

March 17, 2020 | Number 2617

## Important Notice Regarding Bay Area Shelter in Place

**Due to the outbreak of COVID-19, the counties of Santa Clara, San Mateo, San Francisco, Marin, Alameda, and Contra Costa, and the City of Berkeley, have issued orders (the “Orders”) instructing individuals to shelter at their place of residence with certain important exceptions, which permit all businesses to maintain certain minimum operations while providing broader exemptions to certain specified industries.**

The Orders from all six counties and the City of Berkeley are substantively identical, and are discussed below. The Orders became effective at **12:01 a.m. on March 17, 2020 and will continue in effect until 11:59 p.m. on April 7, 2020**, or until they are extended, rescinded, superseded, or amended.

We understand that the Orders will have significant implications for businesses located in the Bay Area and we are hopeful that the information below will provide some guidance to Latham clients operating in these geographies. Section 10(f) of Orders provides a list of Essential Businesses that are exempt from Section 3’s requirement that businesses located across the seven geographies cease activities, while Sections 10(b) and (c) of the Orders provide additional information regarding businesses involved in “Healthcare Operations” and “Essential Infrastructure.” It is important to note, however, that the situation remains fluid, and government agencies have not yet provided significant guidance as to the specific contours of the Orders. Accordingly, while Latham believes that the summary provided below may be useful to obtain a general understanding of the Orders, we recommend that any of our clients affected by the Orders discuss their particular circumstance with their Latham contacts in order to determine the best path forward.

**All individuals currently living in these geographies are ordered to shelter at their place of residence to the maximum extent feasible.** When people need to leave their residences for certain “Essential Activities,” they should follow Social Distancing Requirements, which involve maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible, or using hand sanitizer, covering coughs or sneezes, regularly cleaning high-touch surfaces, and not shaking hands.

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

**Essential Businesses** are listed under Section 10(f) of the Orders, and also include Healthcare Operations and Essential Infrastructure, which are discussed in greater detail below.

Section 3 of the Orders requires all businesses with facilities in the geographies subject to the Orders to “cease all activities” **except Minimum Basic Operations**. Minimum Basic Operations are defined to permit all non-essential businesses to carry out “[t]he minimum necessary activities to maintain the value of the businesses’ inventory, ensure security, process payroll and employee benefits, or for related functions, and to facilitate employees of the businesses being able to continue to work remotely from their residences. **Significantly, it is important to note that the Orders do not require businesses to shut down operations entirely.** Instead, they only require businesses to cease operations except to the extent necessary to perform Minimum Basic Operations, which are described above.

## Industry-Specific Summaries

**Healthcare Operations, including Biotech and Pharma:** Section 10(b) of the Orders provides an important exemption for Healthcare Operations, which are “strongly encouraged to remain open” and are expressly considered “Essential Businesses” under the Orders and therefore exempt from Section 3’s requirement that Non-Essential Businesses cease all activities within facilities located in these geographies.

- Specifically, pursuant to Section 10(b), individuals may leave their residences to **work for or obtain services** at any “Healthcare Operations,” which are **encouraged to remain open**, and which include hospitals, clinics, dentists, pharmacies, **pharmaceutical and biotechnology companies**, other healthcare facilities, healthcare suppliers, home healthcare services providers, mental health providers, or any related and/or ancillary healthcare services,” provided that any such work is performed, to the greatest extent feasible, in compliance with the Social Distancing Requirements described above. Section 10(b) requires that the exemption **“be construed broadly to avoid any impacts on the delivery of healthcare, broadly defined.”**
- It is reasonable to interpret the Orders as exempting all of Latham’s biotech and pharmaceutical clients from the requirement that they cease operations in these geographies.

**Essential Infrastructure, including Internet and Telecom:** Section 10(b) of the Orders provide an important exemption for Essential Infrastructure, which are **“strongly encouraged to remain open”** and are expressly considered “Essential Businesses” under the Orders and therefore exempt from Section 3’s requirement that Non-Essential Businesses cease all activities within facilities located in these geographies.

- Specifically, pursuant to Section 10(c), individuals may leave their residences **to provide any services or perform any work** necessary to the operations and maintenance of “Essential Infrastructure,” which includes, among other things, **“internet and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications and web-based services),** provided that any such work is performed, to the extent possible, in compliance with the Social Distancing Requirements described above. In addition to the businesses described above, the Orders define Essential Businesses to also include newspapers, television, radio, and other media services, and also businesses that supply other essential businesses with the support or supplies necessary to operate.

## Enforcement

Section 11 of the Order requests that law enforcement officials ensure compliance with and enforce the Orders, and also indicates that the violation of any provision of the Orders constitutes an imminent threat to public health. 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.

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If you have questions about this *Client Alert*, please contact the author below or the Latham lawyer with whom you normally consult:

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