

MEMORANDUM

TO: Virginia's Commonwealth's Attorneys and Assistant Commonwealth's Attorneys

FROM: Elliott Casey, CASC

RE: Interpretation of Recent Emergency Orders

DATE: March 30, 2020

Executive Orders

1. March 12, 2020: Virginia Governor Ralph S. Northam declared a state of emergency due to COVID-19 in Executive Order No. 51 (EO-51). No criminal sanctions were included.
2. March 17, 2020: Governor Northam and State Health Commissioner Norman Oliver issued another Executive Order (not numbered and no citation provided). A suggested citation is CoVA PHE Order 3/17/20. That order included criminal sanctions for violations and is available here: <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-854500-en.html>
3. March 20, 2020: Governor Northam and State Health Commissioner Norman Oliver issued an amended Executive Order, "Order of Public Health Emergency One." CASC issued guidance on this order on March 21, 2020. That order included clarified criminal sanctions for violations and is available here: <https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/Amended-Order-of-the-Governor-and-State-Health-Commissioner-Declaration-of-Public-Health-Emergency.pdf>
4. March 23, 2020: Governor Northam issued Executive Order Fifty-Three (hereinafter "EO-53"). This order amended the earlier, March 20 order. This order includes new restrictions and new criminal sanctions for violations and is available here: [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf)
EO-53 also has a "frequently asked questions" (hereinafter "FAQ") page, which is located here: <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Frequently-Asked-Questions-Regarding-EO-53.pdf>
Please note that the "frequently asked questions" page does not have the force of law, but is advisory regarding how to interpret EO-53.

5. March 30, 2020: Governor Northam issued Executive Order Fifty-Five (hereinafter “EO-55”). This order amended the earlier, March 23 order. This order includes new restrictions and new criminal sanctions for violations and is available here: [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf)

Conclusion as to Criminal Sanctions Available for Violations of EO-55

It is my conclusion that under EO-55, the following acts would constitute a Class 1 misdemeanor:

1. Public or private in-person gatherings of more than ten individuals.
2. Failure to close all in-person classes and instruction, and cancel all gatherings of more than ten individuals at institutions of higher education.
3. Failure to cease all reservations for overnight stays of less than 14 nights at all privately-owned campgrounds.
4. Failure to abide by closure of all public beaches for all activity, except exercising and fishing.

Each of those provisions have significant exceptions, which are explained below.

The order went into effect on Monday, March 30, 2020 and remains in effect until June 10, 2020

Law Enforcement should cite Va. Code § 44-146.17 in a citation for such a violation. It would be advisable to include, in parenthesis, a citation to the March 23, 2020 Order. That might appear as: “Va. Code 44-146.17 (EO-55)”

Analysis

This memorandum will provide my analysis of the criminal sanctions for violations of EO-55. I do not plan to address the other, non-criminal provisions of EO-55.

In short, EO-55 adds a relatively short list of new criminal sanctions and changes the number of individuals who may lawfully gather from 9 to 10. In setting a new limit for unlawful gatherings, closing institutions of higher education, limiting campgrounds and closing beaches, EO-55 amends, but does not replace, EO-53. Thus, it appears that both orders are still in effect, except where provided below.

EO-55 issues several orders that carry criminal sanctions:

1. All public and private in-person gatherings of more than ten individuals are prohibited. This includes parties, celebrations, religious, or other social events, whether they occur indoor or outdoor. This restriction does not apply:

- a. To the operation of businesses not required to close to the public under Executive Order 53; or
 - b. To the gathering of family members living in the same residence.Violation of this Order shall be a Class 1 misdemeanor pursuant to Va. Code § 44-146.17.
2. Institutions of higher education shall cease all in-person classes and instruction, and cancel all gatherings of more than ten individuals. For purposes of facilitating remote learning, performing critical research, or performing essential functions, institutions of higher education may continue to operate, provided that social distancing requirements are maintained. Violation of this Order shall be a Class 1 misdemeanor pursuant to Va. Code § 44-146.17.
3. Effective April 1, 2020 at 11:59 p.m., cessation of all reservations for overnight stays of less than 14 nights at all privately-owned campgrounds, as defined in § 35.1-1 of the Code of Virginia. Violation of this Order shall be a Class 1 misdemeanor pursuant to Va. Code § 44-146.17.
4. Closure of all public beaches as defined in § 10.1-705 of the Code of Virginia for all activity, except exercising and fishing. Social distancing requirements must be followed. Violation of this Order shall be a Class 1 misdemeanor pursuant to Va. Code § 44-146.17.

The Governor issued and signed EO-55. Under Va. Code § 44-146.17(1) (fourth paragraph), “Executive orders...shall have the force and effect of law and the violation thereof shall be punishable as a Class 1 misdemeanor in every case where the executive order declares that its violation shall have such force and effect.” EO-55 declares that violation of the above provisions shall have the force and effect of a Class 1 misdemeanor.

Unlike earlier orders, the Commissioner of Public Health did not sign EO-53 or EO-55.

Thus, EO-55 sets a penalty of a Class 1 misdemeanor for certain gatherings, closes institutions of higher learning, beaches, and limits some campground reservations. I will address EO-55 in five parts:

- PART ONE: UNLAWFUL GATHERINGS
- PART TWO: CLOSURE OF COLLEGES/UNIVERSITIES
- PART THREE: LIMITS ON CAMPGROUND RESERVATIONS
- PART FOUR: BEACH CLOSURE
- PART FIVE: “CATCHALL” EXCEPTION
- PART SIX: CHARGING VIOLATIONS

Document continues on next page

PART ONE:
UNLAWFUL GATHERINGS

Class 1 Misdemeanor: Gatherings of more than 10 individuals.

EO-55's rule regarding unlawful gatherings is different than the original rule under EO-53. Under EO-53, all public and private in-person gatherings of "10 or more" individuals were prohibited. EO-55 changes that number to "gatherings of more than 10 individuals." Thus, while it was unlawful under EO-53 for 10 people gather together, under the amended EO-55, 10 people may lawfully gather together (although 11 people may not).

EO-53 and EO-55 do not define the term "gathering." Webster's dictionary defines "Gathering" as an "assembly" or "meeting." The order is not limited to public places; by its own terms, it would apply to an assembly or meeting of persons inside a private home; the order specifically states it "includes parties, celebrations, religious, or other social events, whether they occur indoor or outdoor."

EO-55 also specifically makes two exceptions. The first exception was mentioned in the "Frequently Asked Questions" (FAQ) page for EO-53: EO-55 does not apply to "the operation of businesses not required to close to the public under Executive Order 53." The FAQ issued with EO-53 explicitly states that "For the purposes of this order, employment settings are not considered gatherings."

The second exception to EO-55's rule on unlawful gatherings was not included in EO-53: EO-55 does not apply to "the gathering of family members living in the same residence."

EO-55, while amending EO-53, does not appear to override those original exceptions provided with EO-53. Thus, some informal or unintended "gatherings" of people in a building appear to remain potentially lawful. As EO-55 explains, the other provisions of EO-53, including those that permit retail establishments such as grocery stores to operate with more than 10 patrons at once, create exceptions to this rule. In addition, the "catchall" exceptions discussed at the end of this memorandum would also apply.

What is a "Gathering" versus "Several Adjacent Gatherings"?

Law Enforcement will likely encounter large groups of people who claim that they are each part of a "gathering" of 10 or less persons. Those groups may be physically proximate to one another. Neither EO-55 nor EO-53 provide guidance on how to address that issue.

What is the intent required?

Like EO-55, EO-53 does not state the intent required to criminally violate its terms. The March 20 order punished “willful violation, or refusal, failure, or neglect to comply,” but these orders provide no such guidance. It is not unusual, however, for criminal prohibitions to lack an explicit *mens rea* element. See e.g. *Charles v. Commonwealth*, 63 Va. App. 14, 753 S.E.2d 860, 865 (2014)(noting that § 18.2–266 does not possess a *mens rea* requirement on its face). However, mere omission from a statute of any mention of intent should not be construed as elimination of that element from the crime. *Morissette v. United States*, 342 U.S. 246, 273, 72 S.Ct. 240, 255, 96 L.Ed. 288 (1952)(cited in *Charles*, 63 Va. App. at Id., 753 S.E.2d at Id.).

In criminal law, the scienter, or mens rea, element of a crime is simply the unlawful intent or design necessary to any criminal act that is not a strict liability offense. *Saunders v. Commonwealth*, 31 Va.App. 321, 324, 523 S.E.2d 509, 511 (2000). (citing *Reed v. Commonwealth*, 15 Va. App. 467, 424 S.E.2d 718 (1992); 1 Wayne R. LaFave, Substantive Criminal Law, § 3.4 (1986); *Livingston v. Commonwealth*, 184 Va. 830, 36 S.E.2d 561 (1946). “All crimes of affirmative action, even strict liability crimes, require something in the way of a mental element—at least an intention to make the bodily movement which constitutes the act which the crime requires.” *Herron v. Commonwealth*, 55 Va. App. 691, 688 S.E.2d 901, (2010)(quoting 1 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 3.5(e), at 314 (1986)). However, some offenses are strict liability offenses.

In construing EO-53 and EO-55, a Court would likely apply typical principles of statutory construction. “While we construe penal statutes strictly against the Commonwealth, `a statute should be read to give reasonable effect to the words used “and to promote the ability of the enactment to remedy the mischief at which it is directed.”” *Dillard v. Commonwealth*, 28 Va. App. 340, 344, 504 S.E.2d 411, 413 (1998) (quoting *Mayhew v. Commonwealth*, 20 Va.App. 484, 489, 458 S.E.2d 305, 307 (1995) (quoting *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984))). In determining the elements established by such statutes, “[w]e may not add ... language which the legislature has chosen not to include.” *County of Amherst v. Brockman*, 224 Va. 391, 397, 297 S.E.2d 805, 808 (1982). See also *Saunders v. Commonwealth*, 31 Va. App. 321, 326, 523 S.E.2d 509, 511 (2000); *Adkins v. Commonwealth*, 27 Va.App. 166, 170, 497 S.E.2d 896, 897 (1998). See, e.g., *Stuart v. Commonwealth*, 11 Va.App. 216, 217-18, 397 S.E.2d 533, 533-34 (1990) (refusing to find a specific intent element “because the unambiguous language” of the statute did “not require proof of a specific intent” to commit bigamy); *Polk v. Commonwealth*, 4 Va. App. 590, 594, 358 S.E.2d 770, 772 (1987) (“The resulting effect of the offender’s threats ... is not an element of the crime defined in Code § 18.2-460. By the express terms of the statute, it is immaterial whether the officer is placed in fear or apprehension.”).

Virginia law is clear that the legislature may create strict liability offenses as it sees fit, and there is no constitutional requirement that an offense contain a *mens rea* or scienter element. *Esteban v. Commonwealth*, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003) (citations omitted). Thus, Virginia courts construe statutes and regulations that make no mention of intent as dispensing with it and hold that the guilty act alone makes out the crime. *Id*; *Herron v.*

Commonwealth, 55 Va. App. 691, 688 S.E.2d 901 (2010)(No intent required to prove appellant intended to bring drugs into a correctional facility).

Esteban is instructive. In *Esteban*, the defendant was convicted under Code § 18.2-308.1(B), which prohibits possession of a firearm on school property. *Id.* at 606-07, 587 S.E.2d at 524. *Esteban* argued that she did not know there was a firearm in the bag she was carrying, although she admitted to intentionally and voluntarily entering onto school property. *Id.* at 608, 587 S.E.2d at 525. The Supreme Court of Virginia held that, in § 18.2-308.1(B), the General Assembly intended to "assure that a safe environment exists on or about school grounds" by prohibiting "the introduction of firearms into a school environment," even those introduced inadvertently or unintentionally. *Id.* at 609-10, 587 S.E.2d at 526. Thus, the Court in *Esteban* held § 18.2-308.1(B) created a strict liability crime and affirmed *Esteban*'s conviction. *See also Charles*, 63 Va. App. 14, 753 S.E.2d at 866 (finding that, in light of the public safety concern, as long as the Commonwealth proves that an intoxicated individual "operated" his vehicle, regardless of intent, he is guilty of driving while under the influence).

Document continues on next page

PART TWO:
CLOSURE OF INSTITUTIONS OF HIGHER EDUCATION

Class 1 Misdemeanor: Institutions of Higher Education

EO-55 orders that “institutions of higher education” shall cease all in-person classes and instruction, and cancel all gatherings of more than ten individuals. This order appears to be directed at the institution itself, rather than, for example, the students or teachers.

However, EO-55 builds in an exception: For purposes of facilitating remote learning, performing critical research, or performing essential functions, institutions of higher education may continue to operate, provided that social distancing requirements are maintained.

“Institution of Higher Education” is a term that appears throughout the Virginia Code. It has two explicit definitions. The first is in Title 23.1, which is the title concerning Institutions of Higher Education. However, that specific definition is confined to private institutions, and specifically excepts “public institutions of higher education.” Va. Code § 23.1-213. Title 60.2, concerning unemployment compensation, also contains a definition of “Institution of Higher Education,” in § 60.2-220. Neither definition is a complete definition, and is restricted to the purposes of the article in which the definition appears.

The Virginia Code makes repeated reference, however, to the U.S. Code. The Federal Code has an explicit definition for “Institution of Higher Education” contained in 20 U.S. Code § 1001; this definition is nearly identical to the definition in Va. Code § 60.2-220. The Federal definition states that: “the term “institution of higher education” means an educational institution in any State that —

(1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of section 1091(d) of this title;

(2) is legally authorized within such State to provide a program of education beyond secondary education;

(3) provides an educational program for which the institution awards a bachelor’s degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;

(4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

Section (b) also states that “the term “institution of higher education” also includes—
(1) any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a); and

(2) a public or nonprofit private educational institution in any State that, in lieu of the requirement in subsection (a)(1), admits as regular students individuals—

(A) who are beyond the age of compulsory school attendance in the State in which the institution is located; or

(B) who will be dually or concurrently enrolled in the institution and a secondary school.

Thus, it would be a Class 1 misdemeanor for an institution of higher education to hold in-person classes or instruction. It would also be a Class 1 misdemeanor for an institution of higher education to fail to cancel a gathering of more than ten individuals.

Document continues on next page

PART THREE:
CANCELLATION OF CAMPGROUND RESERVATIONS

EO-55 orders, effective April 1, 2020 at 11:59 p.m., cessation of all reservations for overnight stays of less than 14 nights at all privately-owned campgrounds. EO-55 does not specifically direct this order at either the customer or the business; thus, it is fair to read this order as directed to both parties.

EO-55 specifically adopts the definition of "campground" found in Va. Code § 35.1-1. That definition provides that "'Campground" means any area, place, parcel, or tract of land, by whatever name called, on which three or more campsites are occupied or intended for occupancy, or facilities are established or maintained, wholly or in part, for the accommodation of camping units for periods of overnight or longer, whether the use of the campsites and facilities is granted gratuitously, or by rental fee, lease, or conditional sale, or by covenants, restrictions, and easements, including any travel trailer camp, recreation camp, family campground, camping resort, or camping community.

Under § 35.1-1, "Campground" does not mean a summer camp, migrant labor camp, or park for manufactured homes as defined in this section and in §§ 32.1-203 and 36-85.3, or a construction camp, storage area for unoccupied camping units, or property upon which the individual owner may choose to camp and not be prohibited or encumbered by covenants, restrictions, and conditions from providing his sanitary facilities within his property lines.

Thus, it would be a class 1 misdemeanor for a privately-owned campground to maintain, honor, or permit a reservation for an overnight stay of less than 14 nights. It would also be a class 1 misdemeanor for an individual to continue to stay at a privately-owned campground under a reservation for an overnight stay of less than 14 nights.

Document continues on next page

PART FOUR:
BEACH CLOSURE

EO-55 directs the closure of all public beaches for all activity, except exercising and fishing. The term “exercising” is not defined in the order. The word is an ordinary word, so its common usage would probably control. Webster’s dictionary defines “exercise” as the “regular or repeated use of a faculty or bodily organ” or “bodily exertion for the sake of developing and maintaining physical fitness.” (note that this definition is secondary; the primary definition requires a direct object for meaning.)

Under Va. Code § 29.1-100, ““Fishing” means taking, capturing, killing, or attempting to take, capture or kill any fish in and upon the inland waters of this Commonwealth.”

EO-55 also directs that, at public beaches, “Social distancing requirements must be followed.” Like EO-53, EO-55 does not specify what social distancing requirements must be followed and does not specifically define those requirements.

EO-55 specifically adopts the definition of “Public Beaches” contained in Va. Code § 10.1-705. Under that code section, ““Public beach” means a sandy beach located on a tidal shoreline suitable for bathing in a county, city or town and open to indefinite public use.”

Thus, it would be a class 1 misdemeanor for a owner, operator, or person lawfully in charge of a beach to fail to close that beach to all activity, except for exercising and fishing. It would also be a class 1 misdemeanor for an individual to enter or remain upon a beach, except for exercising and fishing. It would also be possible to charge an individual with Trespassing in violation of Va. Code 18.2-119, if the individual were aware of the Governor’s order.

Are the “exercise” and “fishing” exemptions elements, or affirmative defenses?

EO-55 creates exceptions to the closure of beaches for “exercise” and “fishing.” Those exceptions could be read in one of two ways: First, as elements of the offense that the Commonwealth would have to prove (i.e. prove that the defendant was neither exercising nor fishing), or second, as an “affirmative defense” (i.e. a defense that the defendant could raise, should s/he so choose).

The “bedrock of Virginia’s criminal jurisprudence” is the fundamental precept that the Commonwealth bears the burden of proving every essential element of an offense beyond a reasonable doubt. *Williams v. Commonwealth*, 57 Va. App. 341, 351, 702 S.E.2d 260, 265 (2010). However, generally, it is the defendant that bears the burden of producing evidence in support of an affirmative defense. *Id.*

When a Court “constru[es] penal statutes which contain qualifications, exceptions or exemptions to their application, the limiting language may be viewed as a negative element of

the offense which the prosecution must disprove,” or alternatively, as “a statutory defense, which the accused can assert to defeat the prima facie case of the prosecution.” *Mayhew v. Commonwealth*, 20 Va. App. 484, 489, 458 S.E.2d 305, 307 (1995); see, e.g., *Flanagan v. Commonwealth*, 58 Va. App. 681, 699, 714 S.E.2d 212, 220 (2011) (finding that “the last clause of Code § 18.2-85 constitutes a statutory defense for which an accused bears the burden of providing the supporting evidence”).

In determining whether specific limiting language is either an element of the offense or a statutory defense, the Court considers four factors:

(1) “the wording of the exception and its role in relation to the other words in the statute;”

(2) “whether in light of the situation prompting legislative action, the exception is essential to complete the general prohibition intended;”

(3) “whether the exception makes an excuse or justification for what would otherwise be criminal conduct, i.e., sets forth an affirmative defense;” and

(4) “whether the matter is peculiarly within the knowledge of the defendant.”

Flanagan, 58 Va. App. at 698, 714 S.E.2d at 220 (quoting *Mayhew*, 20 Va. App. at 489, 458 S.E.2d at 307).

Applying the *Mayhew* and *Flanagan* factors to this portion of EO-55, there is a strong argument that the “exercise” and “fishing” exceptions are affirmative defenses, rather than elements that the Commonwealth must prove at trial. Those exceptions are not essential to the stated purposes of these orders. For example, EO-53 states: “Unnecessary person-to-person contact increases the risk of transmission and community spread.” These exceptions are an excuse or justification for otherwise unlawful activity, which is the purpose of an affirmative defense. Lastly, it is the defendant and not the Commonwealth who will know whether the defendant was present on the beach for exercise or fishing.

PART FIVE: **“CATCHALL” EXCEPTION**

Paragraph (7) of EO-55, just like EO-53, stipulates that “Nothing in the Order shall limit:

- (a) the provision of health care or medical services;
- (b) access to essential services for low-income residents, such as food banks;
- (c) the operations of the media;
- (d) law enforcement agencies; or
- (e) the operation of government.”

Thus, to the extent that this order would otherwise limit any of those activities, the order should not be interpreted to do so.

Document continues on next page

PART SIX:
CHARGING VIOLATIONS

Who Can Be Charged?

As noted above, certain portions of EO-55 direct charges to a business entity. Law enforcement may charge the business directly, rather than an individual employee. The procedure for doing so is set forth in Va. Code §19.2-76:

“If the accused is a corporation, partnership, unincorporated association or legal entity other than an individual, a summons may be executed by service on the entity in the same manner as provided in Title 8.01 for service of process on that entity in a civil proceeding. However, if the summons is served on the entity by delivery to a registered agent or to any other agent who is not an officer, director, managing agent or employee of the entity, such agent shall not be personally subject to penalty for failure to appear as provided in § 19.2-128, nor shall the agent be subject to punishment for contempt for failure to appear under his summons as provided in § 19.2-129.”

Thus, service of process for the summons would be under the civil rules of service of process. Va. Code 8.01-285 et. seq. provide rules, which depend on the type of entity. The relevant code sections include:

§ 8.01-296: Service on Persons

§ 8.01-299: Domestic Corporations and LLCs

§ 8.01-301: Corporations, Foreign & Domestic

§ 8.01-304: Partnerships

Who Enforces this Order?

The last question is: “Does local law enforcement have the authority to enforce this order?”

The power and authority to enforce this order would be the general power of law enforcement to enforce violations of the criminal law. For a sheriff, that authority would be Va. Code § 15.2-1609, which provides, *inter alia*, that a sheriff “shall enforce the law or see that it is enforced in the locality from which he is elected.” For a police department, that authority would be Va. Code § 15.2-1704(A), which provides “the police force of a locality is hereby invested with all the power and authority which formerly belonged to the office of constable at common law and is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.”

Therefore, it is my conclusion that a sheriff or police officer would be authorized to enforce a violation of paragraphs 1, 3, 4, and 6 of EO-53, because such a violation would be a Class 1 misdemeanor. The officer should issue a summons pursuant to Va. Code § 19.2-74(A)(1), unless

the person fails or refuses to discontinue the unlawful act, or the person is believed by the arresting officer to be likely to disregard the summons, or the person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, Va. Code § 19.2-74(A)(1), or that person refuses to give such written promise to appear under the provisions of that section. Va. Code § 19.2-74(A)(3).

In order to cite this order, prosecutors and officers should cite the order as Executive Order Fifty-Five, or may use the shorthand EO-55.

[This document is provided for Law Enforcement by the Virginia Commonwealth's Attorneys' Services Council pursuant to Va. Code § 2.2-3705.7\(29\): for the training of state prosecutors and law-enforcement personnel.](#)