

Essential Businesses in CA During the COVID-19 Pandemic

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On March 19, 2020, in response to the spread of COVID-19, Governor Gavin Newsom issued [Executive Order N-33-20](#), directing California's 40 million residents to stay home except for essential activities. So far, [Connecticut](#), [Delaware](#), [Hawaii](#), [Illinois](#), [Indiana](#), [Louisiana](#), [Massachusetts](#), [Michigan](#), [New Jersey](#), [New Mexico](#), [New York](#), [Nevada](#), [Ohio](#), [Pennsylvania](#), [West Virginia](#), and [Wisconsin](#) have issued similar "shelter-in-place" or "stay-home" orders requiring all "nonessential businesses" to close, as have a growing number of local governments. Other states, including [Florida](#), [Kentucky](#), [Maryland](#), [Oregon](#), [Texas](#), and [Virginia](#) have issued narrower orders that close specific types of businesses.

Focusing on stay-home orders in California, this alert summarizes available guidance on what business are deemed "essential," and collects orders issued in California to date.

California's stay-home order and Department of Homeland Security guidance on essential critical infrastructure

California's statewide order exempts workers in 16 "critical infrastructure sectors" that the Cybersecurity and Infrastructure Security Agency (CISA) of the U.S. Department of Homeland Security (DHS) has identified. The order will also cover any other sectors that the Governor decides to designate.



The following CISA-identified [critical infrastructure sectors](#) are incorporated into Governor Newsom's order:

- Chemical
- Commercial facilities
- Communications
- Critical manufacturing
- Dams
- Defense industrial base
- Emergency services
- Energy
- Financial
- Food and agriculture
- Government
- Healthcare and public health
- Information technology
- Nuclear
- Transportation systems
- Water and wastewater systems

CISA has developed sector-specific plans that describe each sector's profile, building upon the 2013 [National Infrastructure Protection Plan \(NIPP\)](#) and related [supplements](#). For example, the 2015 [Communications Sector-Specific Plan](#) details how the NIPP risk management framework is implemented within the context of the unique characteristics and risk landscape of the sector.

While informative, CISA's list of critical sectors is broadly stated. CISA acknowledged as much in its March 19, 2020, [Guidance on the Essential Critical Infrastructure Workforce](#), which explains that the list is "an initial recommended set and [is] *intended to be overly inclusive* reflecting the diversity of industries across the United States."

It is likely that California (and other governments) will continue to refine the definition and scope of "essential" businesses, narrowing the list in some ways while also recognizing some additional essential businesses. In fact, the limited guidance that the state has issued so far already departs from CISA's list of essential businesses. For example, the state's [COVID-19 response website](#) indicates that "entertainment venues," "public events and gatherings," and "convention centers" are closed. By contrast, a DHS [webpage](#) and sector-specific plan explain that the Commercial Facilities Sector includes "a diverse range of sites that draw large crowds of people for shopping, business, entertainment, or lodging," including casinos, other entertainment venues, and similar facilities.

Consistent with this view, on March 21, 2020, the California State Public Health Officer released a list of [Essential Critical Infrastructure Workers](#), which generally tracks CISA's list but does not include a general "commercial facilities" category. The State Public Health Officer's guidance also recognizes some additional types of businesses as essential in California, including entertainment and cannabis businesses and workers.

Notably, CISA's guidance is also evolving. While CISA's guidance from March 19, 2020, references the 16 previously identified critical infrastructure sectors, shown in the graphic above, the document emphasizes a list of 14 sectors that does not include a general "commercial facilities" category. CISA explained that it will "continually solicit and accept feedback on the list (both sectors/sub-sectors and identified essential workers) and will evolve the list in response to stakeholder feedback."

This can also be expected of any orders issued by other state and local governments that reference the CISA list. So far, the Connecticut, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Nevada, Ohio, West Virginia, and Wisconsin orders also reference the CISA critical infrastructure list, while Delaware, Kentucky, New Jersey, New Mexico, New York, Oregon, Pennsylvania, and Virginia do not.

Businesses should stay attuned to the development of the guidance, and consider seeking to inform any further guidance from DHS and state and local governments on what businesses are "essential."

Local stay-home orders

Businesses must also consider local stay-home orders. In California, the governor's order largely tracks orders issued by local governments in Northern California, with some exceptions.

Like the statewide order, local orders have directed residents to stay home except to perform essential activities, undertake essential government functions, or operate essential businesses. However, none of the local orders issued to date has referenced DHS's guidance. Instead, the orders include provisions specifying essential businesses and employees.

To date, most of the orders issued by local governments in California (collected below) exempt the following 21 categories of essential businesses:

- Healthcare operations and essential infrastructure
- Grocery stores, certified farmers' markets, farm and produce stands, supermarkets, food banks, convenience stores, and other establishments engaged in the retail sale of canned food, dry goods, fresh fruits and vegetables, pet supplies, fresh meats, fish, poultry, and household consumer products (such as cleaning and personal care products)
- Food cultivation, including farming, livestock, and fishing
- Businesses that provide food, shelter, social services, and other necessities of life for economically disadvantaged or otherwise needy individuals
- Newspapers, television, radio, and other media services
- Gas stations, auto supply, auto repair, and related facilities
- Banks and related financial institutions
- Hardware stores
- Plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintain the safety, sanitation, and essential operation of residences, essential activities, and essential businesses
- Businesses providing mailing and shipping services, including post office boxes
- Educational institutions—including public and private K-12 schools, colleges, and universities—for purposes of facilitating distance learning or performing essential functions, provided that social distancing of six feet per person is maintained to the greatest extent possible
- Laundromats, dry cleaners, and laundry service providers
- Restaurants and other facilities that prepare/serve food, but only for delivery or carry out
- Businesses that supply products needed for people to work from home
- Businesses that supply other essential businesses with the support or supplies necessary to operate
- Businesses that ship or deliver groceries, food, goods, or services directly to residences
- Airlines, taxis, and other private transportation providers providing transportation services necessary for essential activities and other expressly authorized purposes
- Home-based care for seniors, adults, or children
- Residential facilities and shelters for seniors, adults, and children
- Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities
- Childcare facilities providing services that enable other exempted employees to work as permitted, provided specified conditions are met to the extent possible

As the list above shows, many of the listed business types are specific and narrow (e.g., the orders exempt hardware stores, laundromats, and dry cleaners). But the orders also include several broader categories, such as businesses that supply other essential businesses with the support or supplies necessary to operate; plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintain the safety and sanitation, and essential operation of residences, essential activities, and essential businesses; and essential infrastructure, which includes but is not limited to public works construction, housing construction, and internet and telecommunications services.

Napa, Sonoma, and Monterey counties, which issued stay-home orders more recently, also deem some additional types of businesses essential. For example, Monterey exempted ongoing commercial construction and hotels, provided that they operate

in accordance with specified requirements, while Napa exempted cemetery and funeral service providers. Los Angeles County's order exempts several other specific categories of essential businesses, including “personal grooming services” and hotels and similar facilities.

Most local orders require nonessential businesses to cease all activities, with the exception of “minimum basic operations.” These operations are limited to activities required to (1) maintain the value of the business’s inventory, ensure security, and process payroll and employee benefits, or for related functions; or (2) facilitate employees of the business being able to continue work remotely from their residences. Employees engaged in minimum basic operations must comply with social distancing requirements.

Stay-home orders have been issued by the following local governments in California as of March 23, 2020:

- Alameda County
- Berkeley
- Contra Costa County
- Fresno
- Lake County
- Los Angeles County
- Marin County
- Mendocino County
- Monterey County
- Napa County
- Sacramento County
- San Benito County
- San Francisco County
- San Luis Obispo County
- San Mateo County
- Santa Clara County
- Santa Cruz County
- Solano County
- Sonoma County
- Yolo County

Several other local governments—including Imperial County, Orange County, Riverside County, San Bernardino County, San Diego County, and Ventura County—have issued narrower orders that only limit the operations of specified businesses.

Conclusion

State and local governments are rapidly issuing stay-home orders. Guidance about the intent and scope of those orders, including what types of businesses may continue to operate, is also evolving rapidly.

While the orders remain untested, several, including California’s statewide order, establish civil and even criminal penalties for violations. In addition, businesses that continue on-site operations should ensure a safe workplace for employees and must be mindful of the risk of negligence, workers’ compensation, unfair labor practices, and other potential claims.

Businesses should stay attuned to the development of guidance and may seek to inform further guidance from DHS, and state and local governments on what businesses are essential. Any business that believes itself to be essential should be prepared to justify their conclusion.

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