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## *PH COVID-19 Client Alert Series: Public Health Orders Overview and Preemptive Measures*

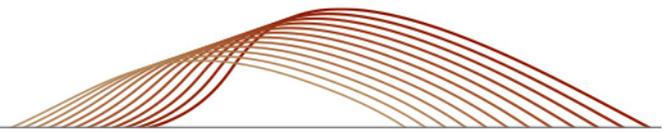
By [Thomas Pollock](#) & [Chris Cruickshank](#)

### **COVID-19 Public Health Orders Overview and Preemptive Measures**

On March 16, 2020, the City of San Francisco, along with other Bay Area Counties, issued “shelter-in-place” orders (the “[Bay Area Orders](#)”). These orders seek to limit all personal, business, and governmental activities other than those considered Essential Businesses or Essential Services. Since then, other California counties, municipalities, as well as the state government, have issued their own shelter in place or stay at home orders. All of which, other than the state order, are modeled after the initial Bay Area Orders.

The spread and diversity of orders has also accelerated outside of California. Adding to the confusion of this new regulatory environment, it is unclear whether statewide orders by California and Pennsylvania preempt local orders. These types of orders, in one form or another, will be implemented across the United States. For example, although New York Governor Cuomo has rejected the phrase “shelter in place” for several days, at his daily news conference on March 19, 2020 he seemed to express support for the material provisions of the San Francisco order, had a copy of the order with him and ordered 75% of employees be kept home (the “[NYS Order](#)”). The next day, he ordered 100% of non-essential workers to stay at home. Similarly, New York City Mayor de Blasio has praised the “San Francisco model.” Because we think the Bay Area Orders have been the most precedential so far, it is worth understanding the essential terms of the Bay Area Orders in order to prepare for similar implementation nationwide.

The essential terms of the Bay Area Orders are limiting activity outside personal residences to “Essential Activities” (defined broadly as (1) tasks essential to each person’s health and safety, (2) obtaining necessary services or supplies or to deliver such to residences to allow persons to live and work from home, (3) outdoor activities while complying with social distancing such as walking, (4) performing work at an Essential Business or to otherwise carry out activities specifically permitted in the orders, including Minimum Basic Operations, and (5) caring for a family member or pet in another household), “Healthcare Operations,” “Essential Government Functions,” and operating or maintaining “Essential Infrastructure.” “Essential Businesses” is the key term in these orders, and the categories are largely copied over from the original Bay Area Orders in subsequent ones with some additions based upon experience. Any travel outside “Essential Travel” (defined broadly as any travel related to a permitted activity above; travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons; travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services; travel to



or return from a place of residence outside the jurisdiction; travel required by law enforcement or court order; and travel required for non-residents to return to their place of residence) is not permitted.

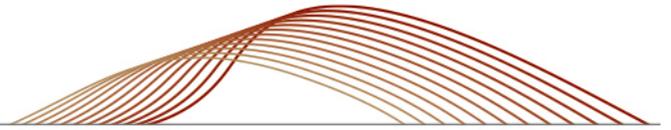
The adoption of new shelter in place orders appear to be iterative, namely, more recently adopted orders have expanded the definition of Essential Businesses. For example, LA County has broadened the terms of several of the categories and San Francisco and Alameda counties have specifically noted that “warehouses and distribution centers that supply businesses that ship and deliver may stay open.” These additions will likely reflect the nature of the communities.

## ***Interpreting the Orders***

In general, the various orders provide little guidance in interpreting their list of essential services/businesses. The current California and New York State orders are especially unclear on what businesses are exempt. For some categories, such as “financial institutions,” included in the Bay Area and Philadelphia Orders, no additional guidance is provided beyond the plain language of the orders. There may be guidance available by looking at state and federal statutory and regulatory definitions of key terms, although it is unclear how persuasive or binding such guidance will be without additional state or federal action preempting local county health orders. Both the Philadelphia and Bay Area Orders also provide exceptions for businesses that provide necessary support or supply for essential businesses. These provisions, along with the repeated use of “and related facilities” are the most likely to provide an exemption for those businesses that are not covered among more straightforward exemptions and create a significant amount of gray areas.

For the large amount of activities that are not specifically covered in the various orders businesses have two choices in determining whether to continue operations. First, businesses that may be uncertain as to whether all or part of their operations fall within a category of Essential Businesses can seek regulatory guidance regarding the permissibility of these activities in as limited a way as possible in support of the other permissible activities. Governmental agencies are maintaining hotlines to answer questions from businesses to clarify whether a business activity qualifies as being essential. Already, the orders adopted by other counties in California have expanded the categories of essential businesses based upon community feedback. The agency you contact may not be prepared to give you a definitive decision, so you or your counsel should be prepared with why you believe you should be exempt. However, asking for guidance involves the risk of being directly denied, so the second option is to rely in good faith upon an exemption that the business and/or its counsel believe covers the applicable activities unless directed otherwise by government officials. Several Bay Area counties have emphasized their desire to avoid punitive enforcement at this time although this sufferance may not last indefinitely.

The federal Cybersecurity and Infrastructure Security Agency (“[CISA](#)”) released guidance on March 19, 2020 providing for what industries are “critical infrastructure” sectors that should not be interrupted if possible. This guidance *did not* attempt to preempt local and state public health orders, but instead was intended to aid local governments in determining which businesses should be exempt. The California Order *exclusively* relies on these sector definitions to determine what businesses are allowed to stay open. CISA identified the following categories: chemical, commercial facilities, communications, critical manufacturing, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare and public health, information technology, nuclear reactors, materials, and waste, transportation systems, and water and wastewater systems sectors. The categories are defined and discussed at



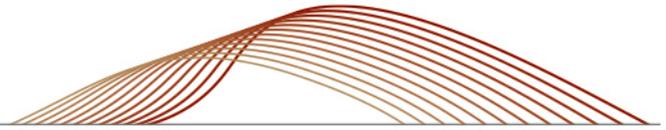
<https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>. If your business fits within one of these categories, it should bolster your argument that your operations fit within the grey areas identified above. It should also be noted to local officials in any communication about your operations classification. If reference to the CISA sectors becomes the new standard in statewide orders it is important to note that CISA identified *sectors* not business models. It is unclear what impact orders like California's will have on those businesses which were exempted due to their operation model (such as delivery to residences) under previous orders. Although California's statewide order is more expansive on exempt businesses that may continue to operate it is much more restrictive than local orders for businesses directly supplying residences. Accordingly, how the state and local orders interrelate still requires additional resolution.

## ***Proactive Measures***

So far, these orders have been issued with effective start dates of less than 24 hours. Accordingly, we believe it is important for companies to take actions to prepare their operations for compliance in the event orders are enacted in jurisdictions applicable to their operations. In many cases, each company may be faced with the possibility that orders may affect some but not all of the jurisdictions in which the company and/or its employees operate or may become effective in the middle of an operation shift. We have identified two major methods of continuing operations. The first, as has been extensively covered and discussed outside this memo in other Paul Hastings client alerts, is transitioning as much of your workforce as is practical to work remotely. All orders to date encourage business to remain open but mandate that work be performed remotely. In addition, the Bay Area Orders provide an exception for "Minimum Basic Operations" that allow a token in-office presence if necessary to "facilitate employees of the business being able to continue to work remotely from their residences." Philadelphia also allows "limited physical access to the place of business by such personnel necessary for the purposes of securing and maintaining the premises, preserving the property or inventory within, processing payroll and benefits, and facilitating remote access to documents, data, and technology that are indispensable to operating the business." Importantly, the Pennsylvania and California Orders do not currently include such an exemption. We expect other localities to similarly allow for some level of in office personnel to remain if necessary.

Accordingly, in addition to preparing your work force to work remotely, we encourage you to identify and notify personnel who are "necessary to facilitate" such remote work and create a plan for their roles after a potential lockdown order. This may include implementing a rotating shift of reduced teams (if such an action is taken, there should be limited or no mixing of different groups of workers working at different times). It may also involve creating appropriate operational definitions for employees to match the CISA guidance on which employees are classified as working on critical infrastructure, as discussed above.

The other potential method of adapting to orders similar to the Bay Area Orders, if feasible for your business, is to model your business operations to match an exempt business category. For example, businesses that deliver goods, products, or services to residences or to Essential Businesses are themselves exempt under local orders. Whether businesses that are Essential Businesses under local orders but are not directly covered in statewide orders can continue to operate still needs resolution. Most of the orders to date have included some form of exception for delivery and shipping services. There are also varying levels of exceptions for services that minimize direct contact. While this type of transformation is obviously not feasible for many businesses, we encourage you to investigate its applicability to you. There may also be some allowance for operating the business (depending on how essential a service it is) analogous to "take out" where customers place orders, ideally by phone or



online, and then pick up with minimal contact to employees or physical objects in the workplace. In addition to limiting direct contact, businesses must be aware of limitations on travel. The Bay Area Orders limits travel to Essential Travel, which for example does not permit any travel to accomplish sales except delivery to residences. Some subsequent orders have explicitly included delivery to residences or businesses as permitted.

We believe that a business operating in a gray area as described above is more likely to be accepted by the local authorities if it makes all efforts to enforce social distancing, increased sanitation, promote remote work as much as is feasible, and is willing to substantially adapt its business model to reduce the risk of spreading the virus. Relying on an unclear exemption while not otherwise respecting the intent of the local authorities increases the risk of adverse action.

### **Conclusion**

This is and will remain an actively developing situation until a vaccine is produced, but it is increasingly looking like the language and procedures used by the Bay Area Orders will be substantially similar to those adopted by most jurisdictions throughout the United States in the near future with the overlay of CISA guidance being used to define Essential Businesses. Our experience advising clients operating in the Bay Area leads us to encourage you to (1) prepare for remote work on short notice, including identifying what personnel are essential to maintain minimum basic operations, (2) analyze what potential business operations can be adapted to a “take out,” or ideally, delivery model, and (3) carefully consider what essential services your operations might be supplying or servicing and/or what essential activities you facilitate. If you are covered by a local exemption, it may be prudent to provide your employees safe passage letters briefly describing the work they will do and why, in plain language, you feel they fall within an exemption to present to any government official they encounter en route to or from work. It may also be beneficial for each business location that remains open to possess a similar letter to present to government officials questioning its exemption.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

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