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Cutting Through the Fog: How to Navigate Federal, State, and Local Orders and Guidance to Determine Whether Your Business Must Cease In-Person Operations Due to COVID-19

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic is dynamic and continues to develop. Please monitor this site, our Covid-19 Task Force Legal Alerts Page, and/or your email for updates.

In response to the COVID-19 coronavirus, several state and local governments have issued public health orders to limit the number of people infected. These orders establish restrictions on business operations and travel. These restrictions are being implemented alongside federal guidance. As of March 23, 2020, California, New York, New Jersey, Pennsylvania, Illinois, Louisiana, and Dallas County issued what in effect are "shelter in place" orders for individuals to remain in their place of residence rather than commute to work or engage in social activities, subject to several exceptions, where the individuals are needed to continue to work from their place of employment to maintain continuity of operations related to "essential" or "critical" infrastructure and essential businesses. Below is a general overview of the steps necessary to take to determine whether your business and workforce are potentially exempt from applicable shelter in place orders, whether issued by states, the federal government or local governments.

Review Your State-Specific "Shelter in Place" or "Stay at Home" Orders

As more states issue shelter in place orders, it is imperative that you and your business first review all applicable orders issued by your governor and local governments (county or city) to determine how the applicable shelter in place order applies to you and your business. Many orders specifically exempt certain categories of "essential" or "critical" businesses, industries, sectors, and workforces. The order issued statewide in California is illustrative. That order references businesses that are classified within one of the 16 "Essential Critical Infrastructures", as described in the federal guidance from the U.S. Department of Homeland Security, Cybersecurity and Infrastructure Security Agency ("CISA"). CISA has issued guidance directed to COVID-19 titled, "Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response" that describes the services and industries deemed critical. These are the services and industries that generally the state and local governments have exempted from their respective shelter in place orders.

Accordingly, it is important to review, not only your state's individual order, but the guidelines and FAQs offered on the individual state government websites, and any other guidance that your state's order may reference. For many businesses and industries, the information provided clearly delineates whether your business may stay open and continue operations. For instance, the California and New York state orders

allow businesses engaged in the sale of groceries and medicine, or that provide financial services, sell or transport gas to continue operating. The issue is less clear for those businesses that provide services or support to these exempt industries. Further analysis is required as to whether the business may stay open entirely, partially, or at all.

Review CISA's Memorandum on Identification of Essential Critical Infrastructure Workers

In addition to reviewing your own state's order, it is important to review the federal guidance provided by the CISA, referenced above (the "CISA Memo"). CISA issued the CISA Memo to assist with determining whether a business is a part of an essential critical infrastructure industry or business and not subject to a state shutter requirement.

The CISA Memo presents a non-exhaustive list of operations and services that provide critical infrastructure viability, and which have a "special responsibility to maintain your normal work schedule." This list includes: staffing operations centers, maintaining and repairing critical infrastructure, operating call centers, working construction, and performing management functions, among others. The CISA Memo also lists several industries considered critical to the nation's infrastructure, including but not limited to medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works. Within each industry, the CISA Memo elaborates on the businesses and business activities deemed to provide an Essential Critical Infrastructure workforce. For instance, a company or business that provides materials and services to a state or federal department of transportation would fall squarely within the parameters of what is critical infrastructure, because it "maintains and repairs critical infrastructure," "works construction," and it provides these services within the industry of "transportation and logistics." Providing services supporting municipal transportation, such as maintenance and parts for buses, would be allowed to continue.

While the CISA Memo provides helpful guidance, it is important to note that the CISA Memo recognizes that it is "an initial baseline" and the "identified sectors and workers are not intended to be the authoritative or exhaustive list of critical infrastructure sectors and functions that should continue during the COVID-19 response."

Review Your County or Local "Shelter in Place" or "Stay at Home" Order to Assist with Your Determination

Independent of action at a state level, many counties and cities have issued their own shutter requirements and regulations and described "essential businesses" that may continue their operations. In fact, the CISA Memo contemplates that local jurisdictions will issue further guidance regarding the business not subject to a relevant shutter order. For instance, the CISA Memo clearly notes that "local officials should use their own judgment in using their authorities and issuing implementation directives and guidance."

Given the above, it is necessary to review your own county's shelter in place or stay at home order if one has been issued and the statewide order has not superseded or voided your county shutter order. For instance, in California, several counties, such as Los Angeles County, San Mateo County, and San Francisco County, issued their own county-specific shelter in place or stay at home orders which expressly provides those "essential businesses" which may continue operations and not be subject to a shutter requirement. The California Order did not repeal these orders or indicate it was superseding them. For that reason, it is important to review relevant county or local shelter in place or stay at home

orders to determine whether your business can be characterized as an "essential business" at the local level. While each scheme will differ as to whether federal, state or local orders control, because these orders are issued to slow the spread of COVID-19 and reduce burdens on local hospitals and medical providers, being compliant with all applicable and potentially applicable orders is important. Determining whether your businesses qualifies as an exempted service, business, or industry that may stay functioning despite a shelter in place order related to COVID-19, will require a holistic look at all federal, state, and local orders and guidance. Businesses that do not fall neatly into an identified exempted line of business will have to weigh the risk of potential fines, reputational harms, and other liabilities in deciding whether to stay functioning.