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Business Continuity During Coronavirus Lockdowns: Am I an “Essential” Business?

With at least one in four Americans living under lockdown orders due to the Covid-19 pandemic, a new question has started to affect many US companies: can my company stay open during a lockdown?

The lockdown orders that started last week in the Bay Area of California have now spread to multiple states have some common features that are helpful to understand:

- They generally allow “essential businesses” to stay open despite the lockdown order;
- They generally do not require a formal application process to become certified or designated as “essential,” or a permit to prove that they are entitled to continue operating;
- They may define “essential” in an ambiguous fashion;
- They have been issued only at the state or local level so far; and
- The question of what is “essential” may be a subjective determination.

The initial lockdown orders in the Bay Area generally provided only that “essential” businesses could stay open and recited a short list of examples: grocery stores, medical providers, and pharmacies, for example. The overall trends in the later orders seem to be to expand that list to include other types of industry, as well as to include businesses that support an essential industry.

For example, the Illinois order issued late on Friday has a list of “essential businesses” that runs to

fifteen or more sub-sections. Not surprisingly, food, medical care and medicine remain on the list; the list also specifically includes several support industries and supply chain industries relating to the production and delivery of food and medical goods and services. The Illinois order also permits various other enterprises such as office supply companies and media companies to remain open because of their criticality to keeping the country running.

It is likely that future orders will follow this trend of naming more and different kinds of industry as “essential” to the orderly conduct of life even in extraordinary times. Unfortunately, however, all such orders will be unique and must be reviewed case by case. For any company that is outside the food and medicine category, this likely will require a close examination of any lockdown orders that apply to them, and an understanding that facilities in different states (or cities) are likely to be subject to different rules.

Upon a determination that a company is (or is not) a permitted “essential” business, the next step is to communicate clearly with employees about expectations, such as whether they are required report to work as usual, to stay home, or to work staggered shifts.

Generally speaking, the “essential” business is not required to obtain a permit to remain in operation. It will be prudent, however, to monitor conditions in the workplace to ensure compliance with any applicable social distancing requirements as well as workplace cleaning recommendations. Given how rapidly conditions are changing, all companies should also continue to monitor local rules to make sure that any new requirements or prohibitions are acted upon timely. Finally, corporate management may wish to enact a plan for local management to respond to any local law enforcement personnel who inquire about why a particular office, factory, shop, or other facility remains open.

Mitzi L. Hill

Mitzi Hill is the chair of Taylor English’s Data Security & Privacy Department. She works with executive management from businesses of all sizes on data and information matters including breach response; creating policies and practices that reduce their risk of consumer privacy claims; security and privacy requirements in customer, vendor, and insurance contracts; and diligence of privacy and security matters in the M&A context.

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Taylor English Duma LLP | 1600 Parkwood Circle, Suite 200 | Atlanta, Georgia 30339