

INSIGHTS

Is Your Manufacturing Operation an "Essential Business" in the Age of the Coronavirus?

March 24, 2020

By: [Richard F. Whiteley](#)

As a business with manufacturing operations that cannot be operated remotely by employees at home, it is challenging to comply with health and safety obligations in the age of the Coronavirus (COVID-19), while also preserving the financial integrity of the business so that orders are fulfilled and employees are working. Challenges arise daily as governmental authorities try to control the spread of COVID-19 by issuing orders that compel businesses to close, and citizens to stay home. A paramount question in determining whether operations can continue is whether the company is an “essential” or “life sustaining” business.

Is There a Mandatory Order?

The first step in this process is determining whether the directive at issue is a guideline or an order from a governmental entity that has jurisdiction over the business and its employees. It is important that applicable government orders are complied with. However, in some cases, directives or statements made by a Mayor or a Governor are not mandatory, but are only suggested guidelines. Mandatory orders often reference statutes that set forth the powers of the governmental entity during an emergency, or state that violations are punishable with fines or imprisonment (or similar language). Even if your facility is not located in the jurisdiction at issue, a shelter in place order in a nearby county can drastically affect the availability of your workforce. It is important to monitor the communications of relevant governmental entities, both before and after orders are issued. Even after orders have issued, they are often revised, amended or clarified in response to questions or public pressure.

All Orders are not Created Equal.

Numerous governmental entities have issued directives or orders, including but not limited to [California Executive Order N-33-20](#), [New York Executive Order 202.6](#), [New Jersey Executive Order 108](#), an [Executive Order from Pennsylvania Governor Wolf](#), [Ohio Department of Health Director's Stay at Home Order](#), [Texas Executive Order GA-08](#), [Louisiana Proclamation 33 JBE 2020](#), [Michigan Executive Order No. 2020-21](#), [West Virginia Executive Order No. 9-20](#), [Indiana Executive Order No. 20-8](#), and [Connecticut Executive Order No. 7H](#). There will be more orders issued in the coming weeks. It is important to locate and verify the order at issue on the website of the governmental entity and review it in its entirety without relying on interpretations or partial quotations by the media, which can be inaccurate or incomplete.

While many orders have similar language and provisions, they are all unique and must be analyzed independently. Some orders include a general instruction that businesses cease

operations or that citizens stay home or shelter in place, followed by exceptions or definitions of “essential businesses” or “life sustaining businesses” that are allowed to continue operating. The focus for manufacturing companies will be the definitions and exceptions in the order. These definitions and exceptions will need to be carefully reviewed to identify categories of business operations that may include your business.

Some orders include general language and generic categories of exceptions that invite broad interpretations. For example, New York Executive Order 202.6 includes the language that “any essential business or entity providing essential services or functions shall not be subject to the in person restrictions. This includes . . . essential manufacturing . . . construction . . . [and] vendors of essential services.” While other states are more restrictive and issue orders that provide specific lists of businesses that may continue operations and others that may not. This type of order leaves little room for interpretation. For example, in Pennsylvania, the lists are organized by industry, sector, subsectors, and then specific and narrow descriptions such as “bakeries and tortilla manufacturing.” Other states, like California, have issued orders that tailor their exceptions to be consistent with maintaining the continuity of operations for the federal [critical infrastructure sectors](#) as outlined by the Department of Homeland Security.

There is often published guidance, FAQs and public speeches that accompany orders, which can provide valuable information about the intent of orders and to what businesses they apply. These resources should be consulted as they may provide more clarity on gray areas of certain orders.

Does the Business Supply Products to Essential Businesses?

It is imperative to ensure you have a complete understanding of the business operations at each facility and what customers and industries it is supplying. While the business may not fit into one of the excepted categories, it may be providing products to other businesses that have been deemed “essential” or “life sustaining.” Most orders have exemptions for non-essential businesses that provide products for essential businesses or infrastructure. For example, if a business manufactures refrigeration equipment (which is not specifically listed in any category of an order), operations may be allowed if the business provides its equipment to grocery stores or hospitals.

There may also be exceptions for certain businesses to operate on a limited basis if there are “minimum basic operations” that are required to preserve the value of its inventory, ensure security and/or process employee payroll.

Should the Business Apply for a Waiver?

Orders may provide a mechanism for requesting an opinion of applicability or for an exemption designation or waiver. The decision to pursue an opinion or request for an exemption designation should be carefully considered with the assistance of counsel and pursued when a determination is made that there are no applicable exceptions to the business in the order or accompanying guidance. The submission of an exception designation or waiver will often be implied as an admission that the exceptions in the order are not applicable. Also, from a practical standpoint, the wait time for a response will be long, and most jurisdictions require operations to cease during this time.

Creative Solutions in Uncertain Times

As states gear up to combat COVID-19, there is a unique and creative opportunity for

businesses to fill the increasing need for medical supplies. In the event that an order precludes a business from continuing normal operations, it is worth considering whether your business can fill this need. At least one state, New York, is offering funding and allowing manufacturing facilities to continue limited operations to manufacture personal protective equipment (PPE), gloves, gowns, and masks.

Conclusion

There are not always easy answers in determining whether a business can continue to operate in the wake of government orders that are issued to slow the spread of COVID-19. In most cases, including counsel (either in house or outside the company) in the analysis and decision making process should be strongly considered. A written record of your analysis, including backup information and sources, should be created and kept in the event your operations are challenged by issuing authorities. Businesses should assume at least some of their operations and employees will be affected by such orders, and be proactive in monitoring the various governmental entities that may have jurisdiction over their operations and employees. When equipped with all the information needed about its operations in advance, and when the order at issue and all other guidance is analyzed in detail, businesses can make legally supportable decisions that maintain the safety and health of their employees.