essential businesses, including “licensed medical and adult use cannabis dispensaries and licensed cannabis cultivation centers,” to remain open. The Illinois Department of Financial and Professional Regulation also issued guidelines on March 17[8] temporarily allowing sales via curbside pickup.

Maine

Medical marijuana dispensaries have been deemed essential in Maine. Gov. Janet Mills issued Executive Order 19 FY 19/20[9] on March 24, which permitted only essential businesses and operations to continue operating physical locations that are public-facing (i.e., that allow customer, vendor or other in-person contact). Medical cannabis retailers are essential businesses and operations because they are considered “other medical facilities.”[10] While the possession of recreational cannabis is legal in Maine, commercial sales are not permitted at this time because the state has not issued any recreational dispensary licenses yet.

Massachusetts

To date, only medical marijuana dispensaries have been deemed essential in Massachusetts. Gov. Charlie Baker issued a stay-at-home emergency order[11] on March 24, which requires all businesses that do not provide “COVID-19 essential services” to close their physical workplaces and facilities to workers, customers and the public. Under Exhibit A[12] to this executive order (released the same day), licensed medical marijuana retailers have been deemed COVID-19 essential services.”

The Massachusetts Cannabis Control Commission has also issued an emergency rule[13] allowing licensed medical marijuana retailers to temporarily sell cannabis via curbside pickup. It also remains possible that Baker may expand the scope of marijuana businesses deemed essential to include adult recreational dispensaries, as there is mounting pressure[14] (including from at least one member[15] of the state’s Cannabis Control Commission) for him to do so.

Nevada

Recreational and medical marijuana dispensaries have been deemed essential in Nevada but may operate by delivery only. Gov. Steve Sisolak issued an emergency regulation[16] on March 20, which permits only essential licensed businesses to remain open if they can adopt mitigation measures to reduce the risk of community transmission. The regulation identifies retail cannabis dispensaries as an essential and exempt business but notes that they may operate by delivery only.

Washington

Recreational and medical marijuana dispensaries have been deemed essential in Washington. Gov. Jay Inslee issued Proclamation 20-25[17] on March 23, which requires all businesses that have not been identified as “essential critical infrastructure workers” in the appendix to Proclamation 20-25[18] to shut down. The appendix identifies cannabis retailers and cannabis retail and dietary supplement retail as essential critical infrastructure workers. The Washington State Liquor and Cannabis Board has also

issued an order[19] “temporarily allowing cannabis retailers to sell [via curbside service] to qualifying patients or their designated providers.”

Washington, D.C.

Medical marijuana dispensaries have been deemed essential in Washington, D.C. Mayor Muriel Bowser issued Mayor's Order 2020-053[20] on March 24, which requires temporary closure of the on-site operation of all businesses except those deemed essential businesses, which included medical marijuana dispensaries. While the possession of recreational cannabis is legal in Washington, D.C., commercial sales are not permitted at this time, and there are no recreational dispensaries in operation.

The four states that have not deemed marijuana dispensaries essential are:

Alaska

Medical and recreational marijuana dispensaries have not been deemed essential but can remain open if appropriate social distancing protocols are put in place. Gov. Mike Dunleavy issued Health Mandate 012[21] on March 27, which required all businesses except those in essential services and critical infrastructure industries to “cease all activities at facilities located within the state.”

An attachment[22] to HM 012 provides a list of essential services and critical infrastructure industries that does not explicitly include cannabis retailers, but has a catch-all provision exempting “[a]ll other businesses that can maintain Social Distancing Requirements ... and prohibit congregations of no more than 10 people in the business at a time (including employees).” Thus, retail cannabis dispensaries can stay open if they comply with this catch-all provision.

Michigan

Medical and recreational marijuana dispensaries have not been deemed essential but they have been permitted to offer curbside pickup sales and to continue delivery sales. Gov. Gretchen Whitmer issued Executive Order 2020-21[23] on March 23, which directs all Michigan businesses except those that employ “critical infrastructure workers” to temporarily suspend in-person operations that are not necessary to sustain or protect life. The Marijuana Regulatory Agency issued an advisory bulletin[24] on March 23, noting that medical and recreational dispensaries “may only engage in sales through curbside service or delivery.”

Oregon

Medical and recreational marijuana dispensaries have not been deemed essential but they may remain open if appropriate social distancing protocols are put in place, continue home delivery, and temporarily offer curbside pickup sales. Gov. Kate Brown issued Executive Order 20-12[25] on March 23, which requires certain businesses requiring close contact to shut down completely, and requires restaurants, bars, cafes and similar establishments to shut down all in-door consumption, but permits these establishments to continue delivery and takeout functions.

While EO 20-12 does not refer to cannabis dispensaries, it indicates that other retail business would not be required to cease operations if it “designates an employee or officer to establish, implement, and enforce social distancing policies, consistent with guidance from the Oregon Health Authority.” On

March 22, the Oregon Liquor Control Commission issued a temporary rule that allows curbside pick-up orders and allows dispensaries that already were permitted to conduct home delivery to continue operating.

Vermont

Medical marijuana dispensaries have not been deemed “essential” but they may continue home delivery. Governor Phillip Scott issued Executive Order 01-20[26] on March 24 that requires businesses “not critical to the public health and safety, as well as economic and national security,” to suspend in-person business operations. At the same time, however, the order encourages these noncritical businesses to develop online ordering and delivery services. Cannabis dispensaries have not been identified as essential businesses that may continue in-person operations. But these dispensaries are permitted to maintain or develop delivery services. While the possession of recreational cannabis is legal in Vermont, commercial sales are not permitted at this time under current law.

Where Home Delivery Is Permitted, It Is Enabling Marijuana Businesses to Skyrocket During the COVID-19 Pandemic

Cannabis sales are reportedly skyrocketing in the wake of the COVID-19 crisis.[27] But the business boom has been uneven across the country.

Indeed, while many dispensaries have witnessed a big upsurge in sales, others have been completely shut out. The dividing line is home delivery.

Generally, marijuana businesses with a home-delivery option are flourishing relative to those without a home-delivery option. Not every company has the necessary licenses. And in some states, delivery is not even permitted. As yet, no state agency has promulgated temporary rules — where delivery is currently absent — permitting the option.

Dispensaries deemed nonessential and that cannot rely on delivery are really feeling the pain of the COVID-19 crisis[28] and undoubtedly some of their customers are diverting to the black market.[29] There is a significant public policy issue here for states that have legalized marijuana and are trying to stamp out the illegal market to help support licensees, by allowing or expanding the delivery option.

Some states are moving quickly to address this issue. For example, Michigan’s marijuana regulatory agency, LARA, issued an advisory bulletin[30] on March 16 promising “every effort” to speed up license approvals for delivery services to within 48 hours following requests. Other state cannabis agencies are hamstrung by state law. For example, recreational delivery in Colorado is statutorily prohibited (HB19-1234)[31] from coming online before 2021.

Some state agencies appear to be hoping that half measures, such as curbside services (discussed below), may be enough to help get licensees and customers seeking legal, regulated marijuana through the crisis. But as stay-at-home orders are extended in response to the continued risk of exposure to COVID-19, increased consumer demand for delivery[32] may force state regulators (and legislators) to expedite home delivery as an available option for businesses and consumers.

For example, Massachusetts — where recreational delivery regulations were just approved late last year — has yet to issue a single delivery license. The COVID-19 pandemic may spur the Massachusetts Cannabis Control Commission to follow Michigan’s lead, and expedite the approval of recreational

delivery licenses as a means of staving off the collapse of the adult recreational industry in the commonwealth.

Massachusetts is not alone. Within the industry, there has long been a robust debate about the safety and efficacy of marijuana delivery services. The COVID-19 crisis may prove to be decisive: The crisis has already led to a short-term embrace of delivery services, and it may well lead to a long-term embrace as well.

Curbside Pickup: A Temporary Fix or Long-Term Addition?

In response to the COVID-19 crisis, many states are relaxing and modifying existing regulations to accommodate curbside service. Curbside service^[33] allows customers to purchase cannabis products in advance by placing an order online or by phone with a local, licensed dispensary offering curbside pickup. The dispensary then calls, texts or e-mails when the order is ready, and the customer drives to the store and parks in a designated pickup location.

A dispensary clerk, taking precautions like wearing latex gloves and maintaining as much distance as possible, goes out to the car to verify the customer's ID and the order, and to receive payment. The dispensary clerk then goes back to the dispensary, picks up the order, and returns with a receipt and delivery. This procedure prevents customers from queuing in lines at the dispensaries and thus promotes social distancing.

Curbside pickup was not allowed in many jurisdictions prior to the current crisis. In California, for example, curbside service was expressly prohibited by the Bureau of Cannabis Control,^[34] which explained: "Security is very important in operating a cannabis business, which is cash intensive. Allowing a licensee to make sales and deliveries curbside, exposes the licensee and the consumer to additional security risks, and potentially involves commercial cannabis activity on public streets or property."

But the current crisis has led to a sea change in the regulator's view. Today, just weeks into the crisis, California has already granted curbside pickup licenses to about 600 dispensaries and delivery services. The Colorado Marijuana Enforcement Division and Oregon Liquor Control Commission had similar rules founded on similar concerns.

Colorado, where the state's Marijuana Enforcement Division had previously imposed a curbside prohibition similar to California's, has also changed its approach.^[35] Indeed, the division has mandated that during the crisis every adult-use dispensary must now offer curbside pickup. Washington and others have followed suit.

By way of explanation, the Washington State Liquor and Cannabis Board, or LCB, stated^[36]: "To promote social distancing for qualified patients, the LCB is temporarily allowing cannabis retailers to sell to qualifying patients or their designated providers outside of their business but within the licensed property line. This is the same allowance provided to approved alcohol licensees during this time."^[37]

It remains to be seen whether curbside pickup will be only a temporary solution to the current exigencies or whether it will remain an option after the current crisis abates. Time will tell. The outcome will likely turn on the experience states have with the experiment in which they have been compelled to participate.

Conclusion

These are unprecedented times, including for the marijuana industry. A product that is illegal at the federal level is not only legal in many states but now has been deemed essential to daily life in many of those states. And, in order to provide these essential products to the public, many regulators have relaxed regulations on delivery services and temporarily eliminated prior prohibitions on outdoor, curbside pickup. It remains to be seen whether these short-term fixes will become lasting mainstays of the cannabis landscape.

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[1] <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>.

[2] See Executive Order N-33-20, available here: <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.

[3] <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>.

[4] See Executive Order 2020 017.

[5] https://drive.google.com/file/d/1I7fpbthi9Vq_KHmpX2icFczgxbRiboK/view.

[6] <https://drive.google.com/file/d/1HXTMP8E5KF9ppvusW4kAJIIDQrdHckqQ/view>.

[7] https://www2.illinois.gov/IISNews/21288-Gov._Pritzker_Stay_at_Home_Order.pdf.

[8] <https://www.idfpr.com/News/2020/2020%2003%2017%20IDFPR%20Cannabis%20COVID%2019%20Guidance.pdf>.

[9] <https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/An%20Order%20Regarding%20Essential%20Businesses%20and%20Operations%20.pdf>.

[10] https://www.maine.gov/dafs/omp/sites/maine.gov.dafs.omp/files/inline-files/Memorandum_on_Coronavirus_COVID-19_Civil_Emergency.pdf.

[11] <https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download>.

[12] <https://www.mass.gov/doc/covid-19-essential-services/download>.

[13] https://mass-cannabis-control.com/wp-content/uploads/2020/03/2020FRIDAY_Administrative-Order_Curbside-Operations.pdf.

[14] Although recreational marijuana retailers were not deemed “essential” in EO No. 13, there has been a strong push from the industry—including an open letter to Governor Baker on March 30, 2020 from recreational operators and applicants and “members of the broader Massachusetts cannabis industry”—urging Governor Baker to also classify recreational cannabis retailers as essential during this crisis as well.

[15] <https://www.bostonglobe.com/2020/03/30/marijuana/mass-marijuana-regulator-joins-fight-allow-recreational-pot-stores-re-open/>.

[16] http://gov.nv.gov/News/Emergency_Orders/2020/2020-03-20_-_COVID-19_Declaration_of_Emergency_Directive_003/.

[17] <https://www.governor.wa.gov/sites/default/files/proclamations/20-25%20Coronavirus%20Stay%20Safe-Stay%20Healthy%20%28tmp%29%20%28002%29.pdf>.

[18] <https://www.governor.wa.gov/sites/default/files/WA%20Essential%20Critical%20Infrastructure%20Workers%20%28Final%29.pdf>.

[19] <https://content.govdelivery.com/accounts/WALCB/bulletins/281c100>.

[20] https://coronavirus.dc.gov/sites/default/files/dc/sites/mayormb/release_content/attachments/Mayor%27s%20Order%202020-053%20Closure%20of%20Non-Essential%20Businesses%20and%20Prohibiti....pdf.

[21] <https://gov.alaska.gov/home/covid19-healthmandates/>.

[22] <https://gov.alaska.gov/wp-content/uploads/sites/2/03232020-COVID-19-Health-Mandate-010-Attachment-A.pdf>.

[23] https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html.

[24] https://www.michigan.gov/documents/marijuana/Stay_home_stay_safe_bulletin_-_03.23.2020_684532_7.pdf.

[25] https://govsite-assets.s3.amazonaws.com/jkAULYKcSh6DoDF8wBM0_EO%2020-12.pdf.

[26] <https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%206%20TO%20EXECUTIVE%20ORDER%2001-20.pdf>.

[27] <https://www.cnbc.com/2020/03/25/legal-cannabis-industry-sees-record-sales-in-coronavirus-crisis.html>.

[28] <https://www.wgbh.org/news/local-news/2020/03/28/marijuana-businesses-struggling-to-stay-open-urge-baker-to-declare-them-essential>.

[29] <https://cannabislaw.report/regulated-unregulated-cannabis-sales-in-ny-reportedly-up-50-in-last-fortnight/>.

[30] https://www.michigan.gov/documents/lara/Marijuana_Sales_in_Response_to_COVID-

19_Final_002_683969_7.pdf.

[31] <https://leg.colorado.gov/bills/hb19-1234>.

[32] <https://www.denverpost.com/2020/03/27/colorado-marijuana-delivery-coronavirus/>.

[33] <https://www.leafly.com/news/industry/weed-covid19-curbside-pickup-leafly>.

[34] https://bcc.ca.gov/law_regs/cannabis_fsor.pdf.

[35] <https://www.westword.com/marijuana/colorado-governor-forces-retail-weed-sales-curbside-to-limit-covid-19-medical-dispensaries-still-open-11671162>.

[36] <https://www.thenewstribune.com/news/coronavirus/article241269801.html#adnrb=900000>.

[37] At the time this article was written, Illinois, Michigan, New Jersey, Oregon, Pennsylvania and Ontario (Canada) had also relaxed their regulations, but this profile is rapidly changing and dispensaries should seek professional legal advice about the current status in their state.