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State and local “stay-at-home” orders and quarantines have businesses seeking guidance on whether they provide “essential” services. Squire Patton Boggs attorneys say those that operate across states and municipalities face an even more difficult task of complying with incongruous orders.

State and local government leaders are issuing “shelter-in-place” orders in response to the coronavirus pandemic. These orders generally require that “non-essential” workers remain at home, and that raises many questions for businesses.

Although some mandates define “[essential services](#),” the vast majority are pliable, given the breadth of American business. Businesses have struggled to determine if they can continue operating. They want to stay open, but also need to keep employees safe and comply with lawful orders.

They face challenging questions: If we’re not expressly covered, is there relief? What if we don’t follow the rules? Or if we mistakenly interpret the definition of “essential”? Do the orders have teeth, and if not, should we ignore them?

If the orders alone are not effective, interactions between citizens and government will increase, as law enforcement and health officials attempt to identify and enforce their shelter-in-place mandates.

Businesses that have chosen to read ambiguities in their favor may be challenged and must be prepared to respond honestly and convincingly. Those that operate across states and municipalities will face an even more difficult task of complying with the dizzying array of incongruous orders.

State and Local Enforcement

State and local leaders are determined to enforce shelter-in-place orders if necessary. In New York Gov. Andrew Cuomo’s (D) words, “These are legal provisions. They will be enforced. There will be a civil fine and mandatory closure for any business . . . not in compliance.”

Similarly, Pennsylvania Gov. Tom Wolf (D) announced state police would enforce his stay-at-home order. In California, reports are National Guard and state police have stopped essential employees and sent them home, despite the presentation of letters from their employers explaining their critical role or task. State attorneys general are also monitoring businesses’ activities during this time, and may use their own enforcement powers. For example, 33 state AGs warned Amazon, Craigslist, eBay, Facebook, and Walmart against price gouging. Illegal price gouging during crises is common, but so is the aggressive enforcement by AGs, who have the authority to issue stiff civil penalties and revoke business licenses.

To date, law enforcement officials have mostly engaged in education efforts, allowing people and businesses time to adjust to these unprecedented changes. Law enforcement wants to get the word out they mean business, and expect people to stay home.

Likewise, officials are gathering intelligence about which businesses actually are critical, so they can ensure those businesses run smoothly, and monitoring movement to and from them is easier. That intelligence will also form the basis to question businesses that fail to have a clearly essential mission. Many states have issued guidance for first responders that companies should read, as they may shed light on law enforcement priorities.

Importantly, state and local health officials (and to some extent the Occupational Safety and Health Administration) could shutter a business, too, under these orders, particularly if they determine the company is failing to follow prophylactic guidelines, or if an employee tests positive for the coronavirus.

Health officials will be examining businesses that remain open to ensure compliance with required safety measures. Businesses should strictly adhere to the numerous health requirements in place, such as social distancing, taking employee temperatures upon arrival at the work place, shift work, etc., and most importantly, documenting their historical and contemporaneous mitigation efforts.

Although enforcement to date has been mild, more serious measures are inevitable if the crisis goes unabated. The emergency authorities the government is relying upon for shelter-in-place are the same authorities that allow for more serious restrictions, such as guarded quarantines. In fact, U.S. Customs and Border Protection and U.S. Coast Guard officers are authorized to enforce federal public health quarantine orders.

Exemptions/Waivers

One option for businesses not enumerated as “essential” under a particular order is to apply for a waiver. Many mandates provide a mechanism to seek exemption. For example, in Pennsylvania businesses may request an exemption to business closure. Similarly, in Massachusetts and Connecticut, companies wishing to expressly designate their business as “essential” may complete an online application.

However, these processes are slow and may be headed by the same entities issuing the shelter-in-place orders in the first place. As more non-essential businesses struggle to survive layoffs, maintain customers, and avoid bankruptcy, there is an incentive for “essential” designation.

But, of course, the more active businesses, the greater the likelihood of perpetuating the spread of Covid-19. It is possible express exceptions will be granted sparingly. And it may be a real business risk to stay open while awaiting a decision, as each day, or even each employee, could be viewed as a separate violation.

What to Expect

In the coming weeks, every business in the U.S. will likely be impacted by a current or forthcoming shelter-in-place order. As the virus spreads and deaths increase, these orders will evolve and become more, not less, restrictive. There will also likely be greater enforcement efforts, clearer police presence and interactions, roadblocks, and perhaps the involvement of the National Guard.

Further, if the aggressive efforts of California, New York, and Pennsylvania fail to “flatten the curve,” or if looser restrictions in Illinois, Ohio or Nevada get abused, other states will likely employ robust enforcement action.

Conversely, if social distancing proves successful, states may employ shelter-in-place orders earlier to reduce the spread of Covid-19. Indeed, roadblocks and enhanced patrols are already in place throughout Washington, D.C., and the police chief in San Jose, Calif., has warned the police were “looking to begin” enforcement through “a criminal citation, business license suspension, and health code citations.”

As we enter this uncharted territory, companies should keep in mind that, like the orders themselves, enforcement will likely vary from jurisdiction to jurisdiction. Each order, and its enabling legislation, requires case-by-case analysis of whether a particular company’s activities qualify as “essential,” what enforcement mechanisms (particularly against a business) exist, and whether that business could qualify for a waiver.

Regardless, companies that decide to stay open must engage in reasoned decision-making, documenting their compliance with the numerous orders, and their rationale for being “essential.”

The signatory of each order is well aware of its impact on the economy and citizenry, but the health consequences of Covid-19 simply outweigh the economic impact at this time. Businesses should be conscious of this balance in making sound decisions to guard against inviting scrutiny by regulators, health officials, and law enforcement. When our elected leaders say “stay-at-home,” they mean it.

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