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Six Bay Area Counties and City of Berkeley Issue Revised Shelter-in-Place Orders

April 1, 2020

As reported in a previous Cooley alert, on March 16, 2020, six Bay Area counties (Santa Clara, San Francisco, San Mateo, Marin, Alameda and Contra Costa) and the City of Berkeley issued orders (March 16 Orders) directing all individuals living in these specific locations to shelter at their place of residence except to engage in certain Essential Activities or perform work for Essential Businesses, Essential Infrastructure and Essential Governmental Functions. These Orders went into effect on March 17, 2020, and applied to any for-profit, nonprofit or educational entities, regardless of the nature of the service, the function of the business, or the corporate entity or structure.

On March 31, 2020, these same jurisdictions issued updated orders (March 31 Orders) that extended and expanded the restrictions set forth in the March 16 Orders. The March 31 Orders went into effect as of 11:59 pm on March 31, 2020, and supersede the prior March 16 Orders. The March 31 Orders will remain in effect until *May 3, 2020.*

The March 31 Orders contain many changes as compared to the March 16 Orders, including increased limits on recreational activity and public gatherings. Linked below are each of the March 31 Orders and redlines showing the changes to each order:

- Alameda
- Berkeley
- Contra Costa
- Marin
- San Francisco
- San Mateo
- Santa Clara

This alert focuses on the key changes in the March 31 Orders that impact employers in these six counties and the City of Berkeley.

Those changes are as follows:

Essential Businesses can continue operations, but should do so on a very limited basis

Both the March 16 and March 31 Orders provide that Essential Businesses can remain open and operating, and also state that these businesses are "strongly encouraged to remain open." In addition, residents of the affected counties are permitted to leave their residences in order to operate Essential Businesses.

The March 31 Orders contain various changes to the definition of Essential Business, including to clarify the limited kinds of construction projects that may continue and only allow childcare facilities to provide care to individuals that work for Essential Businesses or Essential Government Functions. Minor changes have also been made to the definition of Healthcare Operations and Essential Infrastructure under the March 31 Orders. These changes are all reflected in the redlines linked at the bottom of this alert.

Even though Essential Businesses may remain open and operating, the March 31 Orders direct Essential Businesses to maximize the number of employees working from home. Essential Businesses are only permitted to assign those employees who cannot perform their job duties from home to work outside the home.

Those businesses that have both an Essential Business component and a non-Essential Business component at their facilities must, to the extent feasible, scale down their operations to the Essential Business Component only. There is an exception for mixed retail businesses to continue to stock and sell non-essential products.

Essential Businesses must also follow any industry-specific guidance issued by each jurisdiction's health officer related to COVID-19.

Essential Businesses must post Social Distancing Protocols by 11:59 pm on April 2, 2020

The March 31 Orders require every Essential Business to prepare and post, by no later than 11:59 pm on April 2, 2020, a Social Distancing Protocol for each of their facilities in the various counties that are frequented by the public or employees.

The protocol must be posted at or near the entrance of the facility and be easily viewable by the public and employees. Essential Businesses must also provide a copy of the protocol to each employee working at that facility.

A sample Social Distancing Protocol is attached as Appendix A to each of the March 31 Orders. Each Essential Business must implement the Social Distancing Protocol and provide evidence of such implementation to the authorities on demand.

The Social Distancing Protocol requires each Essential Business to:

- Post a sign at each public entrance to its facility informing individuals to avoid entering if they have a cough or fever; maintain a minimum six-foot distance; sneeze or cough into a cloth, tissue or elbow; and to not shake hands or engage in any unnecessary physical contact;
- Direct employees who can work from home to do so;
- Tell all employees not to come to work if sick;
- Conduct symptom checks before allowing employees to enter the workspace;
- Separate all desks and work stations by at least six feet;
- Limit the number of people who enter the facility to ensure that people in the facility can easily maintain a minimum six-foot distance at all times (except as required to complete an Essential Business activity);
- Frequently disinfect break rooms, bathrooms and other common areas;
- Make disinfectant, hand sanitizer, and soap and water available to all employees; and
- If the facility is open to customers or other members of the public, implement additional measures to prevent crowds from gathering, keep people at least six feet apart, prevent unnecessary contact and increase sanitization.

Under these local orders, employers that are not Essential Businesses can still operate with offsite owners, employees, volunteers and contractors, and can still perform Minimum Basic Operations at their facilities

Any businesses that are not Essential Businesses within the counties covered by the March 16 and March 31 Orders must continue to cease all activities at facilities located within the counties except for Minimum Basic Operations.

The March 31 Orders have updated the definition of Minimum Basic Operations such that they now encompass the following activities, provided that individuals comply with Social Distancing Requirements in carrying out the operations (changes in the March 31 Orders as compared to the March 16 Orders are in **boldface**):

(i) the minimum necessary activities to maintain **and protect** the value of the business's inventory **and facilities**; ensure security, **safety, and sanitation**; process payroll and employee benefits; **provide for the delivery of existing inventory to residences or businesses; and** related functions; and

(ii) **the minimum necessary activities to facilitate** owners, employees, **and contractors** of the business being able to continue to work remotely from their residences**, and to ensure that the business can deliver its service remotely**.
In addition to being able to conduct Minimum Basic Operations, the March 31 Orders are clear that "businesses may also continue operations consisting exclusively of owners, employees, volunteers, or contractors performing activities at their own residences (i.e., working from home)." In addition, individuals are still permitted to leave their residence in order to carry out certain Minimum Basic Operations at an employer's facilities.

Like Essential Businesses, these Minimum Basic Operations must comply with the Social Distancing Requirements already in the March 16 Order. However, non-Essential Businesses are not required to post and implement a Social Distancing Protocol.

Employers must also comply with the statewide orders

At the time the March 16 Orders were issued, no statewide shelter-in-place order had been issued. However, on March 19, 2020, California Governor Gavin Newsom issued Executive Order N-33-20, directing all California residents to follow the order issued that same day by the State Public Health Officer ("State Shelter Order").

The March 31 Orders reference the State Shelter Order and state that such order was complementary to the March 16 Orders. The March 31 Orders note that the State Shelter Order continues to apply, but also that the March 31 Orders are more restrictive in certain aspects. All individuals and entities must comply with the most restrictive aspects of the State Shelter Order and the applicable county or city's March 31 Order.

There are key differences for employers between the State Shelter Order and the March 31 Orders. For example, the State Shelter Order does *not* use the same Essential Business definition as the March 16 and March 31 Orders. Rather, it references a list of Essential Critical Infrastructure Workers that will be continuously updated by the State Public Health Officer.

The State Shelter Order also does *not* have any language explicitly permitting non-Essential Businesses to maintain Minimum Business Operations. While the list of Essential Critical Infrastructure Workers includes "central office personnel to maintain and operate central office" facilities and "support staff," it is unclear how broadly these references can be interpreted.

Recommended steps for employers

Employers should first determine whether they still fall into any of the Essential Business categories as revised in the March 31 Orders. If they do, they should further limit their operations as described above and should immediately implement, post and distribute a Social Distancing Protocol. **The protocol must be posted by 11:59 pm on April 2, 2020.** A sample is attached to each jurisdiction's March 31 Order and also linked above.

If they have not already, employers should also carefully review the State Shelter Order to confirm that their businesses are also permitted to continue operating under the State Shelter Order.

For those employers who do not fit into any of the Essential Business categories under the March 31 Orders and do not have any Essential Critical Infrastructure Workers under the State Shelter Order, they should immediately implement a requirement that employees, volunteers and contractors work from home, to the extent they haven't already done so. As noted above, it is unclear whether the State Shelter Order would permit such employers to continue to maintain Minimum Business Operations.

If you have any questions about the March 31 Orders or State Shelter Order, or have any other employment questions or issues that have arisen given the Orders, please reach out to a member of the Cooley employment team to assist you with your questions.

Coronavirus resource hub

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