

Kansas Shut Down Businesses That Were Willing and Able to Comply with Safety Guidelines

The COVID-19 pandemic creates unprecedented challenges for our country. These challenges only heighten the need for our government to operate fairly, evenly, and for the best interests of all its citizens. The due-process rights our federal and state founders guaranteed us are just as important now as they were before COVID-19. The [Kansas State Constitution](#) states this clearly: “All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.” Unfortunately, with Governor Kelly’s [Executive Order No. 20-15](#), the state arbitrarily labeled Kansan-owned businesses “essential” or “non-essential” when deciding whether they could remain open.

This is the wrong approach. Small businesses are the lifeblood of Kansas’s economy, and their owners and employees now suffer because of the government shutdown of the economy. Kansas should have thought primarily about public safety and health—and which businesses can thus safely remain open. For example, on its [Kansas Essential Functions FAQ](#) site, Kansas states that golfing is essential, with reasonable safeguards, such as six feet of social distancing. But when asked about personal trainers? The government answers only with a terse “No.”—with no other explanation. What if trainers took the same precautions as golfers? And isn’t physical fitness an essential part of health?

There appears to be no rhyme or reason to Kansas’s designations of essential businesses in this process. This arbitrary and capricious process serves only to pick winners and losers. And it is fundamentally unfair to the many struggling small business owners in our state. We can and must do better by using up-to-date science, exercising reasonable safeguards to protect public health, and protecting individual liberty so that Kansans can

innovate our way out of this problem. These are hard tasks, but they are not impossible—and they are the responsibility of state and local government officials working together with private citizens and business.

Records Reveal How KEFF Failed Small Business

An investigation by Americans for Prosperity Foundation Kansas (“AFPF-KS”) uncovered how the Kansas Essential Functions Framework (“KEFF”) unnecessarily shut down businesses, even ones that proposed plans to continue safely operating under the guidelines. AFPF-KS reviewed essential business approvals and denials provided by the Kansas Department of Emergency Management (“KDEM”) in response to our Kansas Open Records Act request. The requests to KDEM from small businesses in various industries include photography, dog grooming, furniture stores, tabletop games, vinyl records, online sales, and personal training. All these businesses showed a willingness to protect customers and employees by adhering to reasonable safeguards. But because none of their industries were chosen as “essential,” their requests were denied.

See table on next page.

Allowed to Operate While Following Guidance	Not Allowed to Operate even if Following Guidance
Golf courses and online golf retailers	Non-food retail companies taking orders for products online and shipping to customers
Liquor stores	Non-food retail companies selling products to be picked up without customer contact
Vape and smoke shops	Photographers
Home renovations and pool cleaning	Dog groomers
Farmers markets	Personal trainers
Flower shops	Gyms
Candy shops	
Scrap gold and silver buyers	
Bait shops	

The first column in the table above shows examples of which industries could continue operating in some capacity, while the second column shows examples of businesses that were closed regardless of their ability to follow the safety guidance. One common theme was business owners offering details on how they would keep customers and employees safe by fundamentally changing their business operations.

One business wrote to KDEM detailing how they only needed one employee to work in the warehouse to potentially save the jobs of 100 employees.

“We are a business of 100 employees that ships vinyl records and vinyl record cleaning fluids (manufactured in-house) directly to residences. We have sent all of our staff to work from home with the current exception of two warehouse workers in a 30,000-square-foot warehouse to continue packaging and shipping orders and manufacturing the record cleaning chemicals. If we could be allowed to continue having just one person all alone in a 30,000-square-foot warehouse, we could continue operations and save the jobs of 100 people. Obviously, our business would still be considerably impacted, but allowing just one warehouse worker to work in complete isolation would allow us to continue to operate. We hope that this request and our willingness to comply will be seen as very reasonable. We are in favor of the mandate. We are in favor of measures to protect our state’s citizens and our company’s employees. We wish to comply. This one small measure would make a

massive difference for the lives of a great many people.”
 - *Business owner in Salina writing to KDEM.*
Request Denied.

Two other businesses also explained how they would be able to keep running with a single employee shipping product without customer interaction. Under what theory does this pose a health risk?

“We had reduced our operating hours to only 12-4 and had a single employee going to the store to fulfill website orders, using gloves while handling product and cleaning everything we shipped. When finished the employee would drop off the items at the post office and then go home. During these hours we were offering curbside pickup for local customers, however with the most recent statewide stay at home order we do not believe that offering curbside pickup is in anyone’s best interest. Yesterday we were given a cease and desist at one of our . . . stores . . . and were told that we were no longer able to operate as of April 7th. While we certainly support the stay at home order and wish to do our part to help flatten the curve, we believe that we should be able to fulfill functions pertaining to our online business during this time. Specifically our request is that a single employee be able to travel from home to their store, fill website orders with strict safety and cleaning protocols (wear gloves, wipe down all inventory being shipped as well as their work area, do not come to work if sick) and when finished deliver the items to the post office or their closest postal drop

box and then return home. If allowed to do this we would be able to have some semblance of business income and provide our store managers with some form of income until we are able to resume normal business operations.”

- *Owner with businesses across Kansas writing to KDEM.*
Request Denied.

“I have a web based store and need to be able to ship and receive goods for it to operate. We will only have one person on site at a time in order to handle operations. We need to be able to have UPS and FedEx come to pick up outbound packages. Is it possible to lift the restrictions on pickup and drop off freight from our store location? Many of our customers have home based business that use the supplies we sell as part of their work. Also, the material we sell is important for the mental health and enjoyment of family time, something that will help in these times.”

- *Business owner in Overland Park writing to KDEM.*
Request Denied.

“As a small business, we are requesting to be allowed to provide curbside pickup of online purchased items, NO in person sales or customers in the store. Items will be paid for online with no personal interaction. Purchased items will be taken to the curb by an employee wearing mask and gloves.”

- *Business owner in Shawnee writing to KDEM.*
Request Denied.

A framework that would not allow a single employee, working alone without interfacing with customers, to fulfill online orders is in dire need of reform. While these retailers seeking to fulfill online orders were forced to close, an online golf retailer could remain open, presumably because golfing is considered “essential” under KEFF.

“[Online golf retailer] operates an ecommerce business by taking orders online and ships from our warehouse directly to residences. ECommerce businesses are exempt under the CISA exemption guidelines. ECommerce businesses support the stay at home order by allowing citizens to acquire goods without leaving home. We specifically provide goods which support the goal of remaining physically active during the stay at home order.

ECommerce warehouses expose the minimal number of people to interaction and allow incorporation of social distancing.”

- *Business owner in Wichita.*
Request Approved.

The arbitrary nature of which businesses were considered “essential” was also a common theme throughout these requests to KDEM from business owners.

“My question is how can liquor stores, smoke shops, golf course, [etc].. stay open?? How are these businesses essential? Wal-Mart is allowed to sell furniture, but I can't open my store to do the same? Am I able to allow for curbside pick-up?”

- *Overland Park Business owner writing to KDEM.*
Request Denied.

“I have over 200 clients (dogs not humans) that I care for I can name [at least] 10 owners fighting cancer or immunocompromised and rely on their dogs schedule nail trims and baths because ONE small scratch could cause havoc on their bodies and this is not the time for them to get sick as they may not get a ventilator. These are just the health reasons for humans. Grooming IS essential more than the literal 15 liquor stores in our tiny town of about 40,000. I believe if Petco and other major corporate offices are able to keep their salons open with the loophole that they “sale food” than we small grooming businesses should be allowed to remain open with stipulations. Such as curbside pick up and drop off of the pets. Limiting clients from only one county. Even a temporary shut down Can cause a permanent shut down for a small business such as mine in a small community. Thanks for taking the time to read this.”

- *Business owner in Finney writing to KDEM.*
Request Denied.

By way of comparison, on the next page are the requests of some businesses approved to operate because their industry was considered “essential” under KEFF.

“I buy scrap gold and silver. When people are short on cash they liquidate their gold. I also sell gold and silver for investment purposes.”

- *Business owner in Bonner Springs.*

Request Approved for “[m]etals purchase and sales only. No jewelry operations.”

“[W]e are tasked with eliminating stagnate pool water and maintaining clean balanced water conditions at residential

- *Business owner in Belton.*

Request Approved.

“I’m a real estate appraiser and go in and out of homes with people in them daily. Can I still do interior inspection or exterior only or not at all?”

- *Business owner in Salina writing to KDEM.*

Request Approved.

“We provide a variety of sweets and snack foods as well as beverages. We provide food and have the [availability] to offer delivery or curbside [pickup] only.”

- *Business owner in Great Bend writing to KDEM.*

Request Approved.

“[W]e sell soda, tobacco products such as pipe tobacco, wood pipe, premium cigars, kratom, cbd products such as Gummies, lotions, tincture, cbd for [pets] and dogs.”

- *Business owner in Manhattan.*

Request Approved.

“I am boarding dogs for other people”

- *Business owner in Liberal.*

Request Approved.

“I am a retail flower shop. I believe the benefits of our no contact delivery service and the contribution to our customers”

- *Business owner in Manhattan.*

Request Approved.

“The bait and tackle industry provides individuals and families with the resources to fish. Fishing is a manner of gathering food that provides the mental health of getting out of the

house without endangering social distance parameters of this pandemic. Fishing tackle related businesses should be considered essential because without them individuals would lose access to obtaining the needed items to go fishing and fishing provides food without going to the grocery store.”

- *Business owner in Galena.*

Request Approved.

These examples are not included to argue that these businesses should have been forced to close as well, but rather to highlight the arbitrary process by which KEFF designates “essential” businesses. Under KEFF, flower shops, nicotine retailers, bait and tackle shops, candy stores, pool cleaners, and stores that buy and sell gold are “essential” regardless of their ability to adhere to reasonable safeguards.

That same framework considers golf to be “essential,” but a one-person photography business that wants to take photos outside—while social distancing—is denied.

“I’m wondering if photographers would be allowed to take headshots for people finding work if photos are taken at the park 6 ft away... and also take photos of babies [etc.] also from 6 ft away at the park. Thanks”

- *Business owner in Shawnee writing to KDEM.*

Request Denied.

Multiple dog grooming businesses highlighted the health benefits for their service along with the ability to operate with minimal or no human contact. Yet all of their requests were summarily denied while pet-boarding and pet food retailers were allowed to operate. In some cases, a dog-boarding or pet hospital could remain open but not allowed to perform any pet grooming on the dogs already in their establishment.

“I offer a curbside service that can be given with no human contact. I routinely follow all the guidelines set forth for other Pet Care organizations with the COVID-19 Restrictions. I can do my job safely and efficiently if you will please allow.”

- *Business owner in Olathe writing to KDEM.*

Request Denied.

“We are a mobile pet groomer in Manhattan, KS. We are an essential service provider delivering [critical] care to pets directly to individual residences. We provide essential pet health critical needs as part of our services including clipping nails, removing debris from eyes, cleaning and disinfecting ear canals to reduce infection. We practice all prescribed methods of social distancing, we only have one pet in the van at a time. We do not come within 6 feet of the owners as well as sanitizing between dogs. It is especially important during these times when people are home with their pets that we keep them healthy and groomed to prevent infections and other health concerns.”

- *Business owner in Manhattan writing to KDEM.*

Request Denied.

“Our clients can book appointments with either our mobile units or our salon. We have implemented several steps to ensure we are compliant with Kansas Stay-at-Home guidelines and provided CDC recommendations. Some [additional] steps we have implemented include: 1) Clients are not allowed inside the salon or mobile unit. We offer curbside pickup at the salon and we do not enter private residences [always] maintaining a 6ft distance. 2) We invoice clients so there is limited client interaction or exchange of currency. 3) Groomers wear masks and wash hands before and after each grooming. 4) There is one groomer in the salon or mobile unit at a time. 5) All equipment, mobile units, salon, door handles, etc. are sanitized between each pet - we are using RTU Disinfectant which is marketed as killing Human Coronavirus and associated Coronaviruses. 6) We send out a notification to our clients [prior] to their appointment inquiring if they have had exposure to anyone with COVID-19 or have traveled to areas with increased cases On March 25, 2020 we received official word from Sedgewick County that our business operation was considered essential. We have reviewed the KEFF and are unsure at this point if we are allowed to proceed with operations pursuant to the Governor’s order.”

- *Business owner in Wichita writing to KDEM.*

Request Denied.

The above reveals that none of the business owners denied were afforded due process. Rather than evaluating each individual request for health and safety needs, the state simply denied them with a categorical approach. These small business owners, their employees, and their customers rely on these businesses. A state bureaucrat should not be shifting them into seemingly-random lists when deciding whether they can continue to pursue their livelihood—or potentially have it destroyed.

Unfortunately, COVID-19 does not appear to be going away. There is a distinct possibility that state governments may decide to reimpose stay-at-home orders or other restrictions in the future. That is why it is so important that the guidelines and rules used to allow business to operate is done fairly and efficiently. AFPP-KS is part of the Stand Together Community, which published an [open letter](#) on March 27, 2020, describing how businesses can safely serve the public during the COVID-19 crisis. As we wrote then, “the choice between ‘business as usual’ or ‘close all business’ is a false choice . . . businesses should not operate in a manner that irresponsibly risks public health and neither should businesses close down if they can operate in a manner that protects public health.” Kansas erred in shutting down businesses that were able to open while protecting public health. It should fix the KEFF by either allowing individualized determinations or replacing it entirely with a new framework that prioritizes the ability to operate safely rather than picking winners and losers with arbitrary designations of “essential” and “non-essential.”