

COVID-19 NEWS OF INTEREST

Should I Stay or Should I Close? Business Shutdowns in the Age of COVID-19

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COVID-19: Business Shutdowns

The continued proliferation and severity of the coronavirus (COVID-19) pandemic has prompted local and state governments to enact drastic shutdown measures to slow its spread. Among these measures are “stay at home” orders that require individuals to stay at home (except for essential needs or critical jobs) and non-critical infrastructure or non-life sustaining businesses to shut down, which measures are quickly heading towards becoming part of the “new normal” across the country. While these orders have generally been issued for the purpose of limiting social interactions, these sweeping measures have created confusion for businesses that are not described with specificity in the applicable order.

California and Pennsylvania are the first two states to institute statewide shutdowns of non-critical businesses, but we expect other states to quickly follow suit and use the orders implemented by these two states as blueprints for their own shutdown orders. The Willkie team has been on the forefront of this constantly developing area and is advising client business teams on a real-time basis as to whether their businesses should remain open and if so, how to conduct their operations in light of such shutdown orders. In this alert, we address the types of businesses that can stay open under the shutdown regimes implemented California and Pennsylvania and provide some practical tips for businesses on how to navigate this new paradigm.

California - Critical Infrastructure Sectors

On March 16, 2020, San Francisco became the first major city in the United States to enact a “shelter in place” order (the San Francisco Order) that required non-essential businesses to close and stop physical operations from March 17, 2020 to

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April 7, 2020.¹ The San Francisco Order was quickly superseded by the statewide order issued by California Governor Gavin Newsom on March 19, 2020 (the California Order) that until further notice requires all California residents to stay at home except to obtain essential products or services (e.g., groceries, banking, laundromats) or to maintain continuity of operations of 16 federal critical infrastructure sectors that are identified on the website of the Cybersecurity & Infrastructure Security Agency (CISA).²

Businesses that operate within these sectors are permitted to continue physical operations during the shutdown, though the California Order requires individuals who continue to perform work in these sectors to practice social distancing. The California Order also provides that the Governor may designate additional sectors as critical in order to protect the health and well-being of all Californians. CISA has provided more detailed guidance in a memorandum issued on March 19, 2020 that is intended to help businesses identify whether they qualify as a critical infrastructure sector business and the essential workers needed to operate such businesses.³

The critical infrastructure sectors identified by CISA are broad-ranging, though the CISA memorandum attempts to provide some specificity around a number of the sectors. Even then, terms used in the CISA memorandum are open to interpretation. For example, the CISA memorandum states that only workers in certain fields “who cannot practically work remotely” should be physical present at their job sites. It is unclear whether this means that if such a worker’s employer is unwilling to provide the necessary infrastructure to allow such worker to work from home, then such worker (and therefore such business) will be allowed to operate that function on premises during the shutdown. In addition, unlike Pennsylvania, California’s approach does not provide a definitive “no” on businesses that do not fall within certain specified categories.

The CISA memorandum states that its list is advisory in nature and state and local governments are ultimately in charge of implementing response activities in their jurisdictions. This means that as the California Order is implemented and enforced, state and local government officials and law enforcement personnel will be required to interpret rules and guidelines that were not prepared by the California legislature, which will in turn likely result in challenges to interpretation and enforcement in the early days of the California Order until a more uniform approach is settled on.

Pennsylvania – Life-Sustaining Businesses

¹ <https://www.sfdph.org/dph/alerts/files/HealthOrderC19-07-%20Shelter-in-Place.pdf>

² <https://covid19.ca.gov/img/N-33-20.pdf>

<https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>

The 16 federal critical infrastructure sectors are: (i) chemical sector, (ii) commercial facilities sector, (iii) communications sector, (iv) critical manufacturing sector, (v) dams sector, (vi) defense industrial base sector, (vii) emergency services sector, (viii) energy sector, (ix) financial services sector, (x) food and agriculture sector, (xi) government facilities sector, (xii) healthcare and public health sector, (xiii) information technology sector, (xiv) nuclear reactors, materials and waste sectors, (xv) transportation systems sector and (xvi) water and wastewater systems sector.

³ <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>

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On March 19, 2020, just three days after Pennsylvania strongly encouraged businesses to close, Pennsylvania Governor Tom Wolf issued an order (the Pennsylvania Order) requiring all business, other than life-sustaining businesses, to shut down physical operations until further notice.⁴ The Pennsylvania Order went into effect immediately and provided that enforcement actions will be taken against businesses that are not in compliance effective March 21, 2020 at 12:01 a.m.

The Pennsylvania Order included an attached chart that outlined 10 key industries, 19 sectors and over 100 subsectors and industry groups.⁵ The chart outlines which subsectors and industry groups may continue physical operations while the Pennsylvania Order is in effect, but more importantly, which specific subsectors and industry groups must shut down during this time. In this regard, the Pennsylvania Order provides better guidance than the California Order as it provides a more specific description of the types of businesses that must be closed.

How Should Businesses Approach Shutdowns?

Other states and local governments are likely to enact orders similar to the California Order and the Pennsylvania Order with the goal of containing the alarming spread of COVID-19. As a result, the debate over whether businesses not specifically addressed by shutdown orders (but that serve an arguably essential role in daily life) should remain open is about to begin. Demands for more transparency in these orders have already been made and we would expect that some may challenge these orders in court.

As a first step, companies and their legal advisors should carefully study the CISA memorandum and Pennsylvania Order to find a specific category that allows their business to remain open and in operation lawfully. Whether a business qualifies to remain open under a shutdown order is a very fact-specific inquiry. Companies should also be closely observing, and remain up to speed on, what other industry participants are doing. If a business sees its competitors shutting down in response to a COVID-19 order, it should seriously consider following their lead given the optics.

Businesses that remain operational when a shutdown order is effective should be prepared to address questions from local law enforcement personnel as to why their operations are ongoing. Such businesses should have on premises managers prepared with talking points addressing this issue and copies of a letter from internal counsel explaining the nature of the business being conducted on-site and why it qualifies to remain open, which managers can share with law enforcement personnel, as well as employees and customers of the business. If law enforcement officials insist on shutting down operations, businesses should comply with their orders and seek recourse through other official channels after complying.

⁴ <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf>

⁵ <http://www.exploreclarion.com/wp-content/uploads/2020/03/20200319-Life-Sustaining-Business.pdf>

The 10 key industries are: (i) natural resources and mining, (ii) construction, (iii) manufacturing, (iv) trade, transportation and utilities, (v) information, (vi) financial activities, (vii) professional and business services, (viii) education and health services, (ix) leisure and hospitality, and (x) other services (except public administration).

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Given the inextricable links between businesses in today's world, we think that although not addressed with a high degree of clarity in any order to date, the better view is that businesses that support critical infrastructure sectors and life-sustaining businesses (while not being direct participants in such industries) should be allowed to remain open through a shut down. Unfortunately, given the lack of clarity on this topic in the California and Pennsylvania Orders, companies that take this position may run the risk of being on the wrong side of future interpretations of these orders and may be subject to enforcement action.

Based on enforcement of local shutdown orders (such as the San Francisco Order) thus far, it appears that enforcement may not be undertaken with a heavy hand given the hardships being imposed on individuals and businesses as a result of COVID-19 and the general lack of clarity of these types of orders. The San Francisco Police Department has even stated that criminal justice remedies will be used as a last resort, though that position may change given the California Order.⁶ In most instances, businesses should expect that local sheriffs or other law enforcement personnel will visit facilities or store locations that are open and ask managers or employees to shut down operations if they do not qualify to remain open under the applicable order, rather than imposing fines or arresting individuals on the spot, as was the case with Tesla, which was ordered to shut down its Fremont, California manufacturing facility on March 18, 2020 by the Alameda County Sheriff's Office.⁷

In all instances, any business that remains open during a shutdown order must practice social distancing and should take as many other mitigating measures as possible. Social distancing and other mitigating measures include: (i) maintaining at least six-foot social distancing from other individuals, (ii) washing hands with soap and water for at least 20 seconds as frequently as possible or using hand sanitizer, (iii) covering coughs or sneezes (into the sleeve or elbow, not hands), (iv) regularly cleaning high-touch surfaces and generally increasing cleaning schedules (e.g., light switches, countertops, door knobs, etc.), (v) providing hand sanitizer, (vi) reducing hours of operation, (vii) ensuring only essential personnel are on-site to operate the business and requiring employees who are able to do so to work remotely, (viii) providing on-site employees with protective gear such as gloves and masks where needed, and (ix) controlling or limiting customer flow into locations and enhancing curb-side service.⁸

Aside from being the right thing to do under the circumstances, practicing social distancing and implementing such other measures may help mitigate liability for businesses (whether such business is specifically permitted to operate or makes the business decision to continue to operate in light of its nexus to other critical businesses) in the event that a customer or employee is exposed to COVID-19 during their continued operations.

⁶ <https://www.kron4.com/news/bay-area/alameda-sheriffs-explain-how-they-will-enforce-shelter-in-place/>
<https://www.businessinsider.com/san-francisco-police-enforce-shelter-in-space-2020-3>

⁷ <https://www.theverge.com/2020/3/17/21184565/tesla-shut-down-california-factory-coronavirus-lockdown>

⁸ See Section 10.j. of the San Francisco Order. Hyperlink in footnote 1 above.

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Conclusion

The interpretation and enforcement of shutdown orders is an area that is constantly changing as the COVID-19 pandemic continues to run its course. The key principle for business leaders to keep in mind is that they need to take an honest and critical approach when assessing whether their operations should remain open. While cash flow and earnings are at serious risk during the COVID-19 outbreak for most businesses, the long-term public relations and image ramifications vis-à-vis customers and other business relations of operating a non-critical business during a public health crisis could prove highly detrimental.

However, there is certainly no one-size-fits-all approach businesses during this time. Business leaders and in-house counsel should carefully review their options and consult with their attorneys as they plan a response. Being prepared to answer questions from local law enforcement personnel regarding their continued operations and practicing social distancing and implementing other mitigating efforts are critical if a business continues to operate during a shutdown.

The Willkie team is on hand and available to advise and guide all of our clients on these rapidly evolving matters. Please reach out to any of our team members with questions on these topics and we would be happy to assist you.

Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

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