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WHAT IS AN “ESSENTIAL BUSINESS”? NEW YORK AND CALIFORNIA TAKE DIFFERENT APPROACHES

To Our Clients and Friends:

As the coronavirus (COVID-19) pandemic continues, state and local jurisdictions across the country have issued unprecedented directives restricting in-person business operations in order to minimize the spread of the virus. New York and California illustrate two differing approaches to this novel issue. In this rapidly changing environment, businesses with operations in multiple jurisdictions must look carefully—and continuously—at the orders applicable to each jurisdiction to determine whether and to what extent their business operations and obligations may be affected.

As discussed in more detail in our March 20, 2020 Client Alert, “[New York Governor Andrew Cuomo Introduces New Executive Order Restricting Non-Essential Business Activity](#),” New York Governor Andrew Cuomo issued an executive order, effective March 22 at 8:00 p.m. through April 19, requiring businesses to keep 100 percent of their workforce at home. “Essential businesses” are exempted from this order. The New York State Department of Economic Development (“ESD”) has provided guidance outlining twelve categories of essential businesses, most of which relate to health, safety, and transportation. The in-person restriction for non-essential businesses is subject to extension by future executive orders.

In contrast, California’s approach to restricting non-essential business activity has been directed at the local level, with counties and cities issuing their own orders and guidance first in the absence of, and now in addition to, orders at the state level. Santa Clara, San Francisco, San Diego, and Orange counties lead the way by declaring local states of emergency as early as February 10, 2020, and Governor Gavin Newsom followed with a statewide declaration of emergency on March 4, 2020. On March 16, 2020, the Health Officers of San Francisco, Santa Clara, San Mateo, Marin, Alameda, Santa Cruz, and Contra Costa counties and the City of Berkeley issued first-in-the-state orders directing residents to shelter in place except to engage in certain essential activities and to work for essential business and government services. On March 31, 2020, the Bay Area counties issued new Orders, strengthening and clarifying the restrictions initially imposed, and extending them through May 3, 2020. The Bay Area orders, which closely mirror one another, define approximately twenty categories of essential businesses that may continue to operate at this time (see San Francisco’s Order [here](#)). Per the County Orders, essential businesses include, among other things, healthcare operations, grocery stores and other suppliers of food and consumer goods, media services, financial institutions, laundromats, and transportation services necessary for essential activities. While essential businesses are “strongly encouraged” to remain open, they must scale down operations to their essential components only, maximize the number of employees who work from home, and implement a “Social Distancing Protocol.”

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On March 19, 2020, Governor Gavin Newsom issued Executive Order 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” as outlined by the U.S. Department of Homeland Security Cybersecurity and Infrastructure Security Agency (CISA). CISA’s guidance, which the Governor’s order incorporates, broadly lists sixteen critical infrastructure sectors considered vital to the population’s health and well-being. (See our April 1, 2020 Client Alert, “The Cybersecurity and Infrastructure Security Agency of the Department of Homeland Security Updates Essential Critical Infrastructure Workforce Guidance” for details of how this guidance has been revised). On March 22, 2020, the California State Public Health Officer issued its own list of “Essential Critical Infrastructure Workers,” which is almost identical to CISA’s guidance in its descriptions of essential personnel. Cities and counties throughout the state continue to issue their own orders and guidance to local businesses, including through lists of Frequently Asked Questions posted on their websites.

The New York ESD guidance and California Public Health Officer guidance, like that adopted by states nationwide, broadly overlap in which businesses are deemed essential. For example, both states consider the food and agriculture sector essential, including most services in the food supply chain. Restaurants are restricted to take-out or delivery only, but are not required to close entirely. Likewise, the health care and public health sector, including services and products in the supply chain, is broadly exempt from work from home restrictions. In addition, essential services, infrastructure, and manufacturing are considered essential, as are certain financial institutions such as banks. Both states permit individuals to leave their homes for fresh air or exercise—as long as people practice social distancing, but fitness centers and gyms are closed.

Despite broad overlap between New York and California, businesses are advised to decide for themselves if their operations qualify (in full or in part) under each applicable state and local order as “essential” and whether they are obliged to close. The orders and guidance are rife with nuances that merit consideration. For example, construction is one ambiguous area where the New York and California approaches may depart. Although originally wholly exempted in New York, revised ESD guidance now exempts only non-essential emergency construction and essential construction, which includes “roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters.” However, even non-essential emergency construction and essential construction must cease if these operations cannot maintain social distancing and safety best practices. In California, the State Public Health Officer’s March 20, 2020 directive views “[w]orkers who support . . . construction of critical or strategic infrastructure”; “construction material suppliers”; and “Construction Workers who support the construction, operation, inspection, and maintenance of construction sites and construction projects (including housing construction)” to be essential. Many of the Counties’ Orders take a narrower view. For example, the Bay Area counties’ March 31 orders further restricted construction beyond what was originally permitted, in response to perceived abuse and a lack of compliance by residential and commercial developers. Now, the Bay Area counties permit only projects immediately necessary with respect to Essential Infrastructure, projects associated with healthcare operations, construction of affordable housing or shelters, and construction necessary to ensure that existing residences and essential businesses are safe. General commercial construction is not allowed.

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Notably, the states' directives differ in the degree to which they govern the employees of essential businesses, with New York businesses granted greater discretion in determining which employees are essential. California's state-wide order and Public Health Department guidance are oriented toward workers' roles, not business functions, and the latter provides detailed guidance on who constitutes the "essential workforce." In contrast, New York focuses on business functions. For business that operate essential and non-essential services, only those operations, and therefore employees, that are necessary to support the essential services are exempt from the New York order. This latter approach gives businesses greater latitude in defining the essential workforce that may continue to work in-office.

The states also take different approaches to exemptions from and potential punishments for violations of the applicable orders. In New York, businesses that do not fit within those categories may apply for "essential" status through ESD. Businesses in violation of the order are subject to civil penalties under section 12 of the Public Health Law. While this order, and further orders and guidance that will likely follow, was issued on the state-level, businesses should expect that certain New York counties may enforce the order more vigorously than others. In contrast to New York, California does not provide a procedure for non-"essential" businesses to obtain an exemption from the public health orders and continue operating. Although the state and local orders provides for potential civil and criminal penalties for noncompliance, according to public statements by the Governor and local public officials, the primary goal of the orders is to achieve voluntary cooperation rather than punitive enforcement. In sum, California's approach is driven at the local level, with issues such as defining "essential businesses" and enforcement being decided by cities and counties based on community priorities but within the overarching rules set forth by the Governor. In contrast, the Governor of New York has provided more specific guidance, resulting in less variability among counties.

Additional client alerts focusing on New York State's executive orders regarding in-person workforce restrictions and guidance on essential businesses exempt from those orders may be accessed [here](#) and [here](#). Gibson Dunn is continuing to monitor developments relating to the restriction of non-essential business activity in various states. Further developments can be expected to follow in the coming days and weeks.



*Gibson Dunn lawyers regularly counsel clients on the issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**. Please also feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's **Public Policy Group**, or the authors:*

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