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Important Update Regarding Bay Area Shelter-in-Place Orders: What Businesses Need to Know

As part of the Bay Area's continued response to the Novel Coronavirus Disease 2019 (COVID-19), on March 31, 2020, the counties of Santa Clara, San Mateo, San Francisco, Marin, Alameda, and Contra Costa, and the City of Berkeley issued updated orders (the Orders) extending through May 3, 2020 the shelter-in-place orders issued on March 16, 2020. The Orders clarify, strengthen, and extend certain terms of the prior orders.

The Orders from all six counties and the City of Berkeley are substantively identical. The Orders became effective at 11:59 p.m. on March 31, 2020, and will continue in effect until 11:59 p.m. on May 3, 2020, or until they are extended, rescinded, superseded, or amended. The situation remains fluid, and it is possible that local or state authorities may update or supersede these orders at any time. Individuals and entities are therefore advised to discuss their particular circumstances with legal counsel in order to determine the best path forward as Latham continues to monitor the rapidly developing situation.

General Restrictions

Pursuant to the Orders, all individuals currently living in these seven geographies are ordered to shelter at their place of residence except for Essential Activities, Essential Governmental Functions, Essential Travel, to work for Essential Businesses, or to perform Minimum Basic Operations for non-essential businesses. When people need to leave their residences for the limited purposes allowed in the Orders, they must strictly comply with Social Distancing Requirements, which require:

- Maintaining at least six-foot social distancing from individuals who are not part of the same household or living unit
- Frequently washing hands with soap and water for at least 20 seconds, or using hand sanitizer that is recognized by the Centers for Disease Control and Prevention as effective in combatting COVID-19
- Covering coughs and sneezes with a tissue or fabric or, if not possible, into the sleeve or elbow (but not into hands)
- Avoiding all social interaction outside the household when sick with a fever or cough

Essential Activities are broadly defined in the Orders, and include activities or tasks important to health and safety, such as obtaining medical supplies or medication; visiting healthcare professionals; obtaining necessary services or supplies to maintain the habitability, sanitation, and operation of residences; and performing work providing products and services at an Essential Business; and maintaining Minimum Basic Operations (discussed below).

Non-Essential Businesses

Except for operations consisting exclusively of owners, employees, volunteers, or contractors performing activities at their own residences, all non-essential businesses with facilities in the covered geographies are required to cease all activities at facilities located within the region, except Minimum Basic Operations.

The Orders define Minimum Basic Operations as permitting all non-essential businesses to carry out the minimum necessary activities to maintain and protect the value of a business' inventory and facilities; ensure security, safety, and sanitation; process payroll and employee benefits; provide for the delivery of existing inventory directly to residences or businesses; and related functions; in addition to the minimum necessary activities to facilitate owners, employees, and contractors of the business being able to continue to work remotely from their residences, and to ensure that the business can deliver its service remotely. To the extent possible, owners, employees, and contractors performing Minimum Basic Operations must comply with the social distancing requirements described above.

Essential Businesses

Essential Businesses are listed under Section 13(f) of the Orders, and also include Healthcare Operations; businesses that operate, maintain, or repair Essential Infrastructure; and businesses that supply other Essential Businesses with the support or supplies necessary to operate, but only to the extent that they support or supply these Essential Businesses.

The Orders strongly encourage Essential Businesses to remain open while also maximizing the number of employees who work from home and assigning only those employees who cannot perform job duties from home to work outside of the home. Businesses that include an Essential Business component at their facilities alongside non-essential components must, to the extent feasible, scale down operations to the Essential Business component only, provided, however, that mixed retail businesses that are otherwise allowed to operate under this Order may continue to stock and sell non-essential products.

Essential Businesses are also ordered to prepare, post, and implement by no later than 11:59 p.m. on April 2, 2020 a Social Distancing Protocol for each of their facilities in the covered geographies that are frequented by the public or employees, which must be substantially in the form attached to the Orders and which is [available here](#). The Social Distancing Protocol must explain how the business is achieving certain social distancing requirements described in Section 13(h)(i)-(vii) of the Orders and must be easily viewable by the public and employees. A copy must be provided to each employee performing work at an operating facility. All Essential Businesses are ordered to implement the Social Distancing Protocol and will be required to provide upon demand to any authority enforcing the Orders evidence of the Protocol's implementation.

Statewide Shelter-in-Place Order

On March 19, 2020, California's State Public Health Officer issued a statewide order pursuant to which all individuals living in California were ordered, until further notice, to stay home or at their place of residence except to get food, care for a relative or friend, get necessary healthcare, or maintain the continuity of

operation of critical government services, schools, childcare, and construction, including housing construction and 16 federal critical infrastructure sectors. The March 31, 2020 Bay Area Orders adopt in certain respects more stringent and additional restrictions.

The Orders clarify that, to the extent a conflict exists between the Orders and any state public health order related to the COVID-19 pandemic, the most restrictive provisions will control. It remains unclear, however, whether the statewide order nullifies exemptions contained in the Orders permitting all businesses to maintain Minimum Basic Operations, or whether the statewide order cancels the sunset provisions contained in the Orders. Latham continues to monitor the situation closely.

Enforcement

The express intent of the Orders is to ensure that the maximum number of people shelter in their places of residence to the maximum extent feasible to slow the spread of COVID-19 and mitigate the impact on delivery of critical healthcare services to those in need. The Orders clarify that all of their provisions must be interpreted to effectuate this intent, and that the violation of, or failure to comply with, the Orders is a misdemeanor punishable by fine, imprisonment, or both.

The Orders are not clear as to the extent or nature of any enforcement, which likely will take place on a case-by-case basis. It is important to note, however, that businesses may possibly subject themselves to tort liability to the extent anyone becomes infected with COVID-19 as a result of those businesses carrying on operations in contravention of the Orders.

Please see the following links for additional information:

- The Bay Area shelter-in-place orders can be found here:
<https://www.lw.com/admin/Upload/Documents/summary-shelter-in-place-bay-area.pdf>
- <https://www.sccgov.org/sites/phd/DiseaseInformation/novel-coronavirus/Pages/home.aspx>
- <https://www.smchealth.org/coronavirus>
- <https://www.sfdph.org/dph/alerts/coronavirus.asp>
- <http://www.acphd.org/2019-ncov.aspx>
- <https://www.coronavirus.cchealth.org/>
- <https://coronavirus.marinhhs.org/>
- <https://www.cityofberkeley.info/covid19/>

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