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INCARCERATION, PERSONAL SERVICE BUSINESSES & INSPECTIONS: THE LATEST IN THE REOPENING OF TEXAS BUSINESSES

by Gray Reed's Back to Business Task Force
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OPEN

Last week, the City of Dallas prosecuted Shelley Luther, a local salon owner, who disobeyed local orders to remain closed due to COVID-19 restrictions. When Luther still refused to cease operations, Dallas County District Judge Eric Moyé held her in contempt and sentenced her to seven days' jail time. After seeing the small business owner jailed, Texas Governor Greg Abbott amended his earlier orders to specifically provide that individuals may not be jailed for non-compliance with orders related to COVID-19.

The Luther case and resulting Governor's order have significant implications for other similarly-situated businesses. Despite this new limitation on enforcement of COVID-19 orders, however, businesses should continue to be aware of the ongoing restrictive executive orders surrounding reopening, as noncompliance can still result in fines. Furthermore, businesses should expect unannounced inspections by fire marshals and other local authorities during the reopening process.

SHELLEY LUTHER'S CASE

In the interest of containing the spread of COVID-19, Dallas County and the City of Dallas prohibited many non-essential businesses from operating, starting on March 29. On March 31, Governor Abbott followed suit and issued an executive order that closed "non-essential" businesses. Included in these businesses deemed to be "non-essential" were salons and other businesses offering services where the very nature of the business would put customers in close contact with staff.

Governor Abbott has since assembled a Governor's Strike Force to Open Texas and issued several additional orders as part of a strategic reopening initiative, allowing certain types of businesses, such as restaurants, to reopen in a limited capacity. But, until this week, the Governor kept orders in place to keep numerous categories of service businesses closed, including "bars, gyms, public swimming pools, interactive amusement venues such as bowling alleys and video arcades, massage establishments, tattoo studios, piercing studios [and] cosmetology salons."

Despite orders from the city, the county and the state to the contrary, on April 22, Luther announced via press release that she was going to reopen her salon and indeed began operating her business two days later. On April 28, the City of Dallas sued Luther, along with her business, Salon a la Mode, for continuing to operate her salon despite Dallas County's "Safer at Home Order." That same day, the City of Dallas obtained a Temporary Restraining Order from the 14th District Court of Dallas County, which ordered Luther to cease and desist from operating Salon a la Mode. After being served with the Temporary Restraining Order, Luther continued operating. So, the City of Dallas asked the Court to hold Luther in contempt for ignoring the Court's orders.

On May 5, the 14th District Court heard the City of Dallas' case, and at the close of the hearing found that Luther's "defiance of the Court's Order was open, flagrant and intentional," and that she "expressed no contrition, remorse or regret" for violating the orders and the City of Dallas' temporary laws. The Court sentenced Luther to seven days in jail, a fine of \$500 per day that she had held the salon open against the city's orders.

On April 28, the same day the City of Dallas sued Luther, she, along with several vapor shops, fitness studios and other service businesses, filed a Petition for Mandamus in the Texas Supreme Court, alleging that the various city, county and state orders that resulted in the temporary closing of their businesses amounted to civil rights violations. On May 5, the Texas Supreme Court denied the businesses' motion for emergency relief, largely based on procedural reasoning that Luther and her co-petitioners had not followed the proper channels of first bringing their action with a district court and intermediate court of appeals, as is generally required before bringing an action to the Texas Supreme Court. However, four justices signed a concurring opinion expressing great sympathy for Luther and the others, stating that the government should have to "demonstrate that less restrictive measures [than closing businesses] cannot adequately address the threat" posed by COVID-19.

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GOVERNOR REOPENS PERSONAL SERVICE BUSINESSES

Also on May 5, the Governor issued GA-21, which reopened "cosmetology salons, hair salons, barber shops, nail salons/shops, and other establishments where licensed cosmetologists or barbers practice their trade," tanning salons and swimming pools, subject to social distancing restrictions, effective May 8.

The Governor's GA-21 order will also reopen, effective May 18:

- a. Office spaces, up to the greater of five individuals or 25 percent of the total office workforce,
- b. Manufacturing services, up to 25 percent of the facility's total listed occupancy, and
- c. Gyms and exercise facilities, up to 25 percent of the facility's total listed occupancy.

Following his order to reopen salons and other service businesses and in light of Luther's jail sentence, Governor Abbott issued GA-22 on May 7, which specifically eliminates confinement in jail as a punishment for violating any orders related to containing COVID-19. Governor Abbott made the order retroactive to April 2. Accompanying the order, the Governor stated "Throwing Texans in jail who have had their businesses shut down through no fault of their own is nonsensical, and I will not allow it to happen."

That same day, as a result of order GA-22, the Texas Supreme Court granted Luther's Motion for Emergency Relief and issued a Writ of Habeas Corpus, which ordered her immediate release from custody. The Supreme Court has not answered Luther's and the other businesses' challenge to the constitutionality of Dallas County's and other counties' "Safer at Home" on the merits. So, the orders remain valid and, confinement aside, enforceable.

ADDRESSING ONGOING COMPLIANCE ISSUES

For the foreseeable future, businesses across the state will be reopening in limited capacities in compliance with the Governor's orders. During this time, affected businesses – from retail to manufacturing to corporate office settings – can expect local enforcement authorities, such as fire marshals, to conduct surprise inspections to ensure compliance. Accordingly, businesses need to be very familiar with the Minimum Standard Health Protocols as published in the Governor's [Report to Open Texas](#). Furthermore, businesses need to be ready to document compliance efforts in the event of a random inspection or audit and to be familiar with the specific requirements for maintaining the safety of their employees, customers and others related to their business.

Questions that local authorities may be asking in an inspection include:

- Is the business following a process for training employees on appropriate cleaning and disinfection?
- Does the business screen employees prior to coming into business for signs and symptoms of COVID-19?
- Does the business follow a process for allowing employees to return to work?
- Does the business require employees to wash or sanitize hands prior to coming into work?
- Does the business have a process for employees and customers to maintain at least six feet of separation?
- Is the business regularly and frequently disinfecting surfaces and items that come into contact with customers?
- Are signs posted to remind all persons of effective hygiene practices?
- What are a facility's processes for maintaining occupancy load limitations?

THE TAKEAWAYS

The Governor's executive orders related to COVID-19 remain in full force and effect. But, following one Dallas salon owner's incarceration, the Governor has ordered that individuals may not be confined in jail for violating any such orders. The local and state authorities' ability to monetarily sanction individuals and businesses for violating of the temporary protections, however, remains in place. As a result, judges who are asked to enforce such orders may well err on the side of higher monetary sanctions through the duration of any COVID-19-related orders. Businesses should be prepared to demonstrate the measures they are taking to protect their employees, customers and others who come into their facilities if and when they are subjected to surprise inspections.

ABOUT GRAY REED'S BACK TO BUSINESS TASK FORCE

Gray Reed's [Back to Business Task Force](#) is strategically comprised of attorneys from several practice areas committed to keeping clients apprised and informed of all they need to know about Texas Governor Greg Abbott's current and forthcoming rules surrounding the strategic reopening of Texas businesses. The Task Force is led by Gray Reed attorney and State Texas Representative [Jeff Leach](#).