

Doing great things.

OTTENJOHNSON
ROBINSON NEFF + RAGONETTI

> ottenjohnson.com



OTTEN JOHNSON ALERT

Shutdown Orders, Rent Forgiveness, and Social Distancing: What Are The Legal Limits?

May 2020 • [Brian J. Connolly](#) and [Lindsay K. Lyda](#)

Even before the advent of the COVID-19 pandemic, the retail sector was struggling nationwide, presenting myriad challenges for the commercial real estate sector. Now, the pandemic has accelerated trends toward online shopping and social distancing measures have all but halted physical retail sales. These impacts have been buttressed by government-enacted emergency measures that have forced “non-essential” businesses to shut down, prohibited gatherings of moderate size, and even contemplated compulsory rent abatements.

These public health orders at all levels of government have undoubtedly saved lives, yet they come at the expense of business profits, which have dipped or dried up. Consequentially, millions of Americans have been laid off and many are or will be unable to pay rent.

In response, some business owners have called for the end of shutdown orders, while others are advocating government-mandated rent forgiveness on the empty spaces they now cannot utilize. Yet even in a pandemic, all government action must still adhere to certain legal limitations, including those of the Constitution. Even a public health emergency does not create additional powers for government. The legal ramifications of government action taken today will likely echo for many years to come.

Shutdown Orders and Emergency Powers

The core powers of state and local government include what is commonly called the “police power,” that is, protecting the public health, safety, and general welfare. Included among these powers is the power to license businesses, but also to declare public emergencies and to shut down those businesses. For example, the Denver municipal code allows the executive director of public health to declare public emergencies and to shut down businesses. To satisfy legal scrutiny, public health regulations such as these must be rationally related to legitimate governmental interests.

In a pandemic, government measures preventing public gatherings in movie theaters, bars, or the like, generally further the legitimate goal of limiting human-to-human contact that spreads the disease. For this reason, legal challenges to shutdown orders are unlikely to be successful.

However, there are at least two limitations on the government’s ability to liberally regulate in the name of public health. First, once there is no longer an emergency or threat of one, then a shutdown order would likely no longer be rationally related to public health, safety, and welfare. Similarly, a shutdown order singling out a protected group, such as a racial minority or a religious organization, would likely fail constitutional scrutiny.

Rent Forgiveness: A Host of Constitutional Problems

While the government is afforded great deference in responding to emergencies, when fundamental constitutional rights are involved, that deference dwindles. This statement is no truer than with respect to the right guaranteed by the Fifth Amendment that, where the government takes private property for public use, the owner is entitled to compensation.

Under this provision, a state- or city-enacted rent holiday—where the government limits tenants’ obligations to pay rent required under a lease—so-called “takings” law would likely obligate the government to compensate landlords. Such a measure essentially forces the landowner to permit another party to occupy his or her property without compensation, potentially requiring the government entity that enacts the rent holiday to compensate the landowner for the deprivation in value.

What’s more, rent payment is an obligation in all commercial leases, which in turn are contracts between private parties. A federal constitutional provision known as the “Contracts Clause” provides, “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” The Contracts Clause precludes states from enacting laws that substantially impair a private party’s rights under an existing contract. A contract is “impaired” when a law releases a contractual obligation or renders it invalid. In order to survive legal review, such an impairment must serve a significant and legitimate public purpose, with means reasonably related to achieving that purpose.

A law releasing tenants from contractual obligations to pay rent would implicate the Contracts Clause, likely substantially. While the preservation of public health is likely a legitimate public purpose, it is questionable whether a rent holiday would be related to that goal. That said, the police power may, at times, justify the impairment of contract rights. Individual leases would need to be examined to determine whether specific lease provisions impact this analysis.

Freedom of Assembly: Can We Gather?

Another legal principle likely affected by government shutdown orders is the right under the First Amendment to assemble or associate with others. Early challenges to shutdown orders on these grounds have been initiated by religious organizations. Courts have rebuffed these challenges on the grounds that shutdown orders and social distancing further the compelling governmental interests of protecting public health. Thus, it is unlikely that the First Amendment will bar these measures.

Constitutional protections are at their greatest importance during emergency situations. While public health issues are of utmost importance today, landowners should be sure to understand the limitations on the government's infringement of property rights.

Otten Johnson attorneys in our [Land Use](#) practice group have substantial experience with development and governmental agreements. For more information on this Otten Johnson Alert or for help evaluating your current situation, contact any of the attorneys in the Land Use practice group. For a listing, [click here](#).

More Great Reads

Rocky Mountain Real Estate Blog

The latest real estate and land use news and updates. [Read More](#)

Rocky Mountain Sign Law Blog

Regulatory, best practices, and other First Amendment news. [Read More](#)

Our lawyers are pleased to present timely, topical issue alerts on the latest legal developments, trends and other subjects of interest to our clients and colleagues. Otten Johnson publishes Otten Johnson Alerts on a monthly basis. If you do not wish to receive future Otten Johnson Alerts, you may unsubscribe by clicking the "opt out" link below. This Otten Johnson Alert has been prepared for informational purposes only and does not constitute legal advice or the opinion of Otten Johnson. Receipt of this summary does not create an attorney-client relationship between you and Otten Johnson. You should not act or rely on any information in this article without seeking the advice of an attorney. Otten Johnson provides legal advice only after being engaged to do so by a

client with respect to particular facts and circumstances.

Read our full disclaimer

950 Seventeenth Street, Suite 1600, Denver, CO 80202
Phone 303.825.8400 | Fax 303.825.6525 | ottenjohnson.com