

KEY CONSIDERATIONS, BUSINESS IMPACTS FOR COVID-19 RELATED ORDERS

As the novel coronavirus inundates health care systems across the nation, federal, state and local governments are launching aggressive mitigation strategies to combat the spread of COVID-19.

Commonly referred to as “stay-at-home,” “shelter-in-place” and “social distancing” orders, these actions can have significant impacts on both essential and nonessential business operations and employees, and must be carefully reviewed to determine their applicability to any particular business. This advisory summarizes some of the key components and considerations included in or related to these orders.

APPLICABLE JURISDICTIONS:

Federal: To date, the federal government has not issued any general order restricting business or personal activity in response to COVID-19, although numerous federal agencies have issued regulatory guidance and requirements regarding employment and workplace activities (for example, Equal Employment Opportunity Commission (EEOC) and Occupational Safety and Health Administration (OSHA)); the Centers for Disease Control (CDC) has issued guidance and information regarding the spread of COVID-19; and the CDC and the State Department have issued travel warnings and advisories. Separately, the U.S. Department of Homeland Security has provided guidance to businesses regarding which personnel qualify as “essential critical infrastructure workers.” This guidance is based on 16 different sectors and industries, but is neither mandatory nor enforced by the federal government.

State: As of March 26, 2020, nearly every state has issued some form of order relating to business and personal activity. These orders typically fall into four categories:

- States (such as Idaho, Illinois, Michigan, New York, New Jersey, Ohio, Pennsylvania and West Virginia) that adopt broad restrictions on business and personal activity, including detail on what businesses qualify as “essential businesses,” and also contain permissive provisions for “essential activity,” “essential travel” and related concepts. It is vitally important to carefully review these definitions because each jurisdiction is tailoring them differently (for example,

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Idaho and West Virginia address the coal industry). Some of the states provide lists which are more specific in nature, whereas other states utilize robust definitions coupled with statements that their definitions are to be construed broadly.

- States (such as Alaska, Missouri, Nebraska, New Hampshire, Utah, Vermont and Wyoming) which put a higher emphasis on the implementation of social distancing requirements rather than defining their own essential businesses; these social distancing requirements are typically restrictions on large gatherings, dine-in operation of restaurants and bars, and operation of or access to facilities such as schools, nursing homes and care facilities.
- States (such as North Carolina, Tennessee, Texas, South Carolina and South Dakota) which have encouraged local governments to exercise their authority to issue orders on a localized basis.
- States (such as California, Florida, Louisiana, Maryland, Mississippi and Nevada) which adopt, refer to or rely on the Department of Homeland Security guidelines.

Local: Numerous counties and municipalities have also taken it upon themselves to issue their own local orders, particularly prevalent in local jurisdictions covering well-established major metropolitan areas. These orders can vary significantly in terms of language and scope of applicable restrictions.

POTENTIAL CONFLICTS:

In our current reactionary environment, both small and large businesses (and their employees) will most likely be subject to numerous and varied orders from different jurisdictions and levels of government. For example, a business operating in the St. Louis metropolitan area may have operations and employees located in and subject to orders issued by Illinois, Missouri, St. Louis City, St. Louis County and St. Charles County. In addition to orders directly applicable to businesses, it is important to consider whether customers, vendors and suppliers located in other areas will also be contending with compliance with orders in their jurisdictions. Some governors (such as in New Jersey and Kansas) acknowledge this potential conflict and utilize their authority to bring consistency across their state by invalidating county and municipal restrictions that conflict with the provisions of the governor's executive order.

It is important to keep in mind that the orders target the individuals and facilities within their jurisdictions, so businesses with a larger presence must be mindful of the various orders affecting their individuals and facilities, and take into consideration the overall impact of those different treatments on both operations and employee morale.

HOW THE ORDERS OPERATE:

The governmental authorities are implementing their directives in a variety of ways: whether at the *business level* by requiring “nonessential” businesses to cease operations; “strongly encouraging” or permitting only essential businesses to keep operating (and any business not deemed essential is required to close); requiring employers to reduce their active workforce by 50%; or at the *individual level* by ordering individuals to stay at their place of residence unless they are leaving for an essential activity or the individual qualifies as an “essential critical infrastructure worker” under the federal guidelines. In jurisdictions that have overlapping orders, it is important to carefully read these orders and how they apply.

In addition to determining whether a business or employee is qualified as essential, considerations should also be given to a business’ supply chain, i.e., whether a direct customer or end-user may be considered essential; and if so, then the supplier and manufacturer of that direct customer or end-user are also likely to be considered essential. Since nearly every business and individual in the nation is being impacted by these orders, many larger manufacturers and distributors are being requested to provide letters to downstream suppliers and service providers of those parties’ places in the supply chain, so that these downstream parties can evidence their qualifications and status as an essential business (and equip their employees who are performing related business activity with this evidence).

Businesses that do not qualify to continue full operations under these orders are generally still permitted to have employees working remotely from their residences, as well as maintaining “minimum basic operations” for purposes such as security, preserving inventory, or undertaking activities to enable employees to work remotely from their residences. State regulators with whom we have spoken also recognize the need for manufacturers, in particular, to maintain site security and critical functions associated with the management of chemical inventories, volatile compounds, stocks, storage tanks and wastes.

IMPLEMENTATION AND ENFORCEMENT:

Deciding how to handle the closure or material restriction of business operations, and informing employees that they are still expected to report to work during the COVID-19 pandemic, can be equally troublesome.

Consideration should be given to employees who are traveling across various state and local jurisdictions to reach their place of work or for other business purposes, and whether it is appropriate and feasible to provide documentation to employees to substantiate their business activities.

Many jurisdictions issuing these orders are requesting that the public exercise



common sense and self-police compliance with the orders. Many orders grant broad discretionary authority to law enforcement, public health and safety personnel in the field to enforce the orders. As the communities empower their local law enforcement to usher compliance, it is becoming increasingly common for local law enforcement and community leaders to question individuals out in public regarding their individual purpose and reasoning. Some orders provide that violation will result in misdemeanors, whereas others establish fines of up to \$5,000, with each day of noncompliance resulting in a new fine, in addition to the revocation of a business' permits and licenses for failure to cease activity or operate according to the orders. Since this is an emerging situation, there may differences in the way the orders are written, and the manner in which the federal, state or local authorities enforce them.

For business activities that are permitted, the orders typically require that those businesses and their employees adopt and strictly adhere to social distancing policies among their employees and customers. In this respect, [OSHA has issued a variety of guidance](#) on social distancing, and safe cleaning and sanitizing practices within the workplace. The various orders typically define "social distancing requirements" to include maintaining at least six feet of distance from other individuals; washing hands with soap and water for at least 20 seconds as frequently as possible or using hand sanitizer; covering coughs or sneezes (into the sleeve or elbow, not hands); regularly cleaning high-touch surfaces; and not shaking hands.

After orders are issued, it is likely that various governmental entities will issue amendments and revocations of these orders that may be equally confusing and conflicting.

HOW WE CAN HELP:

Armstrong Teasdale has a team of attorneys dedicated to monitoring developments regarding stay-at-home, shelter-in-place and social distancing orders. While we are generally focused on orders and guidance at the state and federal levels, we have also closely reviewed orders in numerous local jurisdictions where the firm and its clients operate, and can help businesses and employees understand the impact of these orders on their operations. Our attorneys have also worked with clients to develop "travel papers" explaining the nature of the essential business services the employer provides.

We are also closely tracking developments and advising clients in related areas impacted by COVID-19, such as employment, EEOC, OSHA, Department of Labor and tax matters. If you have a question or require guidance on these or other points, please contact the attorneys listed on this advisory, or your regular Armstrong Teasdale contact.



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