

# Stay-At-Home Orders and Essential Businesses during the COVID-19 Pandemic

March 24, 2020

As the situation surrounding the COVID-19 pandemic rapidly evolves, many state and local governments are taking unprecedented action to slow the spread of COVID-19 by issuing statewide workplace shutdown orders. These state actions generally order non-essential businesses either to close or to conduct business remotely.

As of March 23, 2020, orders have been issued by governors in the following states: California, Connecticut, Delaware, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, New Jersey, New Mexico, New York,<sup>1</sup> Ohio, Oregon, Pennsylvania and West Virginia. In addition, cities across the nation have issued their own orders, many of which are more stringent than those in use by states.

Companies are encouraged to consult orders in their respective states and to seek advice from counsel to help them assess whether they may qualify as essential businesses and whether there are other implications for their businesses. Each state order is unique and requires a fact-specific inquiry to determine the proper course of action.

Nonetheless, most of these orders have certain common attributes, which are outlined below:

- **Essential Businesses.** To define essential businesses that are exempted from the orders, many states refer to federal guidance issued by the Department of Homeland Security's Cybersecurity & Infrastructure Security Agency ("CISA"), which outlines 16 critical infrastructure sectors: (1) chemical sector, (2) commercial facilities sector, (3) communications sector, (4) critical manufacturing sector, (5) dams sector, (6) defense industrial base sector, (7) emergency services sector, (8) energy sector, (9) financial services sector, (10) food and agriculture sector, (11) government facilities sector, (12) healthcare and public health sector, (13) information technology sector, (14) nuclear reactors

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<sup>1</sup> Governor Cuomo's guidance on essential services under the New York State "Pause" Executive Order can be found here: <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>.

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and waste sector, (15) transportation systems sector, and (16) water and wastewater systems sector.

- Many states, including New York and Connecticut, allow businesses to apply to the state to receive a designation as an essential business.
- States continue to refine guidance as they receive feedback from the business community. Even at this early stage, many states have refined their lists multiple times.
- **Length of Stay-At-Home Orders.** Some governors have set end dates for their executive orders, while others have indicated that a stay-at-home order may be indefinite. For example, Illinois's stay-at-home order currently expires on April 7, 2020. New Jersey's order will remain in effect until revoked or modified by the Governor.
- **Penalties.** Penalties also vary across states. In New York, Governor Cuomo has said that the state plans to penalize only employers who violate the order, and not individuals, and those penalties could include civil fines and mandatory closures. In Pennsylvania, businesses that do not comply could face enforcement actions.

Although many of these orders follow a similar approach, each state order has its own unique policies and procedures. It is critical that businesses carefully evaluate their particular circumstances when reviewing these orders. As more states will likely continue to adopt and refine these orders, states are learning from early-adopting states by allowing for more flexibility and precision in the implementation.

Businesses looking to interpret these orders and to make a determination as to whether they qualify as essential businesses should:

- Monitor continuing guidance from the state on which businesses are considered essential.
- Consider reaching out to the state for clarity.
- Evaluate legal and reputational risk associated with an inaccurate or overbroad interpretation of guidance.
- Implement appropriate health and safety measures consistent with CDC and other government agency guidance at workplaces that remain open due to the essential or critical business status.

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As the situation continues to evolve, businesses and clients are encouraged to reach out with any specific questions to help navigate this challenging time. For guidance on the rapidly developing landscape or a discussion of steps to mitigate potential risk, please do not hesitate to contact us.



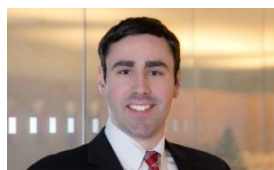
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