

Framework for Assessing the Scope of Essential Businesses in Manufacturing

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Practice Area: Business and Corporate Law & Manufacturing

Is your business an “essential business”? That is a question that manufacturers must prepare to answer as governments continue to act to stem the spread of COVID-19.

In response to COVID-19, a handful of governors across the country are issuing increasingly restrictive shelter in place directives that tighten the exemptions for commercial activities like manufacturing and office functions. Under the most recent directives, exemptions are limited to a narrower group of “essential” businesses. To date, the Evers Administration has not gone as far as these other states.

This *Legal Update* provides a framework to evaluate how a business may be characterized as “essential” in Wisconsin based on shelter-in-place directives issued elsewhere in the country. Now is the time for Wisconsin manufacturers to assess the likelihood that they will be mandated to close as government directives continue to evolve. The analysis of whether a manufacturer can properly be characterized as “essential” should guide any closure decisions.

Current Closure Standard in Wisconsin

Currently, all gatherings of more than 10 people are prohibited pursuant to Wisconsin Department of Health Service Emergency Order #8 (“DHS Emergency Order #8”). This prohibition is subject to a number of exemptions, however. Offices and manufacturing facilities may remain open despite gathering more than 10 people. For offices, DHS Emergency Order #8 provides that office spaces “shall implement social distancing, including teleworking, as much as practicable.” Social distancing is not mandated at this time in manufacturing, processing, distribution and production facilities.

Please note that the lack of a mandate does not in any way diminish the utility of social distancing practices whenever it is practical to implement them. That principle continues to apply even if your business falls within the scope of an “essential” business throughout this pandemic.

A Definition of Essential Businesses and Operations

Government orders outside Wisconsin have varied in their characterization of what business operations are deemed "essential." The Illinois order provides a helpful sample, and tracks more restrictive orders from elsewhere in the country (the "Illinois Stay-at-Home Order"). This is a broad "stay-at-home order," whereby the Governor is mandating that people stay home as a general rule subject to enumerated exemptions. The Illinois Stay at Home Order does not apply to "Essential Businesses and Operations," which include companies engaged in the "Manufacture, distribution and supply chain for critical products and industries." The non-exclusive list of industries includes technology, biotechnology, transportation, energy, steel and steel products, petroleum, mining, construction, and national defense, as well as products used by other essential businesses and operations. Wisconsin manufacturers are well-advised to consider how their operations would be impacted if Wisconsin were to adopt an approach similar to the Illinois Stay-at-Home Order.

Consider Why Your Business is Essential, and Write It Down

As noted, the State of Wisconsin does not currently have a definition of "essential" in the context of closure directives. We are at a stage where it is critical to evaluate and anticipate how your business may be impacted by different definitions that may become part of governmental directives regulating businesses generally. "Essential" could mean that your business supplies an "essential" business. Based on definitions provided elsewhere, it would be helpful to draft a written statement that explains the functions of your business that are currently and likely will remain essential. If your business supports or supplies another "essential" business, you may wish to solicit a written communication from that customer confirming that your company is essential to its operations.

Be Prepared to Communicate

Once you have assessed why your business may be essential, consider the appropriate means to communicate that to the necessary parties. It may be helpful to message the essential nature of your business to your workforce, supply chain and government authorities. In short, prepare now to justify any decision you might make to stay open based on your company's status as an essential business or operation.

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