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Persuading authorities your client's business is essential

By Nick Kipley

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During the first week of the statewide stay-at-home order, a large number of people in the greater Los Angeles area decided to get their dogs groomed. This was evidenced by the number of mobile van pet salons parked across the city. A week later: no mobile salons. Only pet food and pet medications were considered essential business. As businesses hopped in or were pushed out of the "essential" category, attorneys were working behind the scenes on behalf of their clients to convince authorities they were necessary. "My sense is that as these governmental officials learn more, they have been refining these orders as needed, so I think that's why we're seeing some specialized businesses being added and deleted," said A. Marisa Chun, a litigation and white collar defense partner at Crowell & Moring LLP in San Francisco and a member of the firm's COVID-19 response task force. "The original shelter-in-place orders were issued I think with some expediency in mind in terms of trying to get ahead of the virus and flattening the curve."

There was initially a lot of confusion "about whether companies needed permission to continue to operate, what sort of documentation they needed to keep," said Brooke B. Tabshouri, an associate at Duane Morris LLP in San Diego. "For example, I have a manufacturing client who received a bunch



Courtesy of Catharine S. Paik

A. Marisa Chun, a member of Crowell & Moring LLP's COVID-19 response task force

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— Brooke B. Tabshouri, Duane Morris LLP

of requests to start making medical equipment, and they have already shut down their operation and wanted to know what hoops, if any, they had to jump through in order to re-open."

"In California, it became pretty clear within the first week that there is no official process to be designated an official business," Tabshouri added. "The statewide order has been clear that businesses do not need to get any sort of approval to continue to operate if they are essential,

and that's true for many of the local orders, like the LA County order."

"This is very much a dynamic, fluid situation that is in many ways unprecedented. Certainly at Crowell & Moring, it's been 24/7 assisting clients with different legal issues," Chun explained. "These orders that are being issued are at the state, county, and in some cases the municipal level. The designation of certain industry sectors and services as essential

businesses or workers tends to reflect the local community's needs and priorities."

For example, in California cannabis retailers are considered part of the essential workforce under the state public health officer's list, whereas in Arizona, golf courses are considered essential businesses, Chun explained. In Idaho, it's gun shops.

"So when you're looking at this from a big picture, 30,000-foot level, you're going to see some variations across jurisdictions," Chun said.

Navigating this evolving patchwork of layered executive orders are lawyers arguing on behalf their clients' essential status while simultaneously working with risk management professionals to keep existing businesses open.

"There is no approval process," said Tabshouri. "What they're doing is they're trusting companies to look to see if they're on the list and to either shut down if they're not an essential business, to move operations online — which companies that can do that have been doing so — or continue to operate if they are essential. The criteria is pretty broad for a lot of these."

Stephen J. Newman of Stroock & Stroock & Levan LLP explained how he advocates for his clients.

"I email the county health official saying, 'Hi, I represent so and so, their business is not on the list on the web, and here's why we think they should be on the list.' You basically have to tie what the business does to the goal of keeping people

safe and healthy at home. When you make that explanation the health officers understand immediately.”

“A lot of construction is considered essential because there’s a housing shortage,” the Los Angeles-based Stroock partner added. “You need houses, right? You don’t want projects to deteriorate, you don’t want the project to get vandalized. You want to finish the work before winter, or by August when it gets super hot.”

In Orange County, Kyle D. Kring of Kring & Chung Attorneys LLP, said his many construction company clients provide a good litmus test for the way regulation has morphed continuously in the past four weeks. The industry operates from an interlaced web of contractual and sub-contractual obligations spread among laborers, managers, regulators, lawyers and stakeholders. All of these might cross jurisdictional boundaries at the municipal, county, state and federal level depending upon the project.

“All I’ve done for four weeks from home is send emails,” Kring said. “If a worker is sick and tests positive, what do you do? How do you send emails to other employees? What are the OSHA requirements? What are the county requirements? Because they’re all different. How do you furlough employees when work starts to slow down?”

Daily emergent guidance from the Centers of Disease Control and Prevention and the California Division of Occupa-

tional Safety and Health must be followed as well to keep every essential employee as safe as possible as they perform their crucial tasks.

“Kyle’s been a great ally in all of this. It’s highly beneficial for companies to have a strong alliance between their risk management professionals and their lawyers if they want to stay open and operational during this time period,” said Bruce Wick, director of risk management at California Professional Association of Specialty Contractors. “California laws are tough enough on a regular day, and now with COVID-19, oh boy, you need legal counsel to guide you through the storm.”

“Every other day we’ve issued an email on these topics. Every day raises some new issue,” Kring said. “Last week, the big issue was: Do you have to wear a face guard? Next week they’re going to start taking temperatures and that’s an invasive medical procedure, so you have to tell people you’re going to start to do that and get their permission.”

Some workers commuting into a region where the lockdown is more strictly enforced are requesting letters proving their essential status in the event they are subject to a routine traffic stop.

“There was suspicion or apprehension from employees,” Kring said. “They wanted to be able to prove they could go out onto the roads and to job sites and not get pulled over, so we put together letters so workers could prove their work status.”

“Dispute resolution is built on how a case is going to play out, and looking at precedent, well there is no precedent here,” said Jason M. Stone of Stone & Sallus LLP in Manhattan Beach. “The city refuses to allow us to leave an open ditch when we dig down 50 feet, but some times we get mixed messages from the city. They might say this ditch is a hazard, but the people congregating around it pose more of a health hazard.”

“Sometimes we’re talking to code enforcement. Sometimes we’re talking to public health. But our biggest concern is getting the project done,” he added. “We don’t want to go to court, because there’s already going to be such a big backlog.”

Stone says that in the last month alone his jury trials have been moved three separate times.

“First it was moved three weeks later, then a month later, now it’s in July,” Stone said, “That has a ripple effect. Some of our clients are contractors. Everything is done in a contract. And every modification for an underlying contract for either a small, custom home build or a large corporate project, every change has to be in writing.”

Stone has advised clients to maintain clear notes and document all mitigation efforts to reduce chances of conflict later.

“Good record-keeping is extremely important for clients as well as project owners, which is why we have to look very closely at the actual contracts,” Stone said.

One of his clients based in

Cerritos was OK’d to continue working, but a project in Manhattan Beach was a ‘no.’ “In more physically open areas different standards apply,” he said.

“The No. 1 call we’re getting from our contractors and affiliates is: ‘Are people able to cancel these contracts? Are they able to just not pay us?’ That’s the big concern with everyone right now,” Stone added.

Stone also has to deal with calls and disturbances from neighbors around the construction site and asked rhetorically: “Do we have an obligation to monitor those, too?”

According to police departments in Sacramento and San Diego, code enforcement officers in Fresno and public health officials in Riverside, a majority of complaints about businesses operating are phoned in by neighbors.

“The vast majority of people who have been contacted by our officers have been educated. We have a complaint line, and it is constantly ringing: businesses that shouldn’t be open, neighbors having parties, RV parks that are operating and people feel they shouldn’t be open,” said Jose Arballo Jr., a spokesman for the Riverside County Department of Public Health.

“The non-essential businesses have closed their doors and have been compliant. I know we cited 20-something people the other day at the beach but once they got their citation they complied,” said San Diego Police Lt. Steve Bodine.

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