

NOW +

NEXT

INTERSTATE COMMERCE ALERT | NIXON PEABODY LLP

MARCH 20, 2020



COVID-19, interstate commerce, and critical infrastructure

By Kimberly Harding, William Lisa, and Christopher Mason

As official responses to the COVID-19 pandemic increase, new issues are arising for clients every hour. While a federal system provides a wonderful laboratory for governmental experimentation state by state, it creates huge problems for companies in interstate commerce.

Many states (California, New York, and Pennsylvania, for example) are using the “critical infrastructure” format from the Cybersecurity and Infrastructure Security Agency (CISA) of the Department of Homeland Security as a principal way to help define what businesses should be closed and which can allow workers to commute to a job. In general, they are ordering that only “essential” businesses can have their workers work (other than from home).

For our clients, in addition to identifying whether their businesses fall within or outside particular closure orders (look also for our alerts on those subjects with respect to particular state laws and orders), we urge a review of critical suppliers in our clients’ supply chains. If there is a critical supplier in a state where the supplier might be forced to close, and the supplier is essential to a client’s business that would qualify for remaining open (or would be considered essential) in its own state, it may be important to reach out and determine if the supplier can obtain an exemption (and perhaps help it do so).

For example, in Pennsylvania, the governor has categorized industries using the critical infrastructure categories from CISA and has then further identified which types of companies his administration believes are “life-sustaining” and thus excepted from a sweeping closure order. “Manufacturing” is a critical infrastructure. Under the subheadings for the list of “life-sustaining” kinds of manufacturing is the category of “Chemical Manufacturing.” Under that subheading is a list of specific kinds of chemical manufacturing. Many are designated “life-sustaining,” but “Paint, Coating and Adhesive Manufacturing” is not. For many food and beverage manufacturers and distributors, adhesives are used in connection with packaging or labeling. If there is no adhesive being manufactured, there is a problem—you may not be able to package or label the food or beverages. If you cannot do that, you cannot sell the food or beverages. Now, maybe there is enough supply in the wholesaling pipeline for all the upcoming needs, but maybe not. This is just an example to encourage businesses to make this kind of assessment now if they have not already.

As a somewhat different example, businesses in California will have to consider whether the state's recently issued "Stay Home" Executive Order, which purports to except all persons working in support of the "16 critical infrastructure sectors" identified by CISA, may actually be too open. As drafted, the order's exceptions are almost certainly broader than intended. CISA lists the "commercial facilities sector" as "critical infrastructure," but that sector encompasses a wide range of businesses that will likely nonetheless be required to significantly suspend operations, including entertainment, gaming, lodging, retail, real estate, and sports. This ambiguity may leave businesses uncertain as to whether they can continue operations and may make supply chain decisions harder in the short term.

The good news is that state executive offices are being responsive. We have reached out in California, for example, and have received good responses from the governor's office. In Pennsylvania, the governor's office quickly provided a clarifying response to clients concerned about being able to continue with staffing leasing offices for people seeking housing, noting that "property management companies should continue to operate under Emergency Protocol and follow guidelines regarding social distancing. When possible, remote work should be utilized. However, you are able to lease apartments to people seeking housing." We expect that New York (where the governor has just issued a new executive order closing non-essential businesses) will be similarly responsive. (The governor of New York is also seeking to work with other governors in coordinating regional action in the mid-Atlantic region, but this will likely not solve individual supply chain issues.)

If you need help on such issues for yourself or your suppliers, please contact our [Coronavirus Response Team](#), your Nixon Peabody attorney, or:

- Kimberly Harding at kharding@nixonpeabody.com or 585-263-1037
 - William Lisa at wlisa@nixonpeabody.com or 415-984-8299
 - Christopher Mason at cmason@nixonpeabody.com or 212-940-3017
-