

COVID-19 NEWS OF INTEREST

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

Part 2: Business Shutdowns in Connecticut, Illinois, New Jersey and New York

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In the wake of California and Pennsylvania instituting statewide workplace shutdowns in response to the coronavirus (COVID-19) outbreak, on March 20, 2020, Connecticut, Illinois, New Jersey and New York ordered their resident businesses to shutter in-person workplaces. Like California and Pennsylvania, these states have exempted essential businesses from closure. In this alert, which supplements our initial alert on the topic,¹ we review the key features of these new shutdown orders and highlight any material differences in approach from prior orders.

Three initial observations from our review are:

1. States appear to be modelling their approaches based on state or local shutdown or shelter-in-place orders that were previously issued and based on CISA Contractual Infrastructure Segmentation, and not following the more stringent approach utilized in the order issued by Pennsylvania Governor Tom Wolf on March 19, 2020 of only permitting “life-sustaining” businesses to remain open. This is likely due to concerns about the health of the local economy and the fear of being inundated by challenges or requests for exemptions.
2. New York and Connecticut are the first states to officially allow businesses to voluntarily apply for designation by the state as an essential business. This is likely in light of the multiple requests for

¹ <https://www.willkie.com/-/media/files/publications/2020/03/1shouldistayorshouldiclosebusinessshutdownsintheag.pdf>.

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waivers that Pennsylvania has received. Filing an application is not required for a business to be an essential business, but such application can be voluntarily filed to provide certainty of designation, if desired.

3. States are refining guidance on what businesses qualify as essential on an iterative basis. For example, Connecticut has ordered its Department of Economic Community Development (DECD) to issue binding guidance on which businesses are essential by 8:00 p.m. this evening.

The Willkie team is continuing to analyze newly issued shutdown orders and advise client business teams on how to react to shutdown orders in real-time. We will continue supplementing this series of alerts as additional states adopt business shutdown measures in an effort to contain the spread of COVID-19 and existing shutdown orders are updated.

New York – Essential Business

As of Friday morning, March 20, 2020, New York State Governor Andrew M. Cuomo and the Empire State Development Corporation (ESDC) have, through a series of executive orders and published interpretations (NYS Guidance),² directed all businesses in the State of New York to, no later than 8 p.m. EST on Saturday, March 21, 2020, reduce their in-person workforce by 75%³ and to, no later than 8 p.m. EST on Sunday, March 22, 2020, reduce their in-person workforce by 100%.⁴ The NYS Guidance exempts state and local government authorities, businesses having only a single occupant/employee (e.g., gas stations) and essential businesses from closure.

To assist businesses in determining whether they are an essential business, the ESDC issued interpretive guidance that designates 12 categories of businesses and operations that qualify as essential businesses.⁵ Each of these categories is defined through non-exhaustive lists of broad business functions and operations, and specific products and services.⁶

The NYS Guidance states that the essential business designation is not intended to exempt an entire business's operations from the workforce reduction requirements. Rather, the exemption from the workforce reduction requirements

² <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.6.pdf>; <https://esd.ny.gov/guidance-executive-order-2026>.

³ <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.7.pdf>.

⁴ https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf.

⁵ The NYS Guidance designates the following business categories as essential: (i) essential health care operations; (ii) essential infrastructure; (iii) essential manufacturing; (iv) essential retail; (v) essential services; (vi) news media; (vii) financial institutions; (viii) providers of basic necessities to economically disadvantaged populations; (ix) construction; (x) defense; (xi) essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential business; and (xii) vendors that provide essential services or products, including logistics and technology support, child care and services.

⁶ <https://esd.ny.gov/guidance-executive-order-2026>.

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only applies to the portions of a business's operations that are essential. Accordingly, businesses should separately determine whether each of their product or service lines constitute an essential business.

Except for businesses designated by the ESDC as ineligible to qualify as an essential business (such as gyms, casinos, movie theaters, concerts and sporting events), any business that is not a de facto essential business may voluntarily request designation as an essential business by submitting an application to the ESDC.⁷ The application requires the requesting business to state, among other things, the number of employees, description of the business, industry description and a brief description of the reasons why the business should be exempted. The application requires the applicant to certify that the information provided is true and accurate under penalty of perjury. Filing an application is not required for a business to be an essential business, but such application can be voluntarily filed to provide certainty of designation, if desired.

A business that is uncertain as to whether it qualifies as essential and that intends to voluntarily submit a request for designation to the ESDC should consider complying with the workforce reduction requirements until it receives an affirmative designation as an essential business. The NYS Guidance neither provides a time period within which applicants will receive a response nor does it state whether the 12 categories will, going forward, expand to include businesses, products, services and functions designated as essential in response to an individual request.

While essential businesses are exempt from the workforce reduction requirements, they must still adhere to social distancing guidelines and practices at in-person workplaces and utilize telecommuting or work-from-home procedures where they can be safely utilized.

Connecticut – Essential Business

On March 20, 2020, Connecticut Governor Ned Lamont issued an order (Connecticut Order) requiring businesses to shut down all in-person workplaces in the State of Connecticut by 8:00 p.m. EST on Monday, March 23, 2020.⁸ The Connecticut Order is initially in effect through April 22, 2020, but Connecticut businesses should anticipate that the Connecticut Order will be extended through the duration of the outbreak.

The Connecticut Order initially designated 16 categories of businesses and operations as essential businesses that are exempt from the shutdown and may continue in-person operations.⁹ The Connecticut Order stated that the definition of

⁷ A copy of the application is available at https://esd.ny.gov/sites/default/files/Request%20for%20Designation%20Form_2.pdf. The ESDC directs businesses qualifying as an essential business under one of the 12 categories to refrain from submitting a request for designation.

⁸ <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7H.pdf?la=en>.

⁹ The Connecticut Order designated the following business categories as essential: (i) essential health care operations; (ii) essential infrastructure; (iii) manufacturing; (iv) the defense industrial base; (v) essential retail; (vi) pharmacies, gas stations and convenience stores; (vii) food and beverage retailers and restaurants (subject to certain restrictions); (viii) essential services; (ix) news media; (x) legal and accounting services; (xi) banks, insurance companies, check cashing services and other financial institutions; (xii) providers of basic necessities to economically

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essential business also includes the 16 critical infrastructure sectors identified on the website of the Cybersecurity & Infrastructure Security Agency (CISA).¹⁰ The approach to the definition of essential business adopted by Connecticut appears generally consistent with that taken by California; however, the Connecticut Order goes further to expressly exempt vendors of other essential services and goods necessary to maintain the safety, sanitation and essential operations of essential businesses.

However, the definition of essential business remains subject to change as the Connecticut Order requires DECD to issue final, binding guidance on the definition of essential business by 8 p.m. this evening. As a result, this exemption may be circumscribed by DECD's binding guidance.

According to the Connecticut Order, Connecticut will, like New York, provide a process for businesses to voluntarily request designation as an essential business. The process for requesting designation as an essential business will be provided in the DECD's guidance issued this evening.

We will supplement this alert with an analysis of the DECD's guidance after it becomes available.

Illinois – Essential Business

On March 20, 2020, Illinois Governor JB Pritzker issued an order (Illinois Order) requiring all businesses and operations in Illinois to indefinitely suspend all activities.¹¹ The Illinois Order exempts from this suspension all essential businesses and operations, minimum basic operations of businesses and work-from-home activities. The Illinois Order is initially effective from March 21, 2020 at 5:00 p.m. CST through April 7, 2020, but businesses should anticipate Governor Pritzker extending the Illinois Order's effectiveness through the duration of the outbreak.

The Illinois Order designates 26 categories of businesses and operations that qualify as essential businesses.¹² Similar to the NYS Guidance, each of these categories is defined through lists of broad business functions and operations, and

disadvantaged populations; (xiii) construction; (xiv) vendors of essential services and goods necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses; (xv) vendors that provide essential services or products; and (xvi) services needed to ensure the continuing operation of government agencies and the provision of goods, services or functions necessary for the health, safety and welfare of the public.

¹⁰ <https://www.cisa.gov/critical-infrastructure-sectors>.

¹¹ <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf>.

¹² The Illinois Order designates the following business categories as essential: (i) healthcare and public health operations; (ii) human services operations; (iii) essential governmental functions; (iv) essential infrastructure; (v) stores that sell groceries and medicine; (vi) food, beverage and cannabis production and agriculture; (vii) organizations that provide charitable and social services; (viii) media; (ix) gas stations and businesses needed for transportation; (x) financial institutions; (xi) hardware and supply stores; (xii) critical trades (e.g., building and construction tradesmen and tradeswomen); (xiii) mail, post, shipping, logistics, delivery and pick-up services; (xiv) certain educational institutions; (xv) laundry services; (xvi) restaurants for consumption off-premises; (xvii) supplies to work from home; (xviii) supplies for essential businesses and operations; (xix) transportation; (xx) home-based care and services; (xxi) residential facilities and shelters; (xxii) certain day care centers; (xxiii) manufacture,

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specific products and services;¹³ furthermore, the definition of essential business expressly encompasses the 16 critical infrastructure sectors identified by CISA, which is consistent with the approach taken in the Connecticut Order. Like the Connecticut Order, the Illinois Order also expressly exempts vendors that supply other essential services and goods to essential businesses.

The Illinois Order expressly provides that the essential business categories of (a) healthcare and public health, (b) human services and (c) essential infrastructure be construed broadly to avoid any impact on the provision of services and functions encompassed by such categories. Accordingly, businesses seeking an exemption under one of the foregoing categories may find that Illinois authorities presume exemptive coverage more than authorities in other states.

The Illinois Order exempts from its moratorium on activities certain minimum basic operations of all businesses, whether or not such business is considered essential. The Illinois Order's definition of minimum basic operations is consistent with the now-superseded San Francisco shelter-in-place order (San Francisco Order), and is defined as the minimum necessary activities to either (a) maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or for related functions, or (b) facilitate employees of the business being able to continue to work remotely from their residences. Businesses should be mindful that any activity undertaken on-site pursuant to the minimum basic operations exemptions must (i) fit within one of the definitional prongs of minimum basic operations, (ii) not be capable of being carried out remotely and (iii) be undertaken in compliance with Illinois's social distancing requirements.

Businesses in Illinois maintaining in-person workforces pursuant to an exemption provided by the Illinois Order must ensure that their workforce complies with the Illinois Order's social distancing requirements. The Illinois Order's social distancing requirements are based on the requirements from the San Francisco Order and include (a) maintaining at least six feet of spacing between individuals, including between customers; (b) washing hands with soap and water for at least 20 seconds as frequently as possible or using hand sanitizer; (c) having hand sanitizer and sanitizing products available for customers; (d) covering coughs and sneezes with a sleeve or elbow; (e) regularly cleaning high-touch surfaces; and (f) not shaking hands. In addition, businesses maintaining in-person workforces are ordered to, where possible, implement separate operating hours for elderly and vulnerable customers and post online whether a facility is open and how best to reach the facility and continue services by phone or remotely.

The Illinois Order expressly permits county and local governments to, among other things, order the closing of specific locations for up to the duration of the COVID-19 public health emergency and to enact provisions that are stricter than

distribution and supply chain for critical products and industries; (xxiv) critical labor union functions; (xxv) hotels and motels; and (xxvi) funeral services.

¹³ <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf>.

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those provided in the Illinois Order. Illinois businesses should monitor for ordinances issued by applicable local authorities to ensure that their businesses are following any local requirements supplementing the Illinois Order.

New Jersey – Essential Business

On March 21, 2020, New Jersey Governor Phil Murphy issued an order (New Jersey Order) requiring (a) all non-essential retail businesses in New Jersey to close their brick-and-mortar premises and (b) all businesses in the State of New Jersey to accommodate work-from-home arrangements.¹⁴ The New Jersey Order became effective on March 21, 2020 at 9:00 p.m. EST and is to remain in effect indefinitely.

The New Jersey Order exempts from its mandatory closing of brick-and-mortar premises certain essential retail businesses, such as grocery stores, gas stations, convenience stores, hardware stores, liquor stores, medical supply stores and other food stores (including retailers that offer a varied assortment of foods comparable to what exists at a grocery store). Any essential retail businesses that remain open are required to abide by social distancing practices, including keeping customers six feet apart and frequent use of sanitizing products on common surfaces, and where practicable providing pickup services outside stores for goods ordered in advance online or by phone. The physical locations of recreational and entertainment businesses (including casinos and racetracks) are required to close. Unlike the NYS Guidance and the Connecticut Order, the New Jersey Order does not implement a channel for non-essential retail businesses to request they be designated as essential retail businesses. However, the Superintendent of the State Police is empowered to add and make exceptions to the list of essential retail business.

For non-retail businesses (other than recreational and entertainment businesses), the New Jersey Order permits such businesses to maintain an in-person workforce to the extent their employees cannot perform work remotely. Examples include, but are not limited to, construction workers, warehouse workers, lab researchers, information technology maintenance workers, janitorial and custodial staff, and certain administrative staff. The number of on-site employees of such businesses must be limited to the minimum necessary to ensure the essential operations of such business can continue.

The New Jersey Order takes a very different approach from the other shutdown orders that we have seen to date. Instead of requiring all businesses to shut down and then listing exemptions from that general rule, the New Jersey Order applies this principle only to retail businesses, while allowing non-retail businesses to remain open subject to social distancing requirements and requiring employees to work remotely to the greatest extent possible such that the bare minimum number of employees are on site. This approach provides non-retail businesses with significantly more flexibility in operating and appears to be geared towards minimizing the level of disruption to the state's economy as a result of the COVID-19 pandemic.

¹⁴ <https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf>.

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Conclusion

As discussed in our initial alert on this topic, we have been urging clients to carefully assess the nature of their businesses in light of applicable shutdown orders in an objective manner when deciding whether to remain open during a state-mandated shutdown. It is critical in stopping the spread of COVID-19 that non-essential businesses remain closed or have their workers operate remotely in order to “flatten the curve” and reduce strain on the country’s healthcare systems. All businesses that remain open must continue to practice social distancing and mitigating measures.

The good news from the more recent state shutdown orders is that state governments appear to be learning from early adopters and adjusting their approaches to provide more clarity and flexibility in this ever-changing environment. We continue to remain available to our clients and others during this time of need to answer questions, so please do not hesitate to reach out to any member of the Willkie team for assistance.

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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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