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States are issuing commandeering orders to redirect personal protective equipment to help health-care workers fight the coronavirus pandemic. Squire Patton Boggs attorneys lay out issues businesses face with balancing those orders with OSHA duties, eminent domain rules, and public relations issues.

Many states have invoked their respective emergency and disaster powers acts to fight the spread of coronavirus, giving them authority to issue statewide “commandeering orders.”

Generally, these orders direct businesses operating within a state to provide some or all of their personal protective equipment (PPE), often kept for the protection of the business’s own employees, to the issuing state. They are likely to present a variety of issues for businesses, including compliance with federal and state Occupational Safety and Health Administration standards, eminent domain problems, and public relations concerns.

Commandeering Orders

Various states have already issued commandeering orders, including, for example, New Mexico. On March 11, the governor declared a public health emergency under the state’s Public Health Emergency Response Act and simultaneously invoked the state’s All Hazards Emergency Response Act. On March 24, the New Mexico Department of Health issued a public health order titled “Public Health Emergency Order Temporarily Regulating the Sale and Distribution of Personal Protective Equipment Due to Shortages Caused by COVID-19.”

The order provides that NMDH has the legal authority to

1. inspect, regulate or ration health-care supplies if a public health emergency results in a shortage;
2. control, restrict and regulate the allocation, sale, dispensing or distribution of health-care supplies; and
3. maintain and enforce rules for the control of conditions of public health importance.

Pursuant to that legal authority, the New Mexico order directs that

- no health-care provider or wholesale medical supplier in the state with PPE may reduce its inventory of PPE or sell, allocate or otherwise distribute PPE outside of the state without prior approval from the NMDH; and
- that within three business days of the order, each health-care provider and wholesale medical supplier in the state with an inventory of PPE shall report such inventory to the NMDH.

It is worth noting, too, that while New Mexico’s order applies specifically to health-care providers and wholesale medical suppliers, other states’ commandeering orders are broader and apply to any business operating within the state that might have stocks of PPE for any reason.

Common Law Duty of Care and OSHA Issues

In addition to the common law duties of care that employers have to their employees, customer base and the public at large, for example, nearly all employers in the U.S. have a statutory mandate to comply with OSHA’s safety and health standards and requirements.

Importantly, OSHA-regulated employers are under a “general duty” to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

And, depending on the presence of contaminants that may exist in a given workplace, OSHA has specific standards for PPE, which generally require the use of gloves, eye and face protection and respiratory protection.

Therefore, employers should be aware of a potential tension that state commandeering orders create with their general duty requirement. That is, an employer’s duty to provide a safe work environment may necessitate the provision of PPE to employees.

Certain essential jobs and critical infrastructure workplaces may require PPE in order for employees to be properly protected from recognized hazards. However, if an employer cannot provide PPE to employees, because a state commandeering order either prohibits it and/or simply takes an employer’s PPE, then employers risk unavoidable non-compliance with OSHA standards and requirements.

This tension is particularly apparent in states like Colorado, which has also issued a quasi-commandeering order because of the lack of PPE for health workers. The governor has also asked all Coloradans to wear “face coverings” when outside of their homes.

At bottom, employers should consider their general duty and other OSHA standards and requirements when faced with negotiations with a state over commandeering orders. In such negotiations and communications with states, legal counsel can help leverage an employers’ common law duties and OSHA requirements to the employers’ advantage and, at the very least, find some middle ground with the states.

Eminent Domain Issues

State commandeering orders may also trigger a variety of eminent domain issues. For example, New Mexico statute provides that “[t]he state shall pay just compensation to the owner of health care supplies, a health facility or any other property that is lawfully taken or appropriated by the secretary of health, the secretary of public safety or the director for temporary or permanent use during a public health emergency.”

And, “[t]he amount of compensation due shall be calculated in the same manner as compensation due for taking of property pursuant to nonemergency eminent domain procedures . . . provided that the amount of compensation calculated shall include lost revenues and expenses incurred due to the taking or appropriating of property, including a health facility.”

While the application of eminent domain principles to states’ commandeering of PPE may seem straightforward initially, businesses should be mindful of a myriad of issues and questions that are likely to surface. It is vital that employers partner with legal counsel who have identified the universe of potential questions and issues at play, fully thought through them and started developing cogent, creative and concrete solutions.

Public Relations Issues

Finally, any business subject to a state commandeering order should be keenly alert to possible issues stemming from public perception and work with legal counsel now to prevent playing defense only.

Consider a situation where a business does not comply, or does not *fully* comply, with a state commandeering order. Despite a business’s valid, persuasive, and defensible reasons for such noncompliance (*e.g.*, adhering to the OSHA general duty clause), a noncompliant business risks front-page headlines framing it as obstructing state emergency and relief efforts, or putting profits over people, or actively harming the public good, or exacerbating the pandemic.

At that point, playing defense may be the only option. However, staying ahead of such headlines, and working closely with practiced legal counsel to do so, can prove invaluable to a company’s bottom line.

While the New Mexico order was used as a case study of sorts here, other states have also issued commandeering orders and more are likely to follow. These orders are unprecedented in their breadth and importance, and raise a host of novel legal, monetary and reputational issues. Businesses will benefit by understanding and getting ahead of these issues now.

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