

COVID-19



CORONAVIRUS: ESSENTIAL SERVICES

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Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#).

If Kansas and Missouri follow California (and now New York) in issuing stay-at-home orders for all individuals except for essential service providers, is your business likely to be considered an “essential service?” ***It depends.*** Read on to better understand what may be coming to your state and whether your business will count as an “essential service.”

WHAT DOES THE CALIFORNIA EXECUTIVE ORDER DATED MARCH 19, 2020 SAY?

California Gov. Gavin Newsom issued Executive Order N-33-20 yesterday to “order all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors . . . ”

The Executive Order goes on to say that “[t]he federal government has identified 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, economic security, public health or safety, or any combination thereof . . . ” and “. . . that Californians working in these 16 critical infrastructure sectors may continue their work because of the importance of these sectors to Californians’ health and well-being.”

WHAT ARE THE 16 CRITICAL INFRASTRUCTURE SECTORS REFERENCED IN GOVERNOR NEWSOM’S EXECUTIVE ORDER?

Because the federal government has determined that ***functioning*** critical infrastructure is imperative during the response to the COVID-19 emergency for both public health and safety as well as community well-being, it has identified certain critical infrastructure industries that have a special responsibility to continue operations during this

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outbreak. The 16 critical infrastructure sectors identified by the federal government are:

1. Chemical Sector
2. Commercial Facilities Sector
3. Communications Sector
4. Critical Manufacturing Sector
5. Dams Sector
6. Defense Industrial Base Sector
7. Emergency Services Sector
8. Energy Sector
9. Financial Services Sector
10. Food and Agriculture Sector
11. Government Facilities Sector
12. Healthcare and Public Health Sector
13. Information Technology Sector
14. Nuclear Reactors, Materials, and Waste Sector
15. Transportation Systems Sector
16. Water and Wastewater Systems Sector

ARE KANSAS AND MISSOURI REQUIRED TO EXEMPT THESE CRITICAL INFRASTRUCTURE SECTORS?

No. In the newly published guidelines, “Guidance on the Essential Critical Infrastructure Workforce,” from the U.S. Department of Homeland Security, the federal government reminds us that “[r]esponse efforts to the COVID-19 pandemic are locally executed, State managed, and federally supported,” and that “State and local officials should use their own judgment in using their authorities and issuing implementation directives and guidelines.” The list of critical infrastructure sectors and accompanying guidelines are only “advisory in nature,” and the list of sectors “is not, nor should it be, considered to be a federal directive or standard in and of itself.”

Ultimately, Kansas and Missouri authorities can choose whether to exempt essential services providers based on the “Critical Infrastructure Sectors” identified by the federal government or based on some other methodology altogether. Although it’s ultimately up to our State and local authorities, these new guidelines provide us with a starting place to better determine whether your business may or may not be considered an “essential service.”

WHAT CAN YOU DO TO PREPARE YOUR COMPANY FOR A “STAY-AT-HOME” ORDER?

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In addition to staying current and implementing the ever-evolving COVID-19 best practices, regulations, and applicable laws, you may consider creating a description of the activities your company undertakes site-by-site and how those activities contribute to the essential services identified under the federal guidelines. You may wish to relay this information to your employees. However, in doing so, you should exercise caution and remember that public backlash may follow if you try to fit your business into an “essential” service or “critical” sector when it clearly is not.

FOR MORE INFORMATION

If you have questions or want more information regarding essential service providers affected by COVID-19, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. Foulston's lawyers maintain a high level of expertise regarding federal and state regulations affecting businesses. At the same time, Foulston's supply chain practice group's relationships with other practice groups, including the taxation, general business, healthcare, labor and employment, and litigation groups enhance our ability to consider the legal ramifications of these situations. For more information, contact **Francis Baalmann**, 316.291.9559 or fbaalmann@foulston.com, or **Samantha Ernst**, 316.291.9714 or sernst@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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RESOURCES

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