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Introduction

Throughout the world, novel coronavirus 2019 (COVID-19) has presented unprecedented challenges to corporations and governments. Spurred by a need to curb the virus's spread, governments have implemented sweeping measures, including mandatory and recommended industry sector shutdowns and other limitations on the activities of certain types of businesses. Many companies struggle to understand these shutdowns fully. What is the scope of the shutdown? What industry sectors are exempted? Is the shutdown mandatory or subject to individual judgment on the part of the company? When might the shutdown be lifted?

Companies doing business in the US and Japan continue to grapple with these questions. This paper sets forth a broad roadmap of industry shutdowns in these countries, with a focus on the current restrictions applicable in Los Angeles, California, and Tokyo. If you should have any more specific inquiries in relation to the contents hereof, or in connection with any other legal obstacle relating to COVID-19, we stand ready to assist.

US Overview

Defining Essential Business

On March 19, 2020, as various state and local governments throughout the US began to issue "stay at home" orders directed at individuals and businesses in order to slow the spread of COVID-19, the US Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) issued guidelines listing some 16 industry sectors as "essential critical infrastructure," which CISA recommended be exempt from such state and local orders (CISA Guidelines). Those CISA Guidelines, as amended March 28, 2020,¹ listed the following sectors:

1. Healthcare/Public Health
2. Law Enforcement, Public Safety and Other First Responders
3. Food and Agriculture
4. Energy
5. Water and Waste Water
6. Transportation and Logistics
7. Public Works and Infrastructure Support Services
8. Communications and Information Technology
9. Other Community or Government-based Operations and Essential Functions
10. Critical Manufacturing
11. Hazardous Materials
12. Financial Services
13. Chemical
14. Defense Industrial Base
15. Commercial Facilities
16. Residential/Shelter Facilities and Service

Within each of these sectors, the CISA Guidelines identified many specific types of businesses as essential and recommended that such businesses be allowed to continue operations, and that those employees essential to such operations be allowed to access their workplaces in order to conduct such work.

Thereafter, as stated above, during March and April 2020, almost all of the states, and a multitude of county and city governments, issued stay at home and/or shutdown orders or guidance, affecting businesses and employees in their jurisdictions. While these orders differ in some respects from state to state, and county to county, many of these orders cited, and followed, the CISA Guidelines in exempting certain businesses and workers from the stay at home directive.

¹ CISA Guidelines available at the following: https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf.

The California Example

Although states have varied in their specific approaches, the example of California is indicative of the complex dynamics driving policymaking. On March 19, 2020, California Governor Gavin Newsom issued an Executive Order,² directing “all individuals living in the state of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors,” as outlined in the CISA Guidelines. The effect of this Executive Order was to close down schools, restaurants (except for takeout, as noted below), many state government offices, bars, nightclubs, large group sporting events, non-essential travel, much of the service industry, etc.

On March 22, 2020, pursuant to Governor Newsom’s March 19 Executive Order, the California State Public Health Officer issued a list of “essential critical infrastructure workers” to assist local authorities in determining which businesses could remain open and which employees would be allowed to continue to work at their usual workplace rather than from home (California Order).³ While tracking the CISA Guidelines in large part, the California Order goes into greater detail in setting forth those businesses considered essential. For example, under the transportation sector, the California Order specifically includes aviation, which in turn includes aircraft, which also includes both commercial and recreational aircraft, as well as manufacturing such aircraft and their components. Similarly, under the food sector, the California Order specifies that restaurant takeout businesses, as a source of food, may continue to operate.

In addition to the March 19 Executive Order, in March 2020 (as revised April 10) Los Angeles County also issued a stay at home order affecting that county’s residents and businesses.⁴

The City of Los Angeles also issued its own stay at home order, as revised April 10, 2020 (Los Angeles City Order).⁵ The Los Angeles City Order closed schools and all non-essential businesses, including restaurants (except for takeout), bars, etc., and banned large public gatherings, ordered city residents to “isolate themselves at home” except for essential travel to obtain food, etc., and ordered “social distancing” when out of one’s home. However, as with the Los Angeles County Order, the Los Angeles City Order provided certain exemptions for essential businesses, which largely track the CISA Guidelines.

The Los Angeles City Order is in effect until at least May 15. The California Order is expected to last until at least mid-May, as well.

Prospects for Lifting Stay at Home Restrictions

Although decisions as to when the stay at home orders will be lifted or reduced will be made by the state and local authorities who issued such orders, on April 16, the White House announced its own guidelines for “Opening Up America Again.”⁶ These guidelines suggest certain criteria to be met as a prerequisite (a reduction in the rate of infection, the availability of effective testing, etc.) for consideration of reopenings and, further, suggest that such be done in three “phases.” Since the states and localities are not obligated to follow these guidelines, it is unclear at this time to what extent they will be used by such state and local authorities when considering reductions to or lifting of stay at home restrictions in their jurisdictions.

Japan Overview

In response to the COVID-19 pandemic, on March 14, 2020, Japan revised the New Influenza Special Measures Act (*Shingata Influenza tou Taisaku Tokubetsu Sochi Hou*) (the Act).⁷ Subsequently, on April 7, 2020, the Japanese government declared a state of emergency applicable to the following prefectural areas: Saitama, Chiba, Tokyo, Kanagawa, Osaka, Hyogo and Fukuoka.⁸ The scope of this emergency was expanded on April 16, 2020 to include all other prefectures.

The Act provides that, during the emergency period, prefectural governors may not legally obligate any businesses to remain closed. Prefectural governments may, however, “request” certain entities (such as schools, social welfare facilities, entertainment facilities and other facilities that a number of people use) to suspend their operations. Notably, non-compliance with such requests will not subject such businesses to legal penalties.

The Tokyo Example

The approaches throughout Japan have been varied, but the Tokyo approach is one that many multinationals are monitoring closely. On April 10, 2020, Governor Koike of Tokyo announced that companies would be affected by shutdowns in one of four ways. Some companies would be formally requested under the Act to suspend their operations, others would be asked generally (i.e., not under the Act) to suspend operations; others might be requested to suspend operations, depending on the particular types of those companies’ business activities; and, lastly, some companies would be deemed essential and would not be requested to limit their operations.⁹

2 This Executive Order is available at the following: <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>.

3 The California Order is available at the following: <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>.

4 This order is available at the following: http://publichealth.lacounty.gov/media/Coronavirus/HOO_Safer_at_Home_Order_for_Control_of_COVID_04102020.pdf.

5 This order is available at the following: <https://www.lamayor.org/sites/g/files/wph446/f/page/file/SaferAtHomeAPR10.pdf>.

6 These guidelines are available at the following: <https://www.whitehouse.gov/openingamerica/>.

7 The Act is available at the following (Japanese only): https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=424AC0000000031.

8 “[COVID-19] Declaration of a State of Emergency in response to the Novel Coronavirus Disease”: https://japan.kantei.go.jp/ongoingtopics/_00020.html.

9 “Emergency Measures by Tokyo Prefecture for Prevention of Infection with COVID-19”, available at the following (Japanese only): https://www.metro.tokyo.lg.jp/tosei/hodohappyo/press/2020/04/10/documents/27_00.pdf.

Facilities Requested to Suspend Operation

The following facilities have been formally requested under the Act to suspend their operations:

- Recreation facilities (such as cabarets, night clubs, dance halls and bars)
- Universities and cram schools, (such as educational facilities, driving schools and cram schools that have more than 1,000 square meters of the total floor area)
- Sports and recreation facilities (such as gymnasiums, swimming pools, bowling alleys, mahjong parlors, pachinko parlors, game arcades)
- Theaters (such as movie theaters)
- Meeting halls and exhibition facilities in excess of 1,000 square meters, including (i) public halls and exhibition halls, and (ii) museums, art galleries, libraries, hotels and inns (limited to areas used for meetings)
- Commercial facilities (other than stores for daily necessity products or services) that have more than 1,000 square meters of total floor area

Facilities Asked Generally to Cooperate to Suspend Operations

The following facilities that have up to 1,000 square meters of total floor area have been asked generally (i.e., not under the Act) to suspend their operations:

- Universities, certain other educational facilities, driving schools and cram schools, provided that such facilities with up to 100 square meters of total floor are exempted if they take appropriate measures to prevent infection
- Meeting halls and exhibition facilities (such as museums, art galleries, libraries, hotels and inns (limited to areas used for meetings))
- Commercial facilities (other than stores for daily necessity products), provided that such facilities with up to 100 square meters of the total floor are exempted if they take appropriate measures to prevent infection

Facilities That May Be Requested to Suspend Operations Depending on the Type of Facility

The following facilities may be requested to suspend operation depending on the type of facility:

- Certain educational facilities other than universities
- Social welfare facilities (such as facilities providing welfare services or health/medical services that are used for outpatient nursing or short-term stays)

Facilities That Are Essential

The following facilities are essential and may remain open, but have been requested to maintain appropriate measures to prevent infection:

- Medical facilities (such as hospitals, clinics and pharmacies)
- Facilities for daily necessities (such as wholesale markets, grocery stores, convenience stores, daily necessities supplies areas in department stores and supermarkets, etc.)
- Facilities supplying foods (such as restaurants (including taverns), coffee shops (including home delivery and takeout services), provided that shortened business hours (from 5 a.m. to 8 p.m.) and shortened alcoholic beverage serving hours (up to 7 p.m.) have been requested
- Housing, accommodation facilities (such as hotels, inns, apartment complexes, dormitories, etc.)
- Transportation facilities (such as buses, taxis, rental cars, railways, ships, aircraft and logistics services)
- Manufacturing plants
- Financial institutions (such as banks, stock exchanges, securities companies, insurance companies and government offices)
- Others (such as media, pawnshops, veterinary hospitals, beauty salons, laundries, garbage disposal services)

Appropriate Measures to Prevent Infection

Tokyo's government has advised that, where appropriate measures to prevent infection need to be implemented, certain measures may be deemed appropriate. First, people who have fevers should be prohibited from entering business premises. Second, the three C's should be avoided: closed spaces with insufficient ventilation, crowded conditions and conversations at a short distance. Third, precautions should be taken to reduce contact and to reduce airborne micro droplets. Lastly, precautions should be taken during travel. The specific measures that might need to be implemented will vary, depending on the business.

Lifting Industry Restrictions

Japan's declared state of emergency is currently scheduled to remain in effect until May 6, but given the current circumstances, there is a possibility that this date could be pushed back. If that happens, then local governments throughout Japan will likely continue to restrict various economic activity.

At present, the Japanese government has not published any specific guidelines or criteria for reopening industry sectors. Notably, however, under the Act, the Japanese government must terminate the current emergency declaration if "implementation of the Measures under the State of Emergency of Novel Influenza is deemed unnecessary,"¹⁰ although the Act itself is silent on how the word "unnecessary" is to be interpreted.

Conclusion

States and cities in the US have implemented a more mandatory approach to shutting down economic sectors, while Japan's approach has been based more on a combination of formal and informal requests and recommendations, but the result, in each case, has been widespread shutdowns of broad industry sectors. In both countries, detailed criteria for easing stay at home restrictions and allowing or advising shut down businesses to reopen have not yet been established, as governments are having difficulty assessing the public health risks.

In the current climate, companies doing business in the US will need to continue to monitor compliance with any mandatory measures, and those doing business in Japan are recommended to comply with national and local governments' relevant recommendations and requests. They will also need to understand which of their customers, suppliers and other business partners located in various jurisdictions are subject to potential or actual shutdowns. If you have any questions about how a particular business will be treated in the current shutdown environment, or any other legal question or issue in connection with COVID-19, our experienced team stands ready to assist.

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