Ten Reforms to Spur Coronavirus Recovery

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Introduction

In January of 2020, few Americans were paying attention to the novel coronavirus outbreak in distant Wuhan, China. Even as the virus began spreading abroad, the American populace was focused on matters closer to home—the usual state and local controversies, the acrimonious impeachment proceedings against President Trump, the run-up to the yearly college basketball tournament, and the latest binge-worthy Netflix series. When COVID-19 began to penetrate our national consciousness, few would have anticipated that, by St. Patrick's Day, nearly the entire country would be on lockdown. But as the virus spread to the United States, state and local authorities rapidly issued a vast array of orders. Those orders may have saved lives, but they came with a staggering economic cost. The coronavirus was not only a public health emergency, but also a trigger for a major economic crisis.

The pandemic would almost certainly have forced major declines in many spheres of activity, even without lockdown requirements; the coronavirus encouraged people to adjust their activities in response to perceived risks. The nation's economic recovery will remain hobbled until its health problem is solved through either a vaccine, effective treatment, or herd immunity; incalculable illnesses and deaths will occur along the way. Evidence from other countries suggests that the U.S. public health response has been particularly poor. Delays in adequate testing have limited individuals' and officials' ability to take measures to stop the virus's spread. The Centers for Disease Control and Prevention has found that, among 10 hard-hit countries, the U.S. has performed worst at getting the virus's spread under control.

The nation moved from record low unemployment numbers at the beginning of the year to nearly 30 million unemployed by the end of March, rising to Great Depression levels by the end of April. Congress reacted by enacting several bills, including the CARES Act—the single largest appropriation of money in American history—to expand unemployment insurance programs and to provide financial assistance to small businesses that were shut down or otherwise hurting as a result of the pandemic. It was soon apparent that this $2 trillion bill was not enough to save small businesses weakened by the coronavirus. Just a few weeks later, Congress appropriated another $484 billion to coronavirus relief, including additional funding for forgivable loans that were intended to stave off a calamitous wave of bankruptcies. This unprecedented wave of public spending was accompanied by questions about whether the public health benefit of continued state and local shutdown orders was worth the cost.

State and local authorities now struggle to find ways to minimize the coronavirus's economic fallout. It is clear that we are in the midst of a *partially* self-induced recession. But it remains to be seen whether the economic situation will get significantly worse before we see signs of improvement, or whether the American economy will rebound quickly. There is also the possibility of prolonged economic stagnation—as we saw in the wake of the 2008 housing market crash—with entrepreneurs and businesses too afraid to take risks.

Much depends on how state and local authorities respond going forward. Accordingly, this paper sets forth a menu of potential policy proposals for mitigating the economic fallout and for revitalizing the economy. These proposals are designed to outpace the economic destruction that COVID-19 has produced. This paper both outlines positive reforms and warns about pitfalls that are likely to make the situation worse. State lawmakers and public health authorities may prefer other alternatives, but we submit that policymakers who embrace the recommendations below will see recovery begin faster. Moreover, they will be in a better place to weather the storm if COVID-19 cases should escalate.

I. Allow Businesses to Reopen with Standardized Rules or Guidelines Statewide

The extraordinary regulatory ambiguity that the nation's businesses now face began with a wave of state and local government orders that shuttered businesses—and entire industries—in the spring of 2020. Throughout the country, governors began invoking emergency powers to address the COVID-19 crisis in March. Restrictions were narrow in scope at first and aimed at specific types of businesses that appeared to create the highest risk for spreading the virus. But on March 19, Governor Gavin Newsom issued a stay-at-home order for California that required closure of non-essential businesses. The governors of New York and Illinois followed suit on March 20. By April most of the nation was on lockdown, with most states allowing only "essential businesses" or "essential employees" to continue operations—in other words, we saw mass forcible business closures.

There were notable exceptions. As of April 22, governors in at least eight states (Arkansas, Iowa, Nebraska, North Dakota, South Dakota, Oklahoma, Utah, and Wyoming) had balked at issuing stay-at-home orders. For example, Governor Kristi Noem of South Dakota made a judgement call that, in her mostly rural state, the cost of a general shutdown of the economy outweighed its public health benefit. But even in those states that had balked at stay-at-home orders, governments were closing schools and taking steps to limit the size of gatherings. They were also requiring targeted closures or restrictions on certain non-essential businesses, such as restricting the operation of bars and allowing only take-out dining from restaurants.

At this point, most businesses have been allowed to re-open under new state-level restrictions. In many states, businesses are required to continue to obey social distancing rules—often containing precise, industry-specific standards, including limitations on operating capacity for various facilities or requiring some businesses to operate outdoors. The states vary greatly in health screening practices, in face-covering requirements, and in various return-to-work protocols. Moreover, employers must navigate diverse regulatory standards that cover a host of other difficult issues, including procedures for handling confirmed cases and managing leaves of absence. All of this adds significantly greater complexity to the thicket of regulatory issues confronting small businesses at this time.

Even in the best of times, entrepreneurs face a daunting task when 100 percent compliance with complex regulatory regimes is required. Sometimes compliance mistakes that are based on hyper-technical readings of new rules, even when made in good faith, may result in exorbitant fines or lawsuits. But these are not the best of times, especially for businesses that are suffering severe cash-flow problems as a result of the pandemic and the government's response to it. Now more than ever, small businesses struggle to get the legal counsel they need, even as they face new, especially complicated regulatory challenges.

The burdens created by policymakers are not confined to state-level rules. Local authorities have also complicated matters by imposing additional conditions, restrictions, and mandates during this crisis. For example, while state public health officials may choose to limit occupancy for retail establishments at 50 percent, local authorities might well dictate that businesses must further limit the number of customers. Moreover, local authorities may choose to impose more demanding business protocols than required by state or federal guidelines, or they may impose further rules for handling suspected or confirmed coronavirus cases. Likewise, local authorities may choose to impose additional paid sick leave requirements, piling them on top of existing federal and state mandates. Or local authorities may choose to keep some industries closed, even where state lawmakers would prefer to allow them to operate with reasonable regulation. Such heavy-handed local regulation may be at cross-purposes with state-level policy.

In short, tensions between different levels of government can result in policy incoherence. Even if state lawmakers prefer to take a more calibrated approach going forward—seeking to impose targeted evidence-based restrictions, while aiming to minimize regulatory burdens—to the extent local authorities are imposing blunt across-the-board restrictions, or significantly more complicated regulatory regimes, such tensions will make life difficult for their constituents. If the goal is to protect public health while encouraging economic recovery (or preventing further economic fallout), the best way to resolve these tensions is probably for the states to preempt local regulation of business.

We must remember that the economic and physical health transcends local politics. When local businesses fail, the economic impact is not limited to the municipal or county line. The economic ripple effects are felt not just at the local level, but at the state level too—including in state budgets, when there is a reduced tax base or a greater need for public assistance.

None of this is to suggest that states should be blind to local and regional factors. On the ground, the reality of the coronavirus is entirely different in Manhattan than it is in rural counties in upstate New York. Likewise, the public health risks in the Portland metro area are likely far different than they are in the rest of Oregon's mostly rural communities. In the context of this crisis, smart regulation requires states to avoid unnecessary economic fallout by carefully tailoring regional standards if necessary. That requires a coordinated approach at the state level, not balkanization at the local level.

II. Limit Liability for Businesses that Abide by State Rules or Guidelines

Even in the best of times, concerns about the litigation climate haunt private-sector decision-makers; even in the pandemic, commerce continues. At the height of the crisis essential businesses—like health care providers, grocery stores, and utilities—needed to continue operations. And as infection rates slowed, other businesses were gradually allowed to reopen.

But even as businesses are given *permission* by state governments to remain open or to reopen, they are still faced with their own *decision* to do so in light of health consequences and economic realities. That decision will be tempered by the litigation climate: any operating business now faces the prospect of lawsuits by customers and employees who might claim they contracted COVID-19 at the business; therefore, so the argument goes, the business should be liable for coronavirus-related expenses.

In order to reduce barriers to economic resumption, businesses running responsibly during the pandemic should have some liability protection: more precisely, businesses that follow the rules should have a safe harbor from coronavirus litigants. Even before the pandemic, entrepreneurs already faced a bewildering tangle of overlaid regulations—often repetitive, sometimes contradictory—imposed by various governmental entities that create real costs, both in dollars and in innovation. Businesses making the tough decision to open during COVID-19 are pushed further to the margin: the costs of personal protective equipment (PPE), decreased demand from cautious customers, a reduced workforce, and rules that limit customer capacity all limit the financial feasibility of running a business. Add to that the risk of getting sued by a customer or employee who gets infected—even if the business is doing its best to prevent viral spread—and the choice to open up may not be worth it. Some level of protection and certainty is needed for businesses to reduce the chance that we remain at a standstill until a vaccine is developed at some unknown time in the future.

The need for clearer liability rules is also underscored by the unique situation caused by the virus's novel characteristics, such as its contagiousness and asymptomatic spread. Figuring out causation, for example, becomes difficult. If a customer contracts the virus, how can we know it was because some particular business was negligent? A highly contagious disease poses an inherent risk, no matter what protective measures are taken. What is the standard of care that a given business should have used to prevent infection? Did infection occur because the patient visited business A, business B, or business C during a period of asymptomatic infection? Should all those businesses be held jointly liable? What if the customer also attended a house party, or if someone in the customer's own household was an asymptomatic carrier? Lawsuits presenting such questions have already commenced.

When a problem is both as distinctive and as widespread as COVID-19—where no standard of reasonableness and no definition of legal duty has had the opportunity and time to develop—a legal system built for everyday situations will not address such questions well when thousands of lawsuits are filed all at once. These concerns don't just apply to businesses: nonprofits and religious organizations also have expressed concerns about a "swarm of lawsuits." There are public health justifications for liability protections as well: businesses fearing lawsuits will be less likely to take measures to disclose the fact that an employee or customer with COVID-19 was present in their business. Even worse, health care providers who pull back because of lawsuit fears will further cripple our ability to respond to the pandemic. Not all issues will be easily resolved by lawmakers, but legislation can provide clarity that existing common law cannot.

Proposals for a federal solution to the problem of pandemic-related lawsuits have been floated, but states are better situated to confront this issue. After all, it is the states that are determining what businesses are essential and when and how all other businesses can reopen. Common law negligence suits against such businesses almost always must be brought in state court, not federal court. And as always in our federalist system, allowing states to experiment with different solutions to this liability problem will help us determine the correct balance to strike, rather than being shoehorned into a one-size-fits-all national rule.

States already have some level of civil liability protection for those whose actions are in the public interest but nonetheless risk harm to others. For example, many states have "Good Samaritan" laws that protect individuals from liability when they render medical aid to someone freely, voluntarily, and in good faith. Other laws protect volunteers from liability when they are assisting during declared emergencies. During the current pandemic, states have moved via executive order or legislation to shield healthcare workers and providers of needed PPE from the threat of litigation while providing services on the front line. Recognizing that an interminable shutdown is not in the public interest, similar protections should be extended to all businesses that decide to reopen responsibly and in compliance with state laws.

Of course, this cannot serve as blanket immunity for all companies seeking to boost profits by cutting corners and recklessly risking the health of patrons and employees. While polls suggest the public supports protecting cautious business owners making the hard choice to reopen during COVID-19, very few think that employers should be totally off the hook if they refuse to take reasonable steps to protect others. This would unfairly shift the costs imposed by the virus to customers and employees. Rather, the appropriate, over-arching policy goal is to encourage businesses *both* to responsibly reopen *and* to responsibly minimize the risk of infection. Along these lines, states should enact liability shields while considering the following:

First, the aim should be to reduce the uncertainty associated with operating during the pandemic and to instill confidence that responsible opening won't lead to litigation-related financial ruin. This can be done by substituting bright-line rules or presumptions tied to specific practices for common law standards such as "negligence" or "recklessness"; the more traditional approach often allows liability to rest on the vagaries of how a particular judge or jury understands common law concepts. In order to accomplish this, states must first establish clear guidelines for businesses to reduce risk, such as requiring the use of masks, imposing social distancing, regularly testing employees, checking personnel and patrons for symptoms, and establishing sanitation procedures—and promptly notifying authorities, customers, and employees of known exposures. Businesses that comply with these rules can then be given a legal "safe harbor" from litigation that rests on the sickness of an employee or customer—no matter what other steps those businesses conceivably could have taken that clever Monday-morning lawyers can dream up after the fact. For example, Oklahoma enacted legislation stating: "A person or agent of the person who conducts business in this state shall not be liable in a civil action claiming an injury from exposure or potential exposure to COVID-19 if the act or omission alleged to violate a duty of care of the person or agent was in compliance or consistent with federal or state regulations, a Presidential or Gubernatorial Executive Order, or guidance applicable at the time of the alleged exposure."

By the same token, businesses who refuse to comply with state guidelines could be held liable under the legal doctrine of "negligence *per se*." A person who contracts COVID-19 because a business failed to take established protective measures need not prove that failure was negligent, because the violation of state guidelines itself proves the negligence. For those not comfortable with the inflexibility posed by safe harbors and negligence *per se*, compliance or flouting of state-law rules could at least create a *presumption* of liability—a presumption that can be overcome in exceptional cases. These liability protections can be made temporary, so that normal liability rules can apply in the future after we have a better understanding of the virus and the steps businesses should reasonably take to prevent its spread.

Second, if states are unable or unwilling to develop reasonably precise business opening rules, they should consider raising the standard of liability to gross negligence or recklessness, given the inherent uncertainty imposed by the novel coronavirus. "A recklessness standard provides aggrieved parties with a meaningful form of redress in the worst and most explicit cases, while not pretending to cover harder-to-measure or vaguer risks." The National Association of Manufacturers has recommended limiting liability to those businesses with "actual knowledge that an individual would be exposed to COVID-19 and [which] acted with reckless indifference or conscious disregard as to whether they would contract it." Utah, for example, enacted legislation providing that "a person is immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the premises owned or operated by the person, or during an activity managed by the person," except in cases of willful misconduct, reckless infliction of harm, or intentional infliction of harm. Especially because of the asymptomatic nature of this virus's spread, states should also require plaintiffs prove causation by a preponderance of the evidence: that is, plaintiffs would have to prove that they contracted the disease at the place of business and that reasonable steps (other than shutting down the business altogether) would have prevented the harm.

Third, a more limited alternative is to enact protections for businesses that are deemed essential during the pandemic (such as grocery stores and health care facilities) as well as businesses that changed their model for the public benefit during the crisis (such as manufacturers that started creating PPE, disinfectant, and ventilators). For example, North Carolina recently enacted legislation providing immunity from civil liability in COVID-19 suits for essential businesses and emergency response entities except in cases of gross negligence, reckless misconduct, or intentional infliction of harm. States like Alaska, Kentucky, and Oklahoma have added protections from negligence and products liability suits for those who shifted to manufacturing PPE and sanitation products. Other targeted liability rules, such as ones that protect employers from suit for disclosing health information to public health authorities or shield them from claims alleging disability discrimination because they did not allow an employee with COVID-19 to work, are also worth considering. As with liability protections in general, polling suggests that most Americans support such targeted liability shields for businesses.

III. Expand Access to Care While Promoting Entrepreneurship in Medicine

States can implement multiple reforms that will boost access to vital medical services without jeopardizing the health or safety of consumers. The current pandemic highlights the need for (1) eliminating Certificate of Need (CON) laws, (2) jettisoning restrictions on telemedicine, (3) expanding the scope of practice for qualified individuals, and (4) allowing the practice of medicine across state lines. The common theme of these reforms is simple: let competent professionals provide care to those who need it and eliminate anti-competitive barriers that stand in the way.

A. Eliminate Certificate of Need Laws

Certificate of Need ("CON") laws are unlike typical occupational regulations, which purport to ensure a person's fitness for their trade. Instead, CON laws require would-be entrepreneurs to prove that a new business is "needed." In practice, government bodies tasked with making this decision largely defer to the judgments of the existing providers as to whether more competition is desirable, creating a "Competitor's Veto" over new competition. Depending on the state, CON laws may regulate utilities (like gas or electric companies), transportation companies (like taxis and household movers), or medical providers (like ambulances). Allowing existing businesses to artificially limit supply is difficult to justify for any sector of the economy, but it should be especially disfavored when it jeopardizes the provision of life-saving services..

Thirty-six states and the District of Columbia use CON laws to regulate medical services (the study at the link only lists 35 states, because Indiana passed its CON law after the study's publication). While the specifics vary in each state, generally CONs cover the providers of certain procedures, the building of new facilities, or the purchase of new equipment. In many states, providers must get a Certificate of Need just to purchase additional hospital beds.

The Federal Trade Commission and the Department of Justice have said that they "believe that, on balance, CON programs are not successful in containing health care costs, and that they pose serious anticompetitive risks that usually outweigh their purported economic benefits." A body of research now shows that rather than establishing an "adequate" supply of healthcare services, CON laws create shortages, inflate prices, and result in worse patient outcomes. Yet in 36 states, CON laws remain on the books largely at the behest of special interests that have an interest in the law's anticompetitive effects.

The pandemic revealed the nation's startling lack of crisis preparedness. The U.S. has just 2.8 hospital beds per 1,000 Americans lower than Italy (3.2 per 1,000) and drastically lower than South Korea (12.3 per 1,000). And because the CON process is long, onerous, and expensive, it inhibited healthcare entrepreneurs from ameliorating that shortage once it became apparent.

In a crisis, the landscape can suddenly and dramatically change. Hotspots can pop up; entire shifts of frontline workers can become infected. CON laws inhibit healthcare entrepreneurs from responding quickly to changing circumstances. Recognizing this fact, several states suspended their CON laws after the outbreak of COVID-19. That's a good start, but state legislatures can and should make these suspensions permanent.

B. Eliminate Restrictions on Telehealth

COVID-19 underscored the value of receiving the delivery of goods and services while at home; getting health care services while staying at home proved especially valuable. In the pandemic era, many now avoid travel outside the home whenever feasible including limiting their trips to the doctor's office. Visits to primary care doctors dropped by as much as 60 percent; the number of people hospitalized in northern California after having had a heart attack fell by 48 percent. But, skimping on medical attention in order to avoid coronavirus exposure can have its own negative impacts on health.

Telehealth allows people to receive services from the comfort of their home; even after the pandemic, it will remain a valuable option. Some patients live in rural areas and lack access to specialists, while other patients face extraordinary time pressures and struggle to fit a medical visit into their busy schedule; telehealth makes healthcare more convenient for all. Thanks to secure platforms, high quality video, and other advancements in technology, telemedicine makes it easy for people to obtain mental health consultations, monitor chronic conditions, or get quick advice about whether to go to the ER. On the flip side, telehealth provides doctors with a flexible way to see patients, sometimes from the comfort of the *providers*' own homes. About half of primary care offices are small businesses; allowing doctors to move their business models online gives them a way to weather COVID-19 and to provide better care to their patients in its aftermath.

Licensing as telehealth impediment: In some cases, the law blocks medical personnel from providing intrastate telehealth services. In Maine, for example, licensed dentists from any state are prohibited from providing dental consultations by video or phone, even though the state allows telemedicine for osteopathic care and other services. Even where states allow telemedicine, licensing laws sometimes deny qualified out-of-state licensees the opportunity to practice. Licensing laws can force out-of-state providers with the requisite education, training, and experience to secure an entirely new license just to provide telehealth across the border. Some regulatory schemes require out-of-state providers to associate with (and therefore pay) an in-state provider to do business in the state.

These discriminatory requirements are based on antiquated concerns about the competence of professionals who are licensed in other states concerns that are no longer realistic in the 21st century. Advocates of these protectionist requirements simply have no evidence that a provider licensed by Illinois lacks the appropriate education and training to care for a patient in Minnesota. Today, licensing requirements that discriminate on the basis of residency serve as an anti-competitive barrier to entry that deprives patients of beneficial services from qualified providers. When the capacity to provide care in Minnesota is overwhelmed, providers from other states should be allowed to (virtually) fill the void.

Reimbursement as telehealth impediment: Even where licensing doesn't stand as a barrier to practicing, reimbursement policies often make telemedicine impractical. Medicare, Medicaid, and private insurance policies may limit reimbursement for virtual services depending on the specialty or patient setting. Pennsylvania's Medicaid program, to take one example, only reimburses for telehealth services provided by physicians, certified registered nurse practitioners, and certified nurse midwives; that is, it excludes reimbursement to other professionals. Six states only permit reimbursement if there is no traditional provider within a certain distance. Twenty-three states require patients to receive their treatment in specified clinical settings, rather than at home. Some reimbursement policies require a patient-provider relationship, which can only be established by an in-person exam.

And even when policies do provide reimbursement, they may provide much lower reimbursement rates or restrict reimbursement to in-state providers. During COVID-19, Arizona and Illinois mandated coverage for telehealth services offered by in-state providers; it did not do the same for services offered by out-of-state physicians.

Other telehealth impediments: Myriad other regulations unnecessarily stifle providers and consumers who want to opt for telehealth. Laws that require an initial in-person exam before engaging in telemedicine can act as a functional equivalent to a ban for out-of-state telehealth providers, since it's frequently impractical to go out of state just to meet in person. These laws also frustrate technological advancements that render in-person consultations unnecessary. Eye health is a good example. Thanks to technological innovations, consumers can now accurately test their vision using their phones but some states require in-person exams before using such technology or providing a prescription. Washington's legislature, for example, recently considered a bill that would have required providers to conduct an in-person comprehensive eye exam before prescribing eyeglasses or contact lenses. In its criticism of the legislation, the FTC noted that the decision of whether to require a comprehensive exam should be based on a person's symptoms, status, or history. Mandating "unnecessary tests of dubious benefit drives up the cost of health care and denies telehealth" to people who could benefit.

Limits on the authority of providers to prescribe medication, including controlled substances, via telehealth also frustrate the services' potential. Others unnecessarily limit "store and forward" services. Where providers are banned, or not reimbursed for, these technologies, consumers are denied access.

In sum, states should take a permissive stance towards telemedicine by establishing license reciprocity, reimbursing for it, and eschewing one-size-fits-all policies like mandating in-person exams. Providers are capable of deciding which circumstances warrant telehealth and when a patient should be seen in person.

C. Expand the Scope of Practice for Licensees

In addition to making it easier to get credentialed, state policymakers should also consider ways they can empower credentialed individuals to practice to the full extent of their training. Scope of practice laws often hinder registered nurses, pharmacists, dentists, paramedics, social workers, and others from providing services that they are fully capable of providing. Two important reforms in this context are eliminating mandatory physician supervision where it's unnecessary and allowing professionals to engage in services even if they can be performed by another licensed profession.

Thirty-eight states require a physician to directly supervise each physician assistant (PA); eight of those limit the number of PAs that a physician may supervise to fewer than 4. Furthermore, twelve states limit PAs' scope of practice to the specialty of their supervising physician, even if the PA is trained in other areas of medicine. This means that PAs are often prevented from doing work they are qualified to do. A PA who observes that his or her hospital has immediate needs in the ICU, for example, must go through the cumbersome process of finding a new supervisor and formally changing his or her affiliation rather than immediately acting to supply a medical need. Thirty-eight states, by contrast, allow a PA's employer to determine the scope of the PA's work rather than imposing a one-size-fits-all rule. A New York Times video recently detailed how similar laws across the country have prevented physician assistants from quickly changing practices during the outbreak of COVID-19.

Studies show that giving advanced practitioners like PAs more autonomy, greater flexibility, and less supervision would not have a negative effect on patient outcomes and would save patients money. Twenty-three states allow nurse practitioners (NPs) to act as primary care providers, empowering them to diagnose patients, order and interpret diagnostic tests, manage treatment plans, and prescribe medications without immediate supervision. Several studies indicate that restrictions on advanced practitioners have no discernible health benefit; indeed, one report found that "patients were more satisfied with consultations with nurse practitioners than those with doctors." Another estimated that if NPs were able to practice in every state without physician oversight, cost savings could reach $810 million.

States should also consider creating new classes of professionals who can perform services that are ancillary to a pre-existing profession. A handful of states now permit "dental therapists" to practice mid-level dentistry, including routine services like filling cavities. This should not only result in cost savings to consumers and free up shortages in service provision, but also free up licensed dentists to allocate their time to more complex procedures.

D. Reduce Licensing Burdens to Allow the Practice of Medicine Across State Lines

Whether it's because people pursue education, accept a job, need to be near to family, or simply want new scenery, people move. But a patchwork of licensing laws prevents them from practicing once they get to their destination, even if they have many years of experience and are fully trained.

When New York was overwhelmed by coronavirus infections, Governor Cuomo was one of many governors who suspended state regulations so that licensed personnel from all over the country could help out. Arizona already had a universal license recognition law on the books, and Missouri and Iowa passed similar recognition statutes in early 2020.

Relatedly, many states belong to single-occupation compacts that give licensees a quicker path to lawful practice in other member states. For example, 36 states currently adhere to the Nurses Licensing Compact, 8 states have approved the Psychology Interjurisdictional Compact (PSYPACT), and 25 states have adopted the Federation of State Medical Boards (FSMB)'s Interstate Medical Licensure Compact (IMLC) for physicians. However, these compacts are a second-best solution; they create a risk that the drafters will include unnecessarily high standards for compact participation. The IMLC, for example, restricts compact participation to board-certified physicians. Board certification is a credential that demonstrates additional training in a medical specialty; such certification is not required in any state to practice medicine, and it is unreasonable to assume that a physician who is not board-certified will provide substandard health care. States are better advised to focus on licensing reform before turning to compacts, which have the potential of keeping restrictive regimes in place.

IV. Hit the Pause Button on New Regulatory Mandates and Restrictions

Small businesses have faced extraordinary crises these past few months. Many have had to suspend operations entirely. Others have been operating with sharp reductions in staff, services, and income. As these businesses try to return to normalcy, they face a host of problems associated with COVID-19, such as new requirements for masks and gloves, demands for employer and customer distancing, and other changes intended to minimize personal contact and the risk of coronavirus transmission. The coronavirus era is the wrong time for policymakers to expand the regulatory thicket.

Many businesses that are now barely hanging on must rearrange their operations to deal with the coronavirus. The last thing they need is new regulations, new requirements, and new rules. Large businesses, of course, have compliance departments, but even those have been overwhelmed in the past few months with partial or complete shut-downs, business loans, and differing employment and leave rules. As businesses attempt to restart, they need to devote their resources to getting up and running again, to working long hours, and to adapting to the changed market.

One immediate measure that states and localities can take is to stop issuing new business regulations, unless the current health situation makes them necessary. That means no new employment rules, no different and complex tax rules, no new facility or operations regulations, no new licensing requirements, and no new paperwork requirements or forms. In a typical year, the federal government issues thousands of regulations; states also routinely issue dozens, if not hundreds, of regulations. Figuring out new rules and, especially, filling out new paperwork are huge burdens for small businesses. A moratorium would be a huge benefit for businesses struggling to restart.

No new employment rules: State policymakers frequently tweak the rules for wage and hour laws, sick or vacation leave requirements, and workers' compensation regulation. These rules (and the reporting requirements that accompany them) are some of the most onerous aspects of running a small business. These regulatory regimes are tricky: every time they are changed, there is a new learning curve and a new potential for costly mistakes. As such, there should be no changes during the course of this pandemic, other than those mandated as a necessary response to the coronavirus.

No different and complex tax rules: This would be a good year to reduce tax burdens for small businesses. But if policymakers want to do that, they should simply reduce the tax bracket, not create a complex set of exemptions and credits that businesses will have difficulty understanding and documenting. With respect to tax policy, states should pursue a mix of stability and simplification; if changes are made, they should be easy for taxpayers to understand and benefit from, rather than requiring new schedules and forms.

No new licensing requirements: Policymakers are regularly tempted to create new classes of occupational licenses. They should not do so this year. Extending the scope of occupational regulation to new occupations will prevent people who could start work now from doing so. Policymakers would do better to remove occupational licenses or reduce the burdens, as we shall discuss further in this paper.

No new facility or operations regulations: States and cities frequently change their building codes and add new rules about the conditions required for certain kinds of businesses. These requirements range from dictating the minimum number of wastebaskets to the height of counters. Again, this is not the year to make changes. Businesses should not have to worry about understanding new forms of regulations and requirements this year. Even if some of these regulations wouldn't apply to currently existing businesses such as new building codes they would still pose a problem for people who had to postpone their plans for opening a business or building a home until the crisis passes. New codes can require new designs; that creates additional costs and causes additional delays. Instead, state policymakers should put a moratorium on new building codes and rules that govern specific types of facilities or businesses.

No new forms or reporting requirements: Operators of small businesses invariably complain about the time spent complying with different kinds of reporting requirements and filling out different kinds of forms. Most small businesses have acclimated themselves to current reporting and paperwork requirements. If they can just maintain those compliance burdens and not have to absorb more, that would forestall what could be a significant drain on time, resources, and energy.

The extraordinary challenges of operating businesses in the coronavirus era should not be accompanied by new regulatory shackles. States should allow small businesses to do what they do best—provide goods and services—and place a moratorium on any new statutes or regulations. To that end, states should refrain from imposing new regulatory burdens; instead, policymakers should allow businesses to operate as they did in the pre-coronavirus era of 2019.

V. Adopt a Policy of Non-Enforcement for Good-Faith Mistakes and Suspension of Certain Causes of Actions

Even in the best of times, running a business is challenging. Unfortunately, regulatory compliance eats up a disproportionate share of time, above and beyond the ordinary tasks that come with operating a business. But of course, good faith mistakes happen, even for businesses striving for 100 percent compliance. Accordingly, in these unparalleled times, it is important that we offer regulatory safe harbor provisions for businesses that make technical mistakes.

We suggest that unless businesses are *willfully* violating a regulation, regulatory agencies should take a remedial approach. Conduct should be deemed willful only if: (i) the person charged with violation of a rule knew that his or her conduct was prohibited by the rule, or (ii) a reasonable, similarly situated person would have known that his or her conduct was prohibited by the rule. Just because a state or local government has published a rule should not suffice to demonstrate that a person knew, or that a reasonable person would have known of the existence or content of the rule. The demonstration of a willful violation should be an independently required element of proof that must be established in addition to any other requirements imposed by law or rule. This should serve as a basic framework for liability.

As we've explored previously, America's entrepreneurs faced a bewildering tangle of overlaid regulations before the pandemic. Those regulations are often of marginal value or repetitive. Sometimes they are even contradictory. To busy entrepreneurs, regulations appear to be coming from all sides; they impose real costs, both in dollars and innovation. This was so before the pandemic and the unprecedented exercise of police powers that hit the brakes on the American economy.

The current federal policy of non-enforcement for good-faith mistakes is a model that the states should seek to emulate. In May, President Trump signed an executive order directing agencies to combat the devastating economic impact of the coronavirus by adopting discretionary enforcement policies: those policies modify enforcement against businesses that have attempted, in reasonable good faith, to comply with law, guidance, and any pre-enforcement rulings. Under federal policy, the publication of a rule in the Federal Register or the Code of Federal Regulations does not, as such, demonstrate that a defendant knew or should have known about the rule's existence. The executive order also authorized agencies to consider principles of fairness in administrative enforcement and adjudication.

For example, the Occupational Safety and Health Administration (OSHA) released a memorandum earlier this year in which OSHA inspectors were told to adopt an approach more in line with the one recommended herein: that is, evaluate whether the employer acted in good faith, and issue citations only when an employer cannot offer any evidence of good faith compliance. The states should follow suit.

This is an appropriate time for states to shift the focus of their regulators from enforcement to assistance. Businesses should have an opportunity to correct mistakes before facing enforcement actions and/or lawsuits. If a regulatory agency finds a business in non-compliance, it should inform the business owner and provide an opportunity to remediate.

Notably, this isn't a proposal to turn a blind eye: rather, it advises regulators to avoid assuming the worst. Assuming the worst to be true risks hamstringing well-meaning employers. Businesses should only be subject to regulatory enforcement actions if their administrators should reasonably have known that the act under scrutiny was illegal. In many cases, an employer may just be unaware of some particular obligation that is buried in reams of overlapping regulatory codes.

Governments must face the reality that many of the businesses it regulates are more fragile than ever. Businesses need to be nimble. They need to move fast and quickly ramp up. They know that their survival and their employees' jobs depend on it. Many advocates of the lockdown had unrealistic expectations that the country could flip a switch and rapidly resuscitate its economy. Now that American businesses are sputtering and unevenly coming back to life, they must focus on essentials. So, during these difficult times we should avoid taking a punitive approach to regulatory enforcement—except when dealing with truly bad actors. Indeed, we can protect the public interest while promoting economic recovery if we shift our focus to providing regulatory assistance for struggling businesses.

VI. Reform Occupational Licensing Rules

A. Background

The scope of occupational regulation in the United States today is overbroad; overbroad occupational regulation—and, in particular, overbroad occupational licensing—collectively makes workers and consumers much worse off. The national imperative for rollback of occupational licensing is approaching something like bipartisan consensus or conventional wisdom. The Obama Administration argued that overbroad occupational licensing can "reduce employment opportunities and lower wages for excluded workers, and increase costs for consumers." Similarly, the Trump Administration contends that overbroad occupational licensing can "hurt job creation, increase consumer costs, and slow economic growth. Too often, occupational licensing requirements protect practitioners from competition rather than protecting the public from harm." The concrete effects of these dysfunctions are huge: even before the coronavirus crisis, overbroad licensing cost consumers hundreds of billions of dollars and removed millions of jobs from the American economy.

The coronavirus has illuminated the national need for occupational licensing reform. Economic dislocations from the coronavirus have led to levels of unemployment that are unparalleled in recent history. One of the most constructive responses to these unprecedented events is that both Democratic and Republican governors have issued a wide variety of executive orders that roll back various facets of occupational licensing; such policies attempt to increase employment, competition, and the supply of services and, more broadly, to improve the people's general welfare.

This array of coronavirus-era occupational licensing reforms includes executive orders to:

- Recognize occupational licenses from out-of-state jurisdictions (in 27 states);
- Expedite the issuance of occupational licenses or temporary permits (in 21 states);
- Liberalize or reduce training/examination requirements for licensees (in 15 states);
- Expand the scope of permissible telepractice—typically, telemedicine—conducted by licensed professionals (in 18 states);
- Postpone occupational license expiration deadlines (in 17 states);
- Resuscitate occupational licenses in good standing whose bearers are retired or otherwise have let those licenses lapse (in 19 states); and
- Expand permitted scope of practice or relax supervision requirements (in 20 states).

A detailed list of which states have enacted which executive orders is included in the Appendix.

B. What Reformers Should Know

The national wave of reform described above demonstrates that significant progress on occupational licensing reform is possible, despite the political power of self-interested professional organizations and their lobbies. Nonetheless, licensing reformers will likely continue to discover that it is easier to reach consensus on broad, abstract sentiments about the importance of reform generally than on concrete proposals. The issue is much the same as it is for budget politics: many will agree as a *general* matter that a budget is too large and needs to be reduced in size, but it is a regrettable fact that arriving at a consensus on some *particular* cost-cutting proposal is almost inevitably trickier. Agreement becomes harder when the question is "what, concretely, are the most appropriate targets for reform?"

Historically, reformers have often found that the logic used to justify some particular licensing scheme is not strong but that the organized lobby that resists occupational licensing reform is significantly stronger. This "weak claims/strong claimants" dynamic can be found across the regulatory landscape; organized lobbying agents of professions routinely ask policymakers to regulate their own principals. Much of the controversy over the appropriate scope of occupational licensing rests on an unresolved debate—a debate over to what extent occupational regulations benefit the public and, conversely, to what extent occupational regulations only benefit incumbents by creating barriers to entry; to the extent that such regulations are driven by effective lobbying from the claimants themselves, the barrier-to-entry/self-interest explanations appear to bear more weight. But this debate remains difficult to resolve; one reason is that professionals typically have superior technical expertise in their own field, a fact which might initially make weak claims appear strong.

Occupational licensing reformers should therefore be unsurprised at political resistance from professionals who oppose reduction of the barriers to competition those professionals (or their agents) have erected in regulation and statute. To use an economic metaphor for a political phenomenon, reformers should view such resistance as a cost of doing business; successful reformers will anticipate this cost and figure out how to bear it.

Furthermore, to make the case for licensing reform of any particular profession, successful reformers will gather knowledge about the occupation under scrutiny. It does not follow that a reformer needs to have experience in the practice of (for example) interior design in order to reform the interior design profession competently. But when considering regulatory reforms of a particular profession, policymakers will be at an advantage if they become conversant with the status quo, and in particular with:

- The nature of the profession's required training and education (for instance, the number of hours required for licensure);
- Whether the required training and education focuses on or the demonstration of proficiency in particular subfields or subskills;
- To what extent the required training and education is designed to further health and safety, and to what extent health and safety concerns are actually furthered by such design (and, conversely, whether other goals beyond health and safety are included in such education and training);
- How such training and education compares to counterparts in other states; and
- Whether there is any evidence that diversity in training and education regimes for the profession in different states have any effect on outcomes.

Notably, variance in occupational licensing requirements among jurisdictions provides grounds for reasonable suspicion that a particular jurisdiction's relatively burdensome regulatory scheme lacks justification. For instance, if there are sizable numbers of states that license some particular occupation but also sizable numbers of states that do not, this patchwork of policies should serve as a red flag to alert the observer that further investigation is particularly appropriate. A similar patchwork of policies across jurisdictions, in which some states require education and training that is many times larger than that required in other states, or is otherwise disparate, should serve as another kind of red flag.

C. How the Coronavirus Revealed Policymakers' Preferences

Many policy choices rest on tradeoffs; the policy choices in occupational licensing are no exception. Occupational licensing works by banishing some providers of services from the labor market; it necessarily creates labor shortages. Speaking generally, the theory of occupational licensing is that the costs created by these labor shortages are outweighed by their benefits. The costs include the increased prices consumers must pay for services and (as noted immediately above) the reduced numbers of service providers in the labor market. The benefits are largely that consumers are protected from service providers who are quacks, who malpractice, who provide services of low quality, and so forth. This understanding of "benefits" rests on the notion that well-informed consumers who understood their own interests would not want to deal with a significant number of service providers. These providers, because of occupational licensing, are banished from the labor market; they would otherwise provide services that are in some sense unacceptable.

This general analysis holds for any particular profession. For instance, if we require massage therapists to be licensed, the theory of occupational licensing holds essentially that licensing rids the labor market of a multitude of massage therapists, some of whom would otherwise provide massages that are painful, dangerous, or non-therapeutic. In return for the benefit of this labor-market barrier, policymakers accept the cost of the attendant shortage of therapeutic massage services, the unemployment it creates for people who want to provide these services, the blocking of opportunities of those who want to work, and so forth.

Notably, the choice to create an occupational licensing system implies a choice to create such a shortage; the choice of a particular design of the licensing system implies a choice about the size of the shortage. (Depending on the design of the licensing regime, policymakers can control the number of providers of a particular service in either a crude or precise way; one can only make an educated guess as to how many people will become barbers next year, but the residency system determines exactly how many new doctors will be allowed to practice medicine in the United States in 2021.) Criticisms that occupational licensing goes too far, is overbroad, and so forth can reasonably be understood, in economic terms, as expressing a view that this shortage is too big in other words, that the particular tradeoff that has been arrived at consists of benefits that are not worth their costs. The view that occupational licensing is overbroad should not be read as a rejection of the tradeoffs inherent in occupational licensing generally; rather, the rejection is of this particular tradeoff. In other words, the shortage leads to *too much* consumer protection and *not enough* jobs, competition, services, and opportunity. To the extent that decision-makers believe that the labor shortage is too big (as described above, the United States is moving toward something like bipartisan consensus on this matter), this suggests that even in the pre-coronavirus era the system of occupational regulation, by creating a shortage that was simply too large, had missed the mark. Policy success, in these terms, consists of moving toward a smaller shortage by removing or reducing some barriers to labor market entry.

This line of analysis becomes especially noteworthy when we observe the nation's regulatory reaction to the coronavirus crisis. As the crisis unfolded, unemployment increased. The labor shortages that were created by licensing policy were accompanied by new, additional coronavirus shortages: shortages caused by huge swaths of businesses being shut down by government edict, as well as shortages caused by voluntary market exits of proprietors or providers that were fueled by coronavirus concerns. In the coronavirus era, people who had formerly provided all sorts of goods and services suddenly decided to stop, or were suddenly barred from, showing up for work. In the licensing realm, policymakers in both parties attempted to address the (newly larger) shortage problem by, in part, liberalizing licensing regulations. This can be understood as an attempt to reverse course: that is, policymakers who, first, see shortages in the pre-coronavirus era and, second, see the magnitude of those shortages increase in the coronavirus era react to these ever larger shortages by trying to shrink them. More precisely, they react by trying to open up labor markets to new entrants who can provide more services to consumers. Some examples of these policies are provided above: for instance, executive orders to reactivate expired licenses, to allow partially-trained professionals to work even though they only have what would ordinarily be considered inadequate training or credentials, or to recognize licenses from other states. It is fair to say that the coronavirus worsened significant licensing-related structural problems in the American economy, but also that the coronavirus put a spotlight on them.

In retrospect, the fact that it took the hard economic times spurred by the coronavirus to produce wide executive-order licensing reforms should not come as a surprise: it is only natural for policymakers to pay more attention to bigger problems than smaller ones. Notably, however, the solutions provided by this wave of executive orders—in principle, if not in scale—are in many cases as justifiable whether the coronavirus is spreading across the nation or not. Even before the coronavirus, there were plenty of political signals that suggested that addressing the problem of shortages caused by overbroad licensing was becoming more politically feasible: the coronavirus simply highlighted what appeared to be market failures caused by government. Even in a post-coronavirus era, it is unlikely that economic crises are gone forever; regulators should not assume an American economic future of constant and smooth growth, but rather a future punctuated with events like (for instance) the coronavirus crisis of 2020 or the global financial crisis of 2008.

It would therefore be a mistake to assume that the licensing reforms triggered by the coronavirus crisis will do no good when the coronavirus is over. Such reforms are needed whether the economy is in crisis or out of it; the human costs of licensing-related shortages have become increasingly evident, and the relative benefits of shortage creation appear increasingly difficult to justify—especially at the margins. Again, to take note of the size of such shortages does not require a commitment to the abolition of occupational licensing; rather, the point here is that the magnitude of barriers to entry and the accompanying shortages they create make occupational licensing a prime target for significant regulatory rollback. This part of the regulatory thicket especially needs pruning.

D. The Reformer's Toolkit

When armed with the findings of the investigations described above, reformers should consider the following strategies for occupational license reform:

Elimination of licenses/complete deregulation of a given profession: ending all regulation for a given profession. For instance, Florida recently passed a measure to eliminate all licensing requirements for several professions, including hair braiders, makeup artists, boxing announcers, and boxing timekeepers.

Scope of practice reforms/supervisory requirement reforms: allowing professionals to perform services that are typically outside the scope of the authorizing statute or regulation that delimits their practice, or allowing professionals to work outside the boundaries of the supervision requirements they must typically comply with. For instance, Colorado, through executive order, recently began to allow doctors, nurses, and respiratory therapists to perform services outside of their scope of practice under certain conditions; New York, through executive order, recently allowed advanced practice registered nurses, physician assistants, specialist assistants, and nurse practitioners to provide medical services without the supervision by a physician that is ordinarily required. (Such reforms are discussed in greater detail in Section III above.)

Reduction of required education or training: reducing the number of hours of education or training that is typically required by regulation or statute in order to receive a license. For instance, Texas passed a statute in 2019 to reduce the required training for licensed cosmetologists from 1500 to 1000 hours; more recently, the Florida measure referenced above reduced the required training for licensed barbers from 1200 to 1000 hours.

Alternate/substitute avenues for required education or training: allowing trainees to pursue educational requirements through other means than conventional education and training, such as on-the-job apprenticeship experience or military experience and certification. For instance, several southern states have instituted reforms that allow apprenticeship to serve as a substitute for license-related education and training. Similarly, although less progress has been made, multiple states are examining the prospects for substitution of military experience and certification for some of the education or training required for licenses in various professions.

Transformation of licenses to less intrusive methods of occupational regulation: Licensing is not the only way to regulate occupations: instead, policymakers should determine the function that occupational regulation should serve and then craft a method that serves that function. Space does not permit an extensive discussion of the many alternatives to licensing that serve varying policy goals, but, for instance:

- **Bonding or insurance requirements** may be a sufficient substitute for licensing if the policy goal is to manage certain investment risks.
- **Registration** may be a sufficient substitute for licensing if the policy goal is to ensure that providers do not disappear or otherwise evade the legal process.
- **Periodic inspections** may be a sufficient substitute for licensing if the policy goal is to encourage hygiene and sanitation.
- **Certification** may be a sufficient substitute for licensing if the policy goal is to ensure that providers meet sufficiently high standards in the services they provide.
- **Free markets** may be a sufficient substitute for licensing, especially in the era of Facebook and Yelp, if the policy goal is to ensure that consumers are sufficiently informed about the nature of the products and services available, especially in those contexts where the social costs of less-informed consumers carrying out less-informed transactions is not especially high.

The above reforms are most likely to encourage innovation, spur economic growth, and expand opportunities for the nation's workforce. Other methods of occupational licensing reform, which are arguably less effective in opening up the labor supply, include interstate license recognition, commissions or other structural reforms of the licensing/regulatory process, and reforms limited to particular demographic groups (for example, military spouse license recognition reforms and collateral consequences reforms).

VII. Reform Independent Contracting Rules that Inhibit Entrepreneurialism

The economic dislocation caused by the COVID-19 pandemic has underscored the need for policies that encourage flexibility and entrepreneurialism. The debate over classification of independent contractors and employees—which recently reached a flashpoint when a new California statute came close to forcing business shutdowns and mass terminations—illustrates the importance of fostering entrepreneurial breathing room.

Early in the pandemic, we heard concern that independent contractors lacked the safety net and benefits of W-2 employees, which left these workers more vulnerable to economic downturns. The severity of the pandemic's economic turmoil prompted Congress to enact income replacement programs for independent contractors—prompting some to suggest that hiring entities were shifting their responsibility for misclassified workers to the American people.

But the response of government has been the least telling aspect of the coronavirus experience. A more notable consequence is that individuals have turned to freelance work to supplement or replace lost wages, using it as a sort of private-sector safety net. An increasing number of people are bringing their skill sets to the online economy, transitioning from employee to entrepreneurship. As one employee making the transition said, "working remote, with the potential to do freelance or contract work or to pivot into a field where I don't have to go into work every single day and get paid quite a bit more" is a good tradeoff.

That's especially true in a labor market that has about 15 million fewer jobs as a result of the pandemic—without any indication of when or if those jobs might reappear. Employers remain reluctant to hire, given the continued uncertainty over the pandemic and the economy. And long-term unemployment is especially risky—the longer someone remains out of work, the harder it becomes to return to the workforce.

Freelance work benefits the people who are working. It brings productive services back into a sluggish economy. Unfortunately, a hodgepodge of conflicting standards for worker classification threatens the critical role that freelance work can play as the nation recovers from the COVID shut down.

A. What Can States Do to Help?

While the internet economy itself has low barriers to entry, many states have antiquated or restrictive standards for worker classification that interfere with entrepreneurship. Now is a good time for states to consider amending their classification standards to adopt more flexible tests.

Worker classification questions are complex, and a variety of standards also apply at the federal level, so states do not have complete control over the question. The federal standards set the floor that everyone must meet to properly classify workers. The IRS test—once known as the "20-factor test" —remains a multi-factor analysis that emphasizes the degree of control exercised by the hiring entity of the individual worker. The Fair Labor Standards Act uses a different non-exhaustive set of six factors called the "economic realities test," and the National Labor Relations Act uses a "common law agency test" that emphasizes the entrepreneurial opportunity for economic gain.

The downside of these federal tests is a lack of predictability. No one factor controls, so it is difficult to be sure that a given working relationship will pass all the tests. But the federal tests offer flexibility and they can be applied in a way that recognizes and accommodates innovation in working relationships.

Most states include more restrictive tests in at least some of their employment statues. The tests are often not uniform across the various employment contexts. The workers' compensation law might be governed by one test; wage and hour laws, addressing minimum wage and overtime, by another; and unemployment insurance laws by a third.

This lack of uniformity creates unnecessary complexity in determining whether one can safely work with a new business. And whatever the theory of designing the tests around the purpose of the underlying statute, the differences accomplish very little. As a practical matter, the most restrictive applicable standard will control; in most states, that means the ABC test, which requires independent contractors to satisfy all three parts of a three-pronged test.

B. Some Problems with ABC Tests

The ABC tests, as applied in various states, have two advantages: they are easier to use, and the outcome is more predictable than that of federal balancing tests. Unfortunately, many would-be entrepreneurs find that they fail the test; it regularly dictates an "employee" result even when the facts and circumstances suggest that "contractor" is a better fit. The ABC test often fails to accommodate the development of new business models and denies parties the flexibility to decide for themselves how to structure their working relationships.

Unlike federal multi-factor tests, the individual must satisfy all three prongs of the ABC test:

A. The business does not control the individual's performance of the service;
B. The work is outside of the usual course of the business operations, or outside of all locations of business operations;
C. The individual is operating an independent trade, occupation, profession, or business.

There are a few problems with this approach, beginning with its failure to identify the essential attributes of employer/employee relationships. The test was developed in the 1930s, so it's not surprising that it tracks features that characterized employment relationships of a different era. But the result is that the test is not well-suited to the entrepreneurship we want to encourage today.

Although ABC tests have been on the books in many states for years without difficulty, all elements of these tests present risks to individuals looking to transition to freelance work in the coronavirus era; furthermore, the test poses unnecessary, counterproductive hurdles to innovative business models.

The "A" element of the test—the absence of control over the subordinate's performance—goes to the essence of the employment relationship. But objective criteria and standards set by gig platforms can run afoul of an aggressive interpretation of "control." Demand for online teaching and tutoring services, for example, has blossomed during the COVID-19 shutdown. But the standards that make for an appealing product can be deemed "control" and cause legitimate contract workers to fail even the "A" element.

The problems continue with the test's "B" element, which requires a subordinate's work either to be outside of the usual course of business or outside of the place of business. One significant advantage of the internet economy has been the opportunity to disaggregate business operations. In the current environment of reduced consumer demand, the opportunity to outsource for specialized skill sets can increase efficiency enough to allow a business to stay open. At the same time, the entrepreneurial contractor who might otherwise be laid off can instead capture the gains of his or her own specialization.

But the first half of the "B" prong would often prohibit such innovation. Indeed, it would have prevented the explosion of innovation we have already seen in the economy—and often take for granted—if not for the second, disjunctive half of the "B" prong, which allows the test to be satisfied if the work takes place "outside of the place of business."

Of course, during the immediate shutdowns for COVID, almost all work was taking place "outside the place of business." But as non-essential work has resumed, the requirement that work be conducted "outside the place of business" presents significant challenges. Some work is necessarily performed at a particular location. Photography typically takes place on-site. Even journalism often requires onsite presence to at least some degree. And according to the analysis used in some states, the "on-site" criteria can be met wherever the work takes place. Gig economy workers doing grocery delivery would be considered "on-site" when they are at the grocery store or driving from one place to another. Again, the requirement imposes an arbitrary hurdle to innovation, because the on-site requirement does not go to the nature of the working relationship between contract worker and hiring entity.

The "C" prong raises other unnecessary barriers to entry, because many states understand the test to require an established independent business with multiple clients. The interpretation is often justified in the context of workers being exempt from paying unemployment insurance: a worker with a broad clientele is less likely to fall onto unemployment rolls. But such a rigid interpretation of the concept of "independent business" undoes one of the core advantages of internet-based gig economy work—one which is especially critical during a pandemic. The quick and easy on-ramp to gainful work is itself a sort of safety net. But if you need an established business with a broad base of support, how do you ever get started?

Some states have begun to take a fresh look at their tests for worker classification, unifying the analysis across the various labor laws with a more flexible test. In some cases, states have sought to track existing federal standards, because the federal statutes are the baseline that all independent contractors must meet regardless of state law.

But the indeterminacy and inconsistency of application of federal standards remains a problem. So states like Maine have begun developing new tests that better track and support innovative working arrangements. The objective is to provide greater guidance and predictability for entrepreneurs seeking to establish a new business while retaining sufficient flexibility to accommodate the business models that haven't even been thought of yet.

C. Do No Harm: New Enforcement by States

States should avoid increasing these restrictions, because that would impose greater risk on entrepreneurs and other freelance workers. Unfortunately, even before the COVID pandemic had begun, states were feeling pressure to step up restrictions on independent contractor business models. Labor unions see the growth of independent workers as a threat to their business model; they have advocated for even more restrictive ABC models.

Some labor-friendly states have increased enforcement of existing ABC tests and are adopting more restrictive interpretations of them. Independent contractors who believe they satisfy the ABC test by performing work "outside of the place of business" sometimes face enforcement actions that are coupled with an eyebrow-raising new theory of the test: that is, for decentralized gig economy work, the "place of business" is found wherever the contract work is being done. This interpretation effectively nullifies the second half of the test. Rideshare drivers and independent truckers, for example, face enforcement actions based on the idea that roads are a place of business.

Some states have also enacted legislation that sharply increases penalties for getting creative new interpretations of the ABC test wrong. Penalties for worker misclassification have been enacted in the guise of countering "wage theft"; they typically include significant statutory penalties, treble damages based on unpaid overtime, workers' compensation and unemployment premiums, and even jail time. The uncertainty of such interpretations, combined with a significant risk of getting test results "wrong," crushes innovation and deters entrepreneurship at precisely the wrong moment.

D. California as a Cautionary Tale

Other states have formally adopted more restrictive ABC tests by statute. The Massachusetts legislature was the first to adopt the new (more restrictive) ABC as part of its independent contractor law. But California became the face of this effort when it famously adopted AB 5, which eliminated the "outside of the place of business" alternative to meeting the B element of the ABC test for all relevant employment statutes.

The reaction was powerful, even though the state Supreme Court had already imposed the restrictive form of the ABC test on the state in *Dynamex v. Superior Court*. The Court had explained, with some justification, that given "contemporary work practices, in which many employees telecommute or work from their homes," the particular location where work is performed had become less irrelevant to the nature of a working relationship.

But the remaining portion of the B prong—requiring work outside of the "course of business"—has become an anachronism from workplaces of another era. The availability of off-site working arrangements had been mitigating the harm. By eliminating off-site work as a path to meeting the B prong, the decision eliminated most of the innovative arrangements of the internet-based economy.

The heightened visibility of the legislative change triggered a massive backlash across the state's economy, as hiring entities terminated their relationships with freelance workers and many ceased doing business in the state entirely. But to revitalize the economy, California should roll back the change that was adopted in the *Dynamex* decision and codified in AB 5.

States should update their tests to facilitate innovation. We may be dealing with the coronavirus for longer than we've ever considered. That means we need to make successful reforms if we want to mitigate the pandemic's economic fallout. Because we will inevitably encounter another unforeseen economic crisis, it is important to think about permanent reforms to the independent contractor rules; that way, the nation will be in the best position to weather unforeseen storms.

VIII. Reform or Eliminate Land Use Restrictions That Inhibit Business Operations and Economic Growth

A. Relax Commercial Zoning Restrictions

Our country is reopening; so are our local businesses. Reopening brings many challenges and hard decisions. Will businesses simply return to pre-coronavirus operations, or will they modify their practices to fit new consumer demands? Will we see new businesses stepping in to fill the gaps and empty storefronts that now exist because some companies couldn't survive three months without any revenue? The answer to these questions is both yes and no. Changes in consumer demand, supply chain structure, and business practices will certainly shape much of the response. But the success of that response is, as always, inextricably tied to the ability to avoid the entanglements of the regulatory thicket—and, in particular, some of its most confusing aspects: land use regulations and the building permitting process.

Consider your favorite local restaurant. For the first few weeks of the lockdown, uncertainty and fear forced it to shut its doors. But like most businesses, it only had one month of revenue reserves in the bank. After a few weeks, it modified its business model. Maybe it started selling takeout meals for curbside pickup. Maybe to help its suppliers and maintain its contracts, it started selling produce in a farmers'-market-style outdoor setting, or maybe it turned itself into a drive-through meat market. Maybe it's now able to reopen its dining room. The era of reopening presents both challenges and opportunities: because of distancing requirements and success in its newfound catering revenue and direct selling, the restaurant wants to incorporate these new channels into its business model permanently.

Unfortunately, changes like this frequently violate zoning codes. Zoning laws determine where you can build, what you can build, and what activities you can conduct on your property. They tell you how tall your buildings can be, how many parking spaces you need to have, and even what color your building may be painted. In other words, zoning laws dictate how you can operate your business on your land.

Local governments stand in the way of entrepreneurship by limiting which types of businesses can exist in each "commercial zone" of a city. For example, you may be able to operate a restaurant on your land, but you may not be allowed to operate a catering company or a farmers' market. In many cases, land use restrictions are so specific that they will create difficulties for businesses that need to relocate due to COVID-19—and difficulties for property owners who may struggle to find new tenants if their existing tenants move or go out of business.

Further, local parking requirements are often overly prescriptive. For example, Houston has different parking requirements for eight distinct categories of restaurants: depending on the category, the requirements range from 4 to 14 parking spaces per 1,000 square feet of floor space. Changing tenancy from a "neighborhood restaurant" to "small bar" requires a one-third increase is parking spots, which is generally infeasible. In the best of times, parking requirement rigidity contributes to high retail vacancy rates. During the coronavirus recovery and its accompanying economic uncertainty, such requirements pose an unacceptable barrier to property owners' and businesses' ability to adapt.

Over the last few months, local governments have largely relaxed enforcement of these zoning requirements, providing for temporary exemptions to help their local businesses stay afloat. They have allowed restaurants to sell curbside, they have allowed takeout alcohol sales, and they have allowed drive-through farmers' markets to be offered by companies who would otherwise be barred from entering these markets. But as we return to the status quo and these exemptions phase out, businesses will be forced to go through the extended and uncertain process of applying for permanent exemptions, variances, rezoning, and new permits—all of which add costs, delays, and uncertainty and bring innovative new business models to a screeching halt. This is especially true for new businesses that want to enter the market to fill gaps left in COVID-19's wake. In addition to distancing and new health regulations, entrepreneurs must still navigate the lengthy and time-consuming labyrinth of permitting requirements and procedures before opening their doors.

This raises an important question: if relaxing the often vague, subjective, and confusing zoning and permit requirements successfully helped businesses survive the COVID-19 shutdowns and led to innovative business solutions, why not make those changes permanent? This crisis has underscored that we need clearer and more objective land use requirements and expedited permit approval. It has also highlighted the need for land use regulations to allow for flexibility all of the time, not just in moments of crisis; that flexibility will allow for the economic adjustment and experimentation that will spur economic growth.

B. Eliminate Restrictions Limiting Housing for Healthcare Workers

On top of the zoning rules that are standing in the way of business adaptations during the pandemic and recovery, some housing restrictions are also blocking the public health response to COVID-19. These rules impeded health care workers in the spring of 2020; if new COVID-19 hot spots emerge going forward, these rules will create more unnecessary impediments to public health.

During the height of its COVID-19 infections, thousands of health care workers traveled to New York City and other hot spots to provide their assistance where it was needed most. However, some of them encountered challenges in New York City and other regions with notoriously short-supplied housing markets. Some landlords and co-op boards banned health care workers as tenants in an effort to keep themselves healthy.

To prepare for potential future waves of COVID-19, policymakers should focus on eliminating restrictions that stand in the way of short-term housing for health care workers who need flexible options available immediately upon their decision to travel to a hot spot. Currently, short-term rental restrictions stand in the way of health care workers accessing the housing they need. For example, New York City has severe restrictions on short-term rentals, particularly within multifamily buildings. In Washington, D.C., property owners are only permitted to rent out homes as short-term rentals if it is their primary residence. These policies shut off options for short-term housing for visitors at all times, causing problems particularly during a pandemic when housing flexibility is crucial and becomes a public health matter.

Rather than pursuing policies to support flexible short-term housing in response to COVID-19, some policymakers have instead clamped down on short-term rentals as a tool to discourage travel, in some cases prohibiting non-resident property owners from entering the jurisdiction. Travel restrictions on tourism during the pandemic make sense, but these policies should be targeted rules to curb tourism specifically during a public health emergency. They should not specifically target short-term rentals, as such restrictions risk harming essential workers who need housing as they travel to hard-hit locations.

While some policymakers are exacerbating housing shortages with their land-use restrictions during COVID-19, others provide models. State policymakers have a role to play in setting limits on the extent to which their localities are permitted to restrict land use. The benefits of land use restrictions are typically limited to those who live very close to a new development, while the costs are dispersed among everyone who has to pay higher housing costs or struggles to find space for their business due to prescriptive requirements for buildings. Thus, state policymakers are sometimes in a better position to evaluate the overall effects of land use policy.

With short-term rental bans, the benefits of restrictions accrue to residents in neighborhoods where short-term rentals would be common—such rentals could potentially cause nuisances, such as noise—and to the local hotel industry that benefits from reducing competition. However, the costs of restrictions are borne by every traveler (who is faced with fewer choices and higher prices) and by every property owner (who loses out on the opportunity to use property profitably).

Arizona's 2016 short-term rental law provides a model for state policymakers who want to improve housing flexibility during the pandemic and beyond. The law prevents localities from banning home-sharing entirely, but it leaves them with the authority to implement restrictions on health and safety issues along with nuisances like noise.

IX. Eliminate or Reform Food and Alcohol Industry Regulation

During the coronavirus outbreak and the subsequent stay-at-home orders and business closures, many state and local governments eased restrictions on the food and alcohol industries. The regulatory status quo had blocked business flexibility and consumer choice. Permanent relaxation or elimination of some rules in this sphere—especially those rules without a clear health or safety justification—would create breathing room for continued innovation in an industry that has been severely tested during the pandemic.

The food service and alcohol sectors of the economy are among the most regulated in the country. And many of the rules governing them seem unconnected to health and safety rationales, or indeed any public-interest rationale at all. For example, Washington, D.C. bans the use of images of or people dressed as Santa Claus in connection with the sale of alcohol. New Orleans prohibits food trucks from displaying third-party advertising. Such examples are nearly endless.

The coronavirus pandemic has significantly increased difficulties for these economic sectors. As of May 2020, three percent of restaurants had permanently closed, 44 percent were temporarily closed during the coronavirus pandemic, and 11 percent reported that they expected to close permanently within thirty days. Food banks have struggled during the pandemic and face shortages of food to distribute.

Despite these serious challenges, many state and local governments compounded the problems these businesses face by imposing onerous and unwieldy rules and regulations. Los Angeles, for example, prevented restaurants from selling groceries. Because the restaurants lacked grocery permits, the city therefore determined that they could not sell groceries—despite a history of selling prepared foods. "It's not really possible for a restaurant to become a grocery store," said the director of Los Angeles County's Department of Public Health. "You cannot just decide you want to sell groceries." But there are reasons to allow restaurants to enter this market: grocery services in restaurants can help reduce crowding in grocery stores, and social distancing can more easily be enforced. Officials eventually relaxed their rules, but they did so in a way that created more inefficiencies—including prohibiting customers from entering restaurants to obtain groceries, but imposing no such prohibitions on traditional grocery stores. As the pandemic slows and businesses reopen, policymakers should give restaurants more flexibility to sell both raw and prepared foods.

Despite the remnants of Prohibition-inspired rules in state codes, many states have allowed restaurants to sell alcohol to go during the pandemic. These changes ought to be made permanent in order to increase consumer satisfaction. Alcohol sales constitute 20-25 percent of sales for most restaurants; because consumers are no longer dining at restaurants at their pre-pandemic frequency, flexibility in alcohol sales may be crucial in helping restaurants stay afloat. Many states, including Colorado and Ohio, are considering making to-go alcohol and delivery alcohol permanent (or, at least, extending it beyond the pandemic). Oklahoma and Michigan have written permanent reforms along these lines into law.

Some states have reformed other alcohol restrictions in the wake of the pandemic. Louisiana recently expanded its alcohol delivery bill (originally passed last year) to allow third-party delivery companies to deliver alcohol from grocery and liquor stores to consumers. Kentucky passed a landmark alcohol shipping law which allows breweries, distilleries, and wineries to ship directly to Kentucky consumers. Kentucky's measure also allows out-of-state alcohol producers to ship to in-state consumers if their state has a reciprocal shipping agreement with Kentucky (although only a small handful of states allow the direct shipment of all types of alcohol). Even control states—where the government controls all sales of distilled spirits—have shown an inclination for reform. Virginia allowed in-state distilleries the permanent right to hand-deliver their spirits to consumers, and state liquor regulators just announced pilot plans for home delivery from its system of state-run liquor stores in the months ahead.

It remains to be seen how many of these reforms will become permanent and what shape they will ultimately take. Some states, such as Colorado, have opted to extend takeout and delivery alcohol privileges for a few years, rather than making them permanent. Others have proposed allowing alcohol delivery from stores and restaurants, but have restricted third-party companies from conducting such deliveries. The latter policy appears to ignore the realities of the industry; third-party entities like Instacart and Amazon are much better suited to provide delivery services, but most retail stores and restaurants lack the infrastructure or resources necessary to hire employees as delivery drivers. States also may allow some types of licensees (such as restaurants) to deliver alcohol without extending those privileges to other types of licensees (such as liquor stores). Policymakers should embrace an equitable and broad-based system for takeout and delivery alcohol that increases both businesses flexibility and consumer choice.

States should also consider updating other antiquated alcohol rules on their books. Is the public really endangered if companies in Washington, D.C. and Ohio market alcohol with Santa images? Is there any harm if convenience stores and gas stations in Indiana sell refrigerated beer (currently, they can only sell it at room temperature)? What is the purpose of a New Mexico law that prohibits the sale of $1 margaritas? The list goes on. Many of these rules date back to the Prohibition era and have not been updated for nearly 85 years. Such rules are mostly untethered to consumer protection, health, or safety; instead, they appear driven by protectionist motives.

The food truck industry has also been hit with haphazard and onerous regulations. For instance, New Orleans bans advertising on food trucks, a prohibition that is not only without any apparent connection to health and safety but also raises constitutional concerns. The city code prevents the use of "sound-producing devices or music systems which can be heard outside of the truck." If the intent of these rules is to prevent excessive noise, it is unclear why these regulations apply *only* to food trucks, not to all other types of vehicles. Food trucks also are often prevented by localities from operating within a specific distance of a brick-and-mortar restaurant. These prohibitions appear to be motivated less by the goal of protecting consumers than by protecting incumbent businesses. Such regulations stifle the ability of food trucks to operate and discourage prospective entrepreneurs.

Small cottage food businesses also face arbitrary rules. Cottage food laws vary by state: they generally regulate how people who make food at home can sell it. Some states cap the quantity of sales, while others restrict which foods may be sold. Oklahoma is studying how to make fresh food available on the market at the same time that Oklahoma farmers are struggling. Reforms to cottage food laws in that state could both increase access to food and assist farmers in getting their crops to market.

Regulations also constrain the donation of food to those in need. Many local regulations cruelly prevent people from feeding the homeless. In some localities, health officials bleached food intended for the homeless. Louisiana officials similarly destroyed venison that was intended for the homeless. As mayor of New York City, Michael Bloomberg cracked down on food donations, apparently because he was skeptical about their nutritional content.

Even during the pandemic, as demand for food bank services has doubled or tripled in different areas of the country, local governments are squelching generous efforts to give food away to people in need. Many people across the country are using the little free pantry concept—small structures in which people can take or donate food as needed. But despite the fact that hundreds of other little free pantries nationwide operate safely with no regulation, some local health departments have stifled this no-contact solution to food insecurity with red tape. In Asotin County, Washington, a woman decided to open a little free pantry in her backyard to help feed her neighbors. But the health department shut it down, threatening her with fines and criminal charges if she reopened without following a laundry list of regulations designed for large-scale food banks. It's the same story on the East Coast. Health departments in New Bedford and Amesbury, Massachusetts also shut down little free pantries—not because they weren't helping people, but because they hadn't followed burdensome regulations.

In one notorious example, health officials in Georgia cracked down on MUST Ministries' volunteer work that provided hundreds of thousands of lunches for hungry children because the meals were not prepared in certified kitchens. The program was wildly successful; unfortunately, MUST Ministries had to adjust to new enforcement of existing rules in order to serve the needy. Fortunately, in early 2020, a local school district was able to partner with MUST to feed kids who were no longer attending school due to the pandemic. Local and state regulations that prevent people from feeding the homeless are harmful in the best of times and disastrous in the worst. One might think that localities would seek opportunities to partner with charities to better serve the needy, but sometimes it almost appears that local governments view charitable endeavors as a nuisance that should be eliminated.

In short, regulations pertaining to food and alcohol need significant and permanent reform. When rules and regulations have negligible (or negative) impact on the public's health and safety and primarily serve as barriers that protect existing businesses and inhibit innovation, policymakers should see this as an invitation to reform. That is true in normal times: it is especially true when food supply chains are stretched thin and small businesses are trying to adjust operations to stay afloat and meet consumer needs in a pandemic.

X. Learn from the Experience of the Coronavirus

The social and economic damage that followed state and local responses to the coronavirus is unprecedented in modern American history. With the benefit of several months of hindsight, and of the experience of diverse policy responses among states and localities, it is clear that some policies have worked better than others at promoting economic growth while maintaining the public's health and safety. The better policies are those that are broad-based, equitable, and place more decision-making in the hands of those with local knowledge—private parties and consumers—and less in the hands of government officials governing by blind fiat. Although many mistakes were made in the throes of the coronavirus pandemic, some important lessons were learned. This toolkit seeks to highlight the successes and avoid the mistakes of differing policy responses, so that our economy can rebuild in a smart and measured way.

At the same time, the recommendations set forth here do not reflect a complete prescription for state and local governments looking to create a regulatory framework that promotes economic growth and innovation—*even and especially* in the absence of an emergency. What's more, the pandemic has opened an opportunity to explore the existing legal and regulatory framework for every state and locality in the country—and, in many cases, to test whether the status quo before the pandemic has been effective.

We have written elsewhere that some of the most onerous barriers to entrepreneurship and regulation are not found in one bad law or one irrational rule. Instead, the heaviest albatross for most businesses and individual entrepreneurs is the combination and culmination of hundreds or thousands of restrictions put in place by state and local governments, layer by layer, year by year. These include licensing and permitting requirements, zoning and land use regulations, state and local labor mandates, prohibitions or government-conferred monopolies that prevent new entrants to the marketplace, and many more. Taken together, this regulatory thicket imposes enormous costs, often for very little, if any, gain. In its worst instances, it prevents new businesses from starting altogether.

The coronavirus pandemic, however, has created a circumstance in which many state and local rules and regulations have been temporarily suspended to allow an effective response to the emergency. These suspensions include things like permit and license requirements, antiquated rules about the sale or carryout of alcoholic beverages, and many other branches of the regulatory thicket. But as the duration of the pandemic—and different government responses to it—appear less temporary than enduring, many rules have been suspended for months. This has created an opening that allows us to examine which rules have worked, which haven't, and which have imposed costs far greater than any purported benefit.

The jury, of course, is still out on whether the suspension of certain rules has been a net positive. But, in many cases, the last several months have shown that the Chicken Little crowd that is the first to oppose regulatory reform, allegedly on the basis of public health and safety, appears wrong in many of their prognostications about the sky falling. As more time passes, if there continues to be no discernible impact on the public's health, safety, or well-being from the suspension of regulations, it will presumably become increasingly difficult to justify their re-imposition.

We hope that the aftermath of the coronavirus pandemic will be accompanied by significant examination of the many public policy responses to it. Perhaps there is a silver lining here. Among other things, policymakers will have a unique opportunity to look back and ask whether much of what is on the books is actually necessary. And during the next emergency—viral or otherwise—we hope our policymakers will be equipped to enact measures that avoid doing almost more harm than the emergency itself.

Appendix: Executive Orders that Relaxed Licensing Rules

In the wake of the coronavirus, governors across the nation issued executive orders to relax many aspects of occupational regulation. The set of executive-order reforms below is not exhaustive, but it comprises several major categories of licensing reforms. The orders below were issued during March, April, May, or early June of 2020; executive orders issued after that are not included. The seven descriptive categories listed below should not be assumed to have universal or even broad application. For instance, the states in the first category listed below (those with executive orders that allowed recognition of licenses from out-of-state jurisdictions) did not necessarily recognize *all* extra-jurisdictional licenses, but instead may have recognized only some of them or created a procedure for possible recognition. For the most part, each state's executive order referenced below is hyperlinked to the text of the order.

27 state governors issued executive orders to recognize occupational licenses from out-of-state jurisdictions: Connecticut, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas [link goes to summary of order], Virginia, West Virginia, and Wisconsin.

21 state governors issued executive orders to expedite the issuance of occupational licenses or temporary permits: Alaska, Connecticut, Delaware, Georgia [EO 03.23.20.02], Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Massachusetts, New Hampshire, New York, Oklahoma, South Carolina, South Dakota, Tennessee, Texas [link goes to summary of order], and West Virginia.

17 state governors issued executive orders to liberalize or reduce training/examination requirements for licensees: Colorado, Connecticut, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Nebraska, New York, North Dakota, South Dakota, Tennessee, Washington, and West Virginia.

18 state governors issued executive orders to expand the scope of permissible telepractice—typically, telemedicine—conducted by licensed professionals: Alaska, Arizona [EO 2020-29], Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Nebraska, North Dakota, Oklahoma, South Dakota, Tennessee, Virginia, Vermont, and West Virginia.

16 state governors issued executive orders to postpone occupational license expiration deadlines: California, Colorado, Delaware, Hawaii, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New York, North Dakota, Oklahoma, and Tennessee.

19 state governors issued executive orders to resuscitate occupational licenses in good standing whose bearers are retired or otherwise have let those licenses lapse (in 19 states): Delaware, Georgia, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, Tennessee, Texas [link goes to summary of order], Washington, West Virginia, and Wisconsin.

21 state governors issued executive orders to expand a permitted scope of practice or to relax supervision requirements: Colorado, Connecticut, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Oklahoma, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wisconsin.

Notably, many executive orders have multiple parts and multiple policy goals; an executive order referenced above may contain additional rules or commands outside the scope of the policies described here. Several executive orders referenced above contain multiple parts that allow for membership in more than one category above.