

COVID-19: BUSINESSES FACE SUPPLY CHAIN CHALLENGES AS PANDEMIC TRIGGERS STATE 'STAY AT HOME' AND BUSINESS CURTAILMENT ORDERS

Date: 25 March 2020

U.S. Public Policy and Law Alert

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In an effort to respond to the COVID-19 pandemic, states across the nation have adopted restrictions limiting the in-person operations of manufacturers, businesses, and institutions to those deemed "essential" or "life sustaining." To date, twenty-three states^[1] have issued either "stay at home" orders, business curtailment orders, or both, requiring businesses deemed nonessential or non-life-sustaining to close, with more states likely to follow. In other states without a statewide order, some county and city governments are taking similar action (for example, Dallas County in Texas and Mecklenburg County in North Carolina). While the federal government has offered guidance as to what types of businesses should be considered essential^[2], the classification of what is — and is not — essential or life sustaining is currently determined as a matter of state and local law, which varies from state to state and locality to locality.

In navigating these myriad state and local orders, businesses face challenges and concerns regarding the status of not only their own operations, but also those of their supply chain vendors and transporters. Even where a manufacturer or business is in a state without restrictions or in a jurisdiction where they are allowed to stay open as an essential operation, their component and service suppliers may be subject to different classifications. The laws of the state where the supplier's business facility is located will apply to that supplier and govern its ability to operate^[3].

This alert addresses a handful of the most pressing legal and practical issues that arise from this rapidly evolving state of affairs and provides some suggestions on actions that a customer entity or vendor/supplier may consider to address such supply chain issues.

STATES TAKE DIFFERING APPROACHES

The different approaches taken by the various states in identifying essential businesses have resulted in varying degrees of restriction. Many states, such as California, Hawaii, Louisiana, Maryland, Ohio, and Wisconsin, incorporate by reference the list of essential critical infrastructure sectors identified by the U.S. Department of Homeland Security, many of which sweep into the "essential" category workers that support the supply chain associated with the broad industry sectors that are deemed essential. Other states, such as Pennsylvania and Delaware, have taken a more granular approach in identifying specific business sectors as "life sustaining" in a manner that roughly follows along with the industry groupings of the North American Industry Classification

System ("NAICS"). Particularly in states taking the more granular classification approach, businesses deemed essential or life sustaining have faced circumstances in which their suppliers may be classified as nonessential, thereby jeopardizing the proper functioning of the entire essential supply chain.

In Pennsylvania, this disconnect has been addressed through a waiver system in which businesses that are initially classified as nonessential but are suppliers of essential businesses may seek permission to continue operations. Obtaining a waiver requires an application with the Pennsylvania Department of Community and Economic Development ("DCED") in which the applicant must justify its treatment as a "life-sustaining" business and describe its plan for compliance with guidelines issued by the Center for Disease Control for maintaining employee safety during the COVID-19 pandemic. Waiver applicants, however, are required to suspend in-person, physical operations unless and until a waiver is approved[4].

In New York, vendors, suppliers, or other companies that provide support to an essential business that are required for the essential business's operation are exempt from the restrictions under the relevant New York Executive Order and accompanying guidance. Any nonessential businesses can seek to become an essential business by request.

Delaware has also adopted a more granular approach of identifying specific businesses as essential based on their NAICS code. Delaware has addressed supply chain concerns by identifying specific suppliers to essential industry sectors. For example, in the case of chemical and industrial gas supply chains, workers at chemical manufacturing plants, in laboratories, at distribution facilities, and workers who transport basic raw chemical materials to the producers of industrial and consumer goods are all deemed essential. A business may contact the state by email if it questions its classification, believes it should be considered part of an essential supply chain, or wishes to seek some type of exemption.

States such as Illinois, Michigan, and Wisconsin also allow by order certain limited operations for nonessential businesses for the purpose of minimum basic operations, which may include maintaining telecommunications equipment to allow employees to work from home, performing payroll functions, and preserving inventory, among other tasks.

This problem of a patchwork of restrictions by the states is further compounded by variation at the local level in states such as Colorado, Georgia, Kansas, North Carolina, and Texas, where there is no state level order presently in place, but counties or cities have issued restrictive orders on business operations.

STEPS BUSINESSES CAN TAKE

Given the uncertainty of the present circumstances, businesses should consider taking the following steps (among others) to protect their supply chains:

- **Identify the states that matter.** Unfortunately, there is no "one-size-fits-all" approach to these concerns. The differences between the states requires that businesses consider not only the states in which they operate but also the states (and counties or cities, as applicable) in which their suppliers operate. For each location, businesses should identify whether they are considered essential and how their suppliers are similarly classified.
- **Seek waivers where applicable.** Any business required to close and classified as nonessential that operates as a necessary supplier to a business deemed essential could take advantage of any state

waivers that are available. However, because the submission of a waiver request could be implied as an admission that no exception in the order was applicable, any business should consider consulting with counsel and pursuing a waiver only if there is no applicable exception to the business in the order or its accompanying guidance. Where a business lies in a "gray area" and desires confirmation of exemption or a waiver "in an abundance of caution," it should work with counsel to carefully word any such request. Moreover, essential businesses should consider assisting their critical suppliers (and their suppliers' suppliers) in pursuing such waivers where appropriate.

- **Communicate and collaborate with your suppliers.** In communicating with suppliers, essential businesses should be mindful of the need to balance (a) their own critical need to obtain suppliers' compliance with their contractual commitments, and (b) the suppliers' obligation to operate in compliance with the state and local orders discussed above. Striking this balance will require state-specific analysis to ensure essential businesses and their suppliers work together in compliance with all applicable laws to protect their respective interests to their mutual benefit. Any formal communication to suppliers should be prepared with input from legal counsel.
- **Communicate with your own employees.** Essential businesses should consider providing letters to their own employees that document the basis for their continued performance of their essential business functions^[5]. Such letters can be used by those employees in communications with both suppliers and legal authorities to help relieve confusion regarding the legality of the employees' commuting in public or performance of their job duties.
- **Check back on business restrictions regularly.** Finally, businesses should be rechecking state government sources of information about these orders and restrictions regularly, as many of these orders will be further amended or clarified by additional guidance in the days to come.

Attorneys at K&L Gates have tracked (and continue to track) developments concerning evolving governmental responses to the COVID-19 pandemic in all fifty states, and are available to answer any questions related to state and local shutdown orders. Additionally, up-to-date information and resources regarding the broader legal landscape surrounding the impact of the coronavirus, generated by K&L Gates professionals in a variety of practices, are available at the K&L Gates HUB.

NOTES:

[1] As of 10 a.m. Eastern Time on March 25, 2020, the states imposing some form of state-wide stay-at-home or business curtailment order so far include California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Vermont, Washington, West Virginia, and Wisconsin.

[2] See U.S. Department of Homeland Security Cybersecurity and Infrastructure Security Agency, Memorandum of Essential Critical Infrastructure Workers During COVID-19 Response (March 19, 2019), available [here](#).

[3] In some instances, a supplier that transports goods across state lines also may need to consider the restrictions in states through which the supplier travels.

[4] Pennsylvania has provided guidance for businesses seeking a waiver as a supplier of a life-sustaining business, which is available on the DCED's website.

[5] In certain states, this may even be required.

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