

# Labor and Employment Alert

**Akin Gump**  
STRAUSS HAUER & FELD LLP

## What Shelter-in-Place, Shut-down and Closure Orders Mean for Businesses

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### Key Points

- Numerous jurisdictions across the country are enacting a patchwork of different shelter-in-place, shut-down and closure orders in response to COVID-19.
- In some jurisdictions, businesses can look to federal CISA Guidance to determine whether employees are Essential Critical Infrastructure Workers who can continue to work.
- Businesses must review the terms of the specific orders in jurisdictions where they are located to determine whether and to what extent they can continue to operate.

As COVID-19 continues to spread, governors, mayors and county executives across the United States are enacting shelter-in-place, shut-down and closure orders (collectively, "Orders"). As of March 26, 2020, at least 31 states and a number of counties and cities have issued Orders, and this number is growing every day.<sup>1</sup> Akin Gump is currently tracking these Orders on its COVID-19 Resource Center, available [here](#). Many of these Orders require all non-essential businesses to cease physical operations. Although the specifics of state and local Orders vary by jurisdiction, businesses can better comply with them by considering the principles behind what constitutes an essential business, how state and local laws can vary and some key issues the Orders present.

### CISA Guidance

Many state and localities' Orders rely on the Department of Homeland Security Cybersecurity and Infrastructure Security Agency (CISA) guidance memorandum identifying Essential Critical Infrastructure Workers (the "CISA Guidance").<sup>2</sup> While CISA's identification of critical infrastructure sectors predates COVID-19, the CISA Guidance aims to assist state and local governments in determining which businesses and workers serve crucial roles and should continue to operate during periods of community restriction, access management, social distancing or closure orders during the COVID-19 crisis.

The Essential Critical Infrastructure Workers identified in the CISA Guidance include workers performing essential functions in the following sectors:

### Contact Information

If you have any questions concerning this alert, please contact:

**Susan H. Lent**

Partner

[slent@akingump.com](mailto:slent@akingump.com)

Washington, D.C.

+1 202.887.4558

**Gary M. McLaughlin**

Partner

[gmclaughlin@akingump.com](mailto:gmclaughlin@akingump.com)

Los Angeles

+1 310.728.3358

**Dario J. Frommer**

Partner

[dfrommer@akingump.com](mailto:dfrommer@akingump.com)

Los Angeles

+1 213.254.1270

**Robert G. Lian Jr.**

Partner

[blian@akingump.com](mailto:blian@akingump.com)

Washington, D.C.

+1 202.887.4358

**Grace Margaret O'Donnell**

Associate

[godonnell@akingump.com](mailto:godonnell@akingump.com)

New York

+1 212.872.1015

- Health care/Public Health
- Law Enforcement, Public Safety, First Responders
- Food and Agriculture
- Energy
- Water and Wastewater
- Transportation and Logistics
- Public Works
- Communications and Information Technology
- Other Community-Based Government Operations and Essential Functions
- Critical Manufacturing
- Hazardous Materials
- Financial Services
- Chemical
- Defense Industrial Base.

Within each listed sector, the CISA Guidance offers examples of the types of workers who are deemed Essential Critical Infrastructure Workers. Others working in a critical sector but not performing essential functions—such as employees in a business’s marketing or recruiting departments—presumably would not be considered Essential Critical Infrastructure Workers.

Although the CISA Guidance provides specificity for some sectors and workers, other language is broad and could potentially encompass a wide variety of businesses and employees. For instance, with respect to “Critical Manufacturing,” the CISA Guidance could be interpreted to encompass a broad range of manufacturing operations, although not every employee would necessarily be covered.

The CISA Guidance states that the list is advisory in nature and is not a federal directive or standard. The Guidance also states that it is initial guidance and subject to change. While many state and local governments have cited to the CISA Guidance in their Orders, they have the authority to determine whether a business is operating in compliance with their specific order.

## State and Local Laws

Businesses should review the terms of the specific orders in jurisdictions where they do business to determine whether and the extent to which they can operate.

Many states and localities have explicitly incorporated the CISA Guidance into their orders. For instance, the [California Executive Order](#) requires all individuals to remain at home, except as needed for the operation of the critical infrastructure sectors identified in the CISA Guidance. The [Michigan Executive Order](#) similarly provides that no business that requires workers to leave their homes shall operate except to the extent those workers are necessary to sustain or protect life or to conduct minimum basic operations, and refers to the CISA Guidance to define such workers (while also including some additional categories of workers). Workers who are necessary to sustain or protect life are defined as “critical infrastructure workers,” which in turn is

defined to include the workers identified in the CISA Guidance as well as certain other specified workers. Likewise, Orders in other jurisdictions such as [Louisiana](#), [Maryland](#) and [Ohio](#) explicitly reference the CISA Guidance.

Other states' Orders use different standards from CISA. [New York's Executive Order](#) and corresponding guidance does not reference the CISA Guidance, but instead provides its own definition of "Essential Businesses" that is similar, but not identical, to the CISA Guidance. [Virginia's Executive Order](#) likewise provides its own list of essential businesses that may remain open, without mention of the CISA Guidance. Virginia's Executive Order further allows some non-essential businesses to remain open if they can comply with certain safety requirements, such as no more than 10 occupants and practicing social distancing.

In some cases, local orders go beyond the limitations imposed by state orders. For instance, many counties in California have issued Orders providing that people can leave their residences only for "Essential Activities," "Essential Government Functions" or to operate "Essential Businesses."<sup>3</sup> The definition of "Essential Businesses" in the local Orders are different, and narrower, than what is laid out in the CISA Guidance and the California Executive Order. This raises the question of whether the California Order preempts the local Orders to the extent they purport to prohibit employees designated essential under the CISA Guidance from working, or whether the California Order merely sets a floor beyond which localities may set stricter requirements. The California Governor's Office is expected to provide guidance on this issue soon.

## Considerations for Businesses

Because of the variance among state and local laws, it is important for companies in jurisdictions with Orders in place to consider the following issues for each of the jurisdictions in which they operate.

- **Whether a business is "essential."** In most cases, the first step in determining whether a business is subject to a closure Order will likely be determining whether the business or industry is "essential," "critical" or "life sustaining." Although the language will differ depending on the jurisdiction and Order at issue, the concept is largely the same: Whether a business can remain open will typically depend on whether it is serving an essential function, as determined by the jurisdiction at issue. In evaluating whether they serve an essential function, businesses should also consider whether they service or provide materials to an essential business. For instance, a business that supplies plastic for toys and plastic for medical equipment may be considered an essential business to the extent it provides supplies for the health care industry, and only the part of the business that operates to supply plastic for medical equipment would be able to continue to operate.
- **Whether a worker is "essential."** In addition to considering whether a business is essential, businesses must evaluate which workers are essential. Even where a business is essential, that does not mean all employees are permitted to work. For instance, the CISA Guidance not only identifies critical sectors, but also specifically identifies essential workers within those sectors. Likewise, New York has clarified that only those employees needed to provide the essential products and services are permitted to work.<sup>4</sup>
- **Requesting a designation.** Generally, businesses should review guidance from the appropriate jurisdiction to make decisions about whether they are able to

continue operations. Businesses can also consult counsel for guidance. However, if it is unclear whether a business is essential, some jurisdictions (e.g., New York, Connecticut, Massachusetts and Pennsylvania) give businesses the option to request a designation. In contrast, California, for example, does not have a designation process and leaves it up to businesses to make a self-determination. Businesses who are unsure whether they are essential may also consider consulting with local enforcement authorities for guidance or seeking to be added to a list of essential businesses. Businesses who may be exempt from shut-down orders by virtue of their status as a supplier to a designated essential business or government agency may also wish to obtain written verification of their engagement with those entities.

- **Documentation for essential employees.** Businesses should consider providing their employees with written documentation indicating that the employee is performing an essential function for an essential business, in the event they are stopped or questioned by authorities while working or commuting. Michigan, for example, further requires that critical worker designations be made in writing.
- **Additional requirements.** Many Orders impose additional requirements on businesses, even when they are deemed essential. For example, businesses may still be required to practice social distancing, have as few employees in the workplace as possible and follow other safety and health orders.
- **Practical considerations.** On their face, many jurisdictions' Orders appear to prohibit all employees of non-essential businesses from entering the workplace. Although some businesses are able to function with employees working remotely, some tasks like picking up mail or sending paychecks may require an employee to be physically present at the office. Some Orders expressly indicate that employees of non-essential businesses may pick up mail or supplies, or perform other tasks necessary to continue operations such as processing payroll.<sup>5</sup> Other jurisdictions whose Orders did not initially expressly allow such conduct have begun providing additional guidance. For instance, New York clarified that a single person may perform specific tasks at non-essential businesses temporarily so long as they will not be in contact with other people.<sup>6</sup>
- **Enforcement.** Businesses must be aware of the enforcement mechanism associated with applicable Orders, including criminal and civil penalties. For example, under the California Order, violations are a misdemeanor and can be punishable by a fine of up to \$1,000, imprisonment of up to six months or both.<sup>7</sup> In New York, violators can be liable for civil penalties ranging from \$2,000 to \$10,000.<sup>8</sup> Businesses should also familiarize themselves with who will be enforcing applicable Orders. In many jurisdictions, local agencies enforce the Orders, and enforcement may be uneven within jurisdictions.
- **Liability.** In addition to enforcement considerations, businesses should be cognizant of potential civil liability Orders may create. If a business fails to comply with an Order and an employee or member of the public contracts COVID-19 at the business, the business's failure to comply with the law could be used as evidence of negligence.

## Conclusion

As the situation around COVID-19 rapidly develops, businesses should expect additional jurisdictions to enact shelter-in-place, stay-home and other closure laws.

Though President Trump has indicated he would prefer that COVID-19 issues be addressed on the state and local level, it is conceivable that the federal government could issue a national shelter-in-place or stay-home law. Businesses should remain up to date on Orders and guidance in the jurisdictions in which they operate and consult with counsel if needed.

<sup>1</sup> States include California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Vermont, Virginia, Washington, West Virginia and Wisconsin.

<sup>2</sup> The CISA Guidance was issued on March 16, 2020, and updated on March 23, 2020. See [https://www.cisa.gov/sites/default/files/publications/CISA\\_Guidance\\_on\\_the\\_Essential\\_Critical\\_Infrastructure\\_Workforce\\_508C\\_0.pdf](https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_508C_0.pdf).

<sup>3</sup> California counties including Alameda, Contra Costa, Los Angeles, Marin, San Francisco, San Mateo, Santa Clara and Santa Cruz have all issued similar Orders.

<sup>4</sup> See FAQ, [https://esd.ny.gov/sites/default/files/ESD\\_EssentialEmployerFAQ\\_032220.pdf](https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_032220.pdf).

<sup>5</sup> See, e.g., [San Francisco Order of the Health Officer No. C19-07](#) (allowing non-essential businesses to engage in minimum basic operations, such as activities to maintain the value of the business's inventory, ensure security, and process payroll and employee benefits and to facilitate employees of the business being able to continue to work remotely); Michigan Executive Order No. 2020-21 (COVID-19) § 4(b) (discussing workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits) or facilitate the ability of other workers to work remotely).

<sup>6</sup> FAQ, supra note 4.

<sup>7</sup> See California Executive Order N-33-20, § 4; Cal Gov't Code § 8665.

<sup>8</sup> See New York Executive Order No. 202.8; N.Y. Public Health Law § 12.

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