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CALIFORNIA'S COVID-19 EXECUTIVE ORDERS CREATE A LAYERED PATCHWORK OF RULES THAT ARE SOMETIMES CONFLICTING AND ALWAYS CHANGING

To Our Clients and Friends:

As COVID-19 continues to spread across the U.S., Californians for weeks have received evolving guidance from the state, counties, cities, and the federal government encouraging residents to stay home and mandating the closure of certain, non-essential businesses. California was one of the first places in the U.S. to issue a stay home order, starting a trend of a patchwork of regulations, orders, and laws on state, county, and local levels. As the landscape of government directives continues to shift day-by-day (or, at times, hour-by-hour), businesses must continually monitor numerous layers of government for guidance and evaluate their operations to ensure they remain in compliance with all applicable restrictions.

On March 19, 2020, the State of California issued Executive Order No. N-33-20, which required all Californians to “stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors” for an indefinite duration. The State Order refers to and incorporates federal guidance on what constitutes “critical infrastructure sectors,” as outlined by the U.S. Department of Homeland Security Cybersecurity and Infrastructure Security Agency (CISA). CISA’s guidance (updated March 28) broadly lists sixteen critical infrastructure sectors considered vital to the population’s health and well-being, and provides further detailed guidance (updated March 28) outlining “essential critical infrastructure workforce” roles.

While the State Order provides some clarity to individuals and businesses seeking to comply with the appropriate orders, county and city governments have issued their own orders, sometimes creating more stringent restrictions on individuals and businesses than what is mandated in the State Order. While each order is unique, there are commonalities between the orders. Each order protects the operations of the healthcare industry, essential infrastructure, and the food supply chain. Most orders explicitly encourage employers to institute work-from-home policies. All orders mandate the closure of restaurants for dine-in services, limiting restaurants to take-out or delivery. Nearly all orders mandate the closure of gyms and fitness centers.

On March 16, 2020, the first wave of state and local orders restricting personal movement and non-essential business operations began with seven Bay Area counties and the City of Berkeley issuing “Shelter In Place” orders. These orders, while initially in effect until April 7, have now been modified to extend to May 3. (San Francisco, San Mateo, Marin, Contra Costa, Alameda, Santa Cruz, Santa Clara, City of Berkeley.) The County-level orders frame the restrictions differently than the statewide order, focusing on essential “businesses” at the local level, such as grocery stores, banks, and hardware

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stores. Comparatively, the state order identifies sixteen critical sectors, rather than identifying specific type of business. Despite the framing of these issues, the orders appear to be consistent in which businesses are allowed to continue operating.

On March 31, 2020, the Bay Area counties issued revised orders, which supersede the prior orders. (San Francisco, San Mateo, Marin, Contra Costa, Alameda, Santa Cruz, Santa Clara, City of Berkeley.) The new orders tighten and clarify the restrictions on personal conduct and “essential” activities and businesses, and extend their duration to May 3. These orders mandated that businesses “that include an Essential Business component” “alongside non-essential components must, to the extent feasible, scale down their operations to the Essential component only[.]” The revised orders similarly mandate that all construction must stop, except for the following exceptions: (1) projects immediately necessary to the maintenance, operation, or repair of Essential Infrastructure; (2) projects associated with Healthcare Operations; (3) affordable housing that is or will be income-restricted, including multi-unit or mixed-use developments containing at least 10% income-restricted units; (4) public works projects if specifically designated as an Essential Governmental Function by the City Administrator; (5) shelters and temporary housing, but not including hotels or motels; (6) projects immediately necessary to provide critical noncommercial services to individuals experiencing homelessness, elderly persons, persons who are economically disadvantaged, and persons with special needs; (7) construction necessary to ensure that existing construction sites that must be shut down under this Order are left in a safe and secure manner, but only to the extent necessary to do so; and (8) construction or repair necessary to ensure that residences and buildings containing Essential Businesses are safe, sanitary, or habitable to the extent such construction or repair cannot reasonably be delayed.

While the Bay Area counties previously determined that their March 16 Shelter in Place Orders were “complementary” to the State Order, those counties now are stating that their revised March 31 orders are more restrictive. Executive Orders from Bay Area counties indicate that the county orders, which contain, in some respects, “more stringent restrictions[.]” must be complied with in order to “control the public health emergency as it is evolving within the County and the Bay Area.”

Much like the Bay Area, Southern California adopted a patchwork of local city- and county-wide executive orders governing the crisis. The City of Los Angeles and the County of Los Angeles both issued “Safer at Home” orders identifying similar, though not identical, “Essential Businesses” that are permitted to operate during the crisis. For example, the City of Los Angeles prohibits any open houses or “in-person showings of housing for lease or sale[.]” while the County permits professional services related to the transfer and recording of ownership in housing, “including residential and commercial real estate and anything incidental thereto[.]” More nuanced, the County permits the operation of businesses “that supply office or computer products needed by people who work from home[.]” while the City more broadly permits businesses “that supply or provide storage for products needed for people to work from home.”

Recently, several localities in Southern California, including Los Angeles County and San Diego County, separately issued local orders requiring some businesses to post “Social Distancing Protocols” at all entrances of the facility in order to be visible by the public and by employees. The mandated form Protocols require the business to include specific information about the measures that the business is

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taking to comply with the social distancing and sanitation procedures mandated by the local orders. While the Protocols generally require similar information, the orders are inconsistent as to which businesses must post the protocols. In Los Angeles County, all Essential Businesses must post a Protocol, while San Diego County requires only businesses that remain open to the public.

To add a further layer of complication, each level of government authority has the power to enforce its orders, usually through either a fine or imprisonment. However, each government entity has a different approach to the enforcement of the orders. Many officials, including the California Governor Gavin Newsom, have taken the public stance that they are hoping for voluntary cooperation of businesses and residents, with the hope that formal enforcement measures are not necessary. Governor Newsom stated that he did not expect to use law enforcement to enforce the order at this time, but that the “social pressure” is “the most powerful enforcement tool we have.”

Initially, some mayors indicated that they did not intend for the widespread police enforcement of the orders. However, in recent days, we have seen an increased level of enforcement in the Bay Area and in Southern California. On April 3, Los Angeles prosecutors filed criminal charges against four local, non-essential businesses that “flagrantly” refused to close, including a smoke shop, a shoe store, and a discount electronics retailer. One individual in the Los Angeles area was cited \$1000 for surfing, despite repeated warnings from a police officer that the beaches were closed. Similarly, San Francisco police chief Bill Scott said that San Francisco cited at least one person and one business for violating the City’s Shelter in Place Order, and the City Attorney recently obtained a warrant that to shut down an underground nightclub that was operating in violation of the local Order. Other localities have already begun to enforce their ordinances more strictly. In the City of Manhattan Beach located in Los Angeles County, the city issued 129 citations and shut down four construction projects over a single weekend for violations of the city’s social distancing ordinance. While the current enforcement is generally focused on individuals and businesses that ignore government demands for compliance with orders, it’s not clear whether all businesses were given a warning prior to the enforcement actions. We may continue to see a tightening on the enforcement of these orders as the virus continues to spread or as the level of compliance with the orders decreases.

The current regulatory landscape in response to the COVID-19 pandemic in California is complex and continually evolving. This trend is likely to continue into the foreseeable future. As the pandemic continues, cities and counties will tailor their restrictions to the needs of the locality. The COVID-19 restrictions are still new and have not been clarified through litigation, In the face of such uncertainty, businesses must proactively monitor the announcements of the State, the counties, and the cities within which they operate, seek guidance where there is ambiguity and evaluate the risks associated with the uncertainties in each order.



Gibson Dunn’s lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm’s Coronavirus (COVID-19) Response Team, or the following authors:

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