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# MASSACHUSETTS COURT UPHOLDS “NON-ESSENTIAL” CLASSIFICATION OF RECREATIONAL MARIJUANA DISPENSARIES

Insights  
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In a blow to the state’s nascent recreational marijuana industry, a Massachusetts Superior Court Justice denied an emergency challenge to Governor Charlie Baker’s designation of recreational marijuana dispensaries as non-essential and therefore subject to his shut-down orders. The court found that the designation was neither arbitrary nor capricious and the governor had a “rational basis” to distinguish recreational dispensaries from medicinal marijuana dispensaries and liquor stores, which are permitted to open. This is just the first decision that will be sure to spring from a number of challenges pending against the Massachusetts shutdown orders. It remains to be seen whether other courts will be more sympathetic to businesses seeking an “essential” designation.

## HOW DID WE GET HERE?

As part of the state’s efforts to “flatten the curve” amidst the COVID-19 pandemic, Governor Baker ordered all non-essential businesses closed until May 4, 2020. Along with this order, the Governor issued a “COVID-19 Essential Services List” of businesses permitted to continue operations so long as they followed appropriate social distancing protocols. Among those businesses listed as essential were medicinal marijuana dispensaries and liquor stores. Left off of the list, however, were recreational marijuana dispensaries.

On April 9, 2020, a coalition of recreational marijuana dispensaries filed a four-count complaint in Massachusetts

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Superior Court, alleging the governor's classification of recreational marijuana dispensaries as "non-essential" violated those business' guarantee of equal protection under the Massachusetts and United States Constitutions. In their complaint, the recreational marijuana dispensaries argued that there was no "legitimate or rational basis" for distinguishing recreational dispensaries from medicinal dispensaries or liquor stores. The recreational marijuana dispensaries likewise claimed that the governor's shut-down order was an "invalid use of executive power" under Massachusetts law. As relief, the recreational dispensaries sought an emergency injunction against the governor and a ruling that would permit them to re-open their businesses.

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### **A QUICK (AND PAINLESS) CONSTITUTIONAL LAW LESSON**

Under both the Massachusetts Declaration of Rights (the state's constitution) and the 14th Amendment to the U.S. Constitution, Americans — including businesses — are entitled to "equal protection." Generally speaking, this means the state and federal government cannot irrationally discriminate against one business in favor of another. The U.S. Supreme Court has described this concept as "all persons similarly situated should be treated alike."

Depending on the nature of the government's action, courts apply varying standards of review. When a government action implicates a fundamental right or targets a suspect class, such actions are reviewed with "strict scrutiny." However, and as relevant in this case, the right to open a business is not fundamental. Therefore, the government's actions are reviewed to determine whether there is a "rational basis" for the action. Put differently, as long as there is a legitimate reason for the government's decision making, courts will defer to the government's choice. Only government actions that are "arbitrary or capricious" will be found to violate the Constitution.

### **COURT SIDES WITH GOVERNOR, REJECTS CONSTITUTIONAL VIOLATIONS**

In upholding the governor's decision, the court first addressed the government's general "police power" in times of public health crises, relying on U.S. Supreme Court precedent in *Jacobsen v. Massachusetts*, a 1905 decision involving the legality of mandatory smallpox vaccinations. As the Court noted, "[A] community has the right to protect

itself against an epidemic of disease which threatens the safety of its members.”

The court next held that that medicinal dispensaries, liquor stores, and recreational dispensaries were “similarly situated” for purposes of evaluating the constitutional concerns. This teed up heart of the issue: whether treating medicinal marijuana dispensaries and liquor stores differently than recreational dispensaries violated the recreational dispensaries’ right to equal protection.

In order to make this determination, the Court assessed the two justifications the Governor provided for his decision-making: (1) because very few businesses are open, the ones that are may attract large crowds; and (2) because non-medicinal marijuana cannot be purchased in bordering states, opening recreational dispensaries in Massachusetts would attract many out-of-state customers — in direct contravention of guidance to stay at home and avoid unnecessary travel.

In assessing both justifications, the court agreed with the recreational dispensaries that there were ways to avoid both problems that would be less restrictive than closing all recreational dispensaries. For example, the court noted that the medicinal dispensaries and liquor stores were utilizing social distancing protocols that could be used by recreational dispensaries as well. And, the dispensaries could refuse service to out-of-state residents.

Nevertheless, the applicable test is not whether there are less restrictive means, but only whether there was a rational or legitimate basis for the restrictions. Because the governor’s orders were not irrational, “these legal rules doom Plaintiffs’ constitutional claims. The court may not bar enforcement of the governor’s emergency orders against the plaintiff businesses on the ground that the governor could have achieved a similar public health benefit while allowing plaintiffs to stay open. Economic rules do not have to be perfectly tailored.” As a result, the recreational marijuana dispensaries challenge was denied and the governor’s order closing them remains in place.

## **WHAT’S NEXT?**

This is just the first decision out of a number of cases that have been filed challenging certain aspects of the

governor's order. While each case will rise or fall based on its own facts, it is important to note that in most cases (unless a fundamental right is involved), whether a business is essential or non-essential will be subject to a very deferential standard of review. So long as the government can articulate any reasonable basis for its decision-making, it is likely to prevail.

For employers seeking to challenge their designation as non-essential, Fisher Phillips has assembled an Essential Business Designation Task Force to provide advice to businesses hoping to remain open seeking guidance on these evolving issues. Fisher Phillips and the Fisher Phillips Essential Business Task Force will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact the [author](#), your Fisher Phillips attorney, or [any member of our Essential Business or COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#).

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