

## Key Issues for Retailers Navigating Disparate Stay-at-Home Orders and Store Closure Requirements

April 7, 2020

### Key Points

- All but a few states are now under some type of stay-at-home order that requires non-essential businesses to close to the public.
- Retailers seeking to continue store operations should undertake a careful review of the orders in effect in each jurisdiction where stores are located.
- Retailers should anticipate additional and evolving regulations and will need to adapt in real time.

As the COVID-19 crisis continues to evolve, retailers are facing unprecedented challenges. Retailers have provided individuals with access to the goods they need to remain safe and comfortable at home during this difficult time. However, one issue that has been a source of confusion for retailers is the need to navigate a complex and ever-changing patchwork of stay-at-home orders to determine if a store location can remain open and, if so, whether operations need to be limited and whether all goods within the store can be available for sale to consumers.

As of April, 2020, all but a few states have some form of a stay-at-home order in place. Numerous counties have enacted similar orders as well, ranging from those that are more restrictive than the applicable state order to much less restrictive. Often, counties enact orders before the state does, leading to confusion, as very few mention which one applies in the event of a conflict. In addition, all states—even those without official stay-at-home orders—have at least some restrictions in place with respect to social distancing. Although most stay-at-home orders require the closure of “non-essential” businesses, the orders vary significantly in how they define what constitutes a non-essential business. Further complicating matters, enforcement strategies and policies vary widely among states and localities, and, in some cases, businesses are reporting local city or county interpretation and enforcement that is at odds with state-level guidance.

Amidst this unsettled (and unsettling) legal landscape, there are a number of action items that retailers can implement to keep pace from a compliance standpoint with the myriad of new and temporary regulations:

### Contact Information

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

**Meredith C. Slawe**

Partner

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

Philadelphia

+1 215.965.1202

**Lauren Helen Leyden**

Partner

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

New York

+1 212.872.8172

**Daniel E. Brewer**

Senior Counsel

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

Philadelphia

+1 215.965.1391

**Dustin E. Stark**

Counsel

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

New York

+1 212.872.8123

**Marie Bussey-Garza**

Associate

[mbussey-garza@akingump.com](mailto:mbussey-garza@akingump.com)

San Antonio

+1 210.281.7105

- **Stay Informed.** The regulatory landscape is changing at lightning speed. The stay-at-home orders are constantly being updated (sometimes on a daily basis) by state and local governments. To help keep you updated on the latest COVID-19 developments, Akin Gump has developed a [50 State Survey](#) of stay-at-home orders and social-distancing restrictions, which we keep updated.
- **Determine Status.** For a retailer seeking to keep stores open, the first step is determining whether its business is considered essential in each jurisdiction. That scope can vary significantly. This fundamental task will require a careful review of the relevant state and local orders in effect where each store is located and an understanding of how they are being enforced.
- **Consider Requesting an Essential Designation.** Many states provide a mechanism through which a business can seek a designation as an essential business, ask for clarification, or otherwise inquire about how the relevant order(s) should apply to their operations. Retailers should consider invoking such procedures where they are available, or conferring with industry associations. Having this designation would provide retailers with comfort that they can remain open and could also be used to respond to a local enforcement agency's attempt to shut down the store based on its different interpretation of "essential."
- **Think and Act Strategically Across Jurisdictions.** Retailers should thoughtfully consider key strategic legal decisions, such as determining whether and to what extent stores may continue to operate as essential businesses, whether and how to apply for an exemption or consideration as an essential business with local and state officials, and how to prepare and manage essential employees during periods of continued operations. All of these issues will require a nuanced examination of the facts and relevant state and local orders and guidelines in each affected area.
- **Know the Rules for Essential Business Operations.** Even if a retailer is considered essential, these orders provide additional requirements relating to the essential business's operations. Most include, at a minimum, having only a limited number of employees working and number of people in a store at once, following sanitizer placement rules and disinfecting protocols, and ensuring individuals in line are at least six feet apart. In other jurisdictions, in-person sales are prohibited but delivery options, including curbside delivery, are allowed. We are also seeing an increase in the number of locations that require the majority of the goods being sold to fall into certain categories.
- **Maintain Consistent Messaging.** Given the widespread public attention to the COVID-19 global pandemic, retailers should be mindful of consistent messaging during this difficult time period. To that end, retailers should ensure that their communications with government authorities, business partners, employees, and customers align with their overall approach to this crisis.

## Conclusion

The COVID-19 crisis is only beginning to unfold. Retailers can expect to see additional and updated stay-at-home orders and related regulations and guidelines on an almost daily basis in the coming weeks. Retailers should monitor these developments, communicate with their state and local authorities, and take steps to strategically plan and adapt in real time.

[akingump.com](http://akingump.com)