



**PACIFIC LEGAL
FOUNDATION**

July 16, 2020

VIA EMAIL AND U.S. FIRST CLASS MAIL

Governor Gavin Newsom
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Sacramento, CA 95814
governor@governor.ca.gov; gavin.newsom@gov.ca.gov

Sonia Y. Angell
State Public Health Officer and Director
California Department of Public Health
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Kristy Underwood
Executive Director
California Board of Barbering and Cosmetology
2420 Del Paso Road Suite 100
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Dear Governor Newsom, Dr. Angell, and Ms. Underwood,

Pacific Legal Foundation (PLF) writes to urge the Governor, the Public Health Officer, and the Board of Barbering and Cosmetology to reconcile their conflicting messages concerning whether hair salons, barbershops, nail salons, and other personal care providers¹ are allowed to offer their services outdoors during the COVID-19 pandemic. The Board's current interpretation of its regulations—which denies licensees the ability to operate outdoors in conflict with Dr. Angell's Public Health Officer Order—not only threatens the livelihoods of thousands of individuals, it also raises legal concerns. If the Board determines that these services cannot currently be

¹ Throughout this letter we refer to hair salons, barbershops, nail salons, and other personal care services collectively as “personal care services” or “personal care providers.”

offered outdoors, PLF urges Governor Newsom to invoke his authority under the Emergency Services Act to authorize such services so that small business owners, their employees, and contractors may try to make a living as best they can consistent with public health guidelines during COVID-19 related shutdowns.

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Pacific Legal Foundation (PLF) is among the nation's most preeminent public interest law firms litigating in defense of constitutional rights, and in particular, the right to earn a living. PLF has won more than a dozen cases before the United States Supreme Court. PLF is deeply concerned about conflicting government orders, actions that extend beyond the government's scope of authority, and the impact that COVID-19 related shutdowns have had on small business owners across the country.

* * *

The Governor's July 13, 2020 Announcement

On March 19, 2020, Governor Newsom issued an executive order declaring that Californians would be required to stay at home and that businesses other than those deemed "essential" would be required to shut down. That same day, Dr. Angell issued a public health order reinforcing the Governor's order and detailing which businesses were considered essential. Personal care services were deemed non-essential and were eventually classified as Stage 3 under the state's reopening plan. For the owners, employees, and independent contractors who earn a living providing these services, the shutdown order was catastrophic.² As one Southern California salon owner stated, "It's absolutely devastating, there's no income, there's none." "We're about to go under," said another. "My mother first started this business when she escaped the [Vietnam] war, and it's been our famil[y's] livelihood."³ For several months, many small businesses struggled to stay afloat and some were forced to close their doors permanently. Finally, after months of losing income, hair salons and barbershops in

² <https://losangeles.cbslocal.com/2020/05/20/coronavirus-reopen-california-hair-salon-stylist/>

³ <https://californiaglobe.com/section-2/salons-barbershops-face-permanent-closures-despite-pleas-to-governor/>

much of the state were allowed to reopen in late May and other personal care services followed shortly thereafter.

Just as these groups were beginning to get back on their feet, Governor Newsom announced on July 13, 2020 that in response to the increasing rate of COVID-19 infections, certain businesses, including hair salons, barbershops, and personal care services in 30 at-risk counties would be required to stop offering a variety of *indoor* services. That same day Dr. Angell issued a Public Health Officer Order emphasizing that “indoor operations” for these services would be required to cease but clarifying that “Outdoor operations may be conducted under a tent, canopy, or other sun shelter... as long as no more than one side is closed, allowing sufficient outdoor air movement.”⁴ Based on Governor Newsom’s announcement and Dr. Angell’s public health order, many personal care providers understood that they would be allowed to offer their services outdoors so long as they could do so in a clean and hygienic fashion and in harmony with public health guidance⁵ issued by the Department of Public Health and local authorities.

Personal care providers were not the only ones who understood the Governor’s announcement and Dr. Angell’s Order as allowing these services, so long as they were offered outdoors. The City of Long Beach, for example, put out a press release which noted that personal care providers “may conduct outdoor operations.”⁶

Board of Barbering and Cosmetology’s Statement

Unfortunately the California State Board of Barbering and Cosmetology did not interpret Governor Newsom’s announcement or Dr. Angell’s Order as requiring, or even authorizing, the Board to allow personal care providers to offer outdoor services. The Board issued a statement that “Section 7317 of the Business and Professions Code requires that all barbering, cosmetology and electrology services be performed in a licensed establishment” and that therefore “establishments that are within the specified counties must close immediately and not offer any services (including any outdoor

⁴ <https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-158.aspx>

⁵ <https://files.covid19.ca.gov/pdf/guidance-hair-salons.pdf>

⁶ <http://longbeach.gov/press-releases/governor-newsom-announces-further-closures-to-slow-the-spread-of-covid-19/>

services).” According to the Board’s interpretation, outdoor services were incompatible with the Business and Professions Code, and accordingly were not authorized by the public health order.

The Problem with the Board’s Interpretation

The practical impact of the Board’s interpretation will be devastating. Personal care providers will be required once again to close. Many technicians and stylists will lose their jobs. Some establishments will never open again.

This outcome is not required by the Business and Professions Code, which merely states that no one shall practice “in an establishment other than one licensed by the board.”⁷ There is no need for the Board’s unduly narrow and cramped interpretation. The Code does not define “an establishment” or state that an establishment is strictly limited to its indoor space. An outdoor tent or canopy placed right outside of the place of business could fairly be considered to be part of the licensed “establishment.”⁸ And as a policy matter, if the purpose of the Business and

⁷ Indeed, because the Governor and Dr. Angell appear to authorize outdoor services, the Board’s interpretation may actually be contrary to law.

⁸ This more expansive interpretation of an “establishment” would be compatible with how federal law defines the term in some cases. Under the federal Fair Labor Standards Act, for example, an establishment is only considered separate when “(a) it is physically separated from the other activities; and (b) it is functionally operated as a separate unit having separate records, and separate bookkeeping; and (c) there is no interchange of employees between the units.” See *Morales v. 22nd Dist. Agric. Assn.*, 1 Cal. App. 5th 504, 519, 206 Cal. Rptr. 3d 1, 12 (2016) (quoting 29 C.F.R. § 779.305). And under the Equal Pay Act of 1963, an establishment refers to “a distinct physical place of business” but under certain circumstances “two or more distinct physical portions of a business enterprise could be treated as a single establishment.” See *Morales*, 1 Cal. App. 5th at 520 (quoting 29 C.F.R. § 1620.9). An outdoor annex would likely be considered to be part of the same “establishment” under either of these standards, as there would only be limited physical separation, no functional separation, and a total overlap of employees.

Professions Code is to protect the public, then restricting the use of this outdoor space simply makes no sense where hygiene and safety requirements can be met outdoors.

The Board's interpretation also presents potential constitutional concerns. Any restriction on the constitutional right to earn a living must bear a rational relationship to protecting public health or safety. *See Merrifield v. Lockyer*, 547 F.3d 978, 986 (9th Cir. 2008); *see also Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1118 (S.D. Cal. 1999) (restrictions on hair braiding imposed by the Board of Barbering and Cosmetology were irrational and unlawful). A blanket ban on outdoor services deprives people of their livelihood without any connection to public safety; indeed the state's Public Health Officer has determined that outdoor services are acceptable. And the Board would retain its ability to inspect these outdoor spaces.

The irrationality of the outdoor ban is heightened by the fact that other businesses are currently allowed to offer their services outdoors. The Governor and Alcoholic Beverage Control have already authorized, for instance, restaurants and bars to serve food and alcohol in an outdoor area like parking lots or sidewalks "that is adjacent to the licensed premises, that is under the control of the licensee, and where bona fide meals are being served."⁹ Los Angeles Mayor Eric Garcetti has even spearheaded a program to allow restaurants to apply for a permit to operate outdoors in public spaces,¹⁰ and Pasadena soon followed suit.¹¹ Gyms have also moved outdoors.¹² Presumably, restaurants and others are usually required to operate inside an establishment so that the government can inspect the premises and enforce safety standards; yet they've been permitted to operate outdoors as long as they follow health and safety protocols so that they may have a fighting chance of earning a living. There is no justification for arbitrarily denying the owners, employees, and contractors of personal care services the same opportunity to make ends meet.

⁹ <https://www.abc.ca.gov/fourth-notice-of-regulatory-relief/>

¹⁰ <https://la.eater.com/2020/5/29/21275280/la-alfresco-outdoor-dining-sidewalks-parking-lots-coronavirus>

¹¹ <https://www.pasadenanow.com/main/city-launches-website-to-help-facilitate-reopening-of-restaurants-retail-businesses/>

¹² <https://abc7.com/exercise-gym-covid-19-coronavirus/6316887/>.

Accordingly, PLF urges the Board to reconsider its interpretation of the Business and Professions Code and to declare that an outdoor annex, such as a tent, canopy, or other sun shelter, can qualify as a licensed “establishment” where barbers, hairstylists, and others can provide their services consistent with public health guidelines.

Alternatively, Governor Newsom Should Invoke the Emergency Services Act

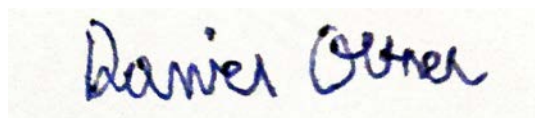
If the Board refuses to reconsider its interpretation of the Business and Professions Code, PLF urges Governor Newsom to invoke the California Emergency Services Act to suspend Section 7317 of the Business and Professions Code to the extent that it prohibits licensees from providing outdoor services near or connected to their licensed establishment. Under the Emergency Services Act, the Governor is authorized to “suspend . . . the orders, rules, or regulations of any state agency . . . where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.” California Emergency Services Act § 8571. Since the start of the pandemic, Governor Newsom has invoked this authority on numerous occasions to reduce the impact of unduly burdensome regulations that have prevented individuals, entrepreneurs, and small businesses from adapting to the new circumstances presented by COVID-19. Suspension is justified here because denying personal services providers the opportunity to operate outdoors would “hinder, or delay the mitigation of the effects” of COVID-19 by forcing providers to completely shut down and lose any means of earning income rather than simply finding new ways of staying afloat.

The Governor has already provided similar relief to other businesses in California, including restaurants and bars, by authorizing them to serve food and alcohol in an outdoor area like parking lots or sidewalks.¹³ Hair salons, barbershops, and personal care services are merely asking for the same kind of relief that has been extended to these establishments.

¹³ <https://www.abc.ca.gov/fourth-notice-of-regulatory-relief/>

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Sincerely,

A handwritten signature in blue ink that reads "Daniel Ortner". The signature is written in a cursive style and is placed on a light-colored rectangular background.

DANIEL M. ORTNER
Attorney
Pacific Legal Foundation

A handwritten signature in blue ink that reads "AB". The signature is written in a cursive style and is placed on a light-colored rectangular background.

ANASTASIA BODEN
Senior Attorney
Pacific Legal Foundation