



Here is a ten-point checklist for determining whether or not your business is “essential” as prepared by Bracewell (with blue bulleted staff comments following each item):

- 1. Determine if the Order is Mandatory, or simply guidance.**
  - Check for State and local orders
- 2. Determine if your business has any physical operations in the jurisdiction at issue, including whether any of your employees live in the jurisdiction.**
  - This may be particularly challenging if your business is geographically located such that employees need to cross jurisdictions to get to work.
- 3. Know the specifics of your operations in the jurisdiction at issue, what you are manufacturing, how many employees are necessary to operate the facility in person, and the industries your customers are in.**
  - It is important to determine if there are specific exemptions for different functions. For example, in New York State, if your firm has three production lines, one of which manufactures medical equipment and the other two manufacture toys, your business would be exempt from the employment reduction requirements of Executive Orders 202.8 to the extent that employees are needed to maintain the production capacity of the line manufacturing medical equipment. All other employees are subject to the workforce reduction requirements. In addition, to the maximum extent possible, employees needed to support the medical manufacturing line (i.e. human resources, accounting, legal, etc.) are still required to utilize telecommuting or work from home procedures to the maximum extent possible.
- 4. Fully read the Order and official guidance, and do not rely on media reports or interpretations of the Order.**
  - It is ultimately your responsibility to determine whether or not you are exempt, and with potentially significant penalties for violations it is important to make an informed decision, not rely on others’ interpretations.
- 5. Focus on the definitions and exceptions or exemptions in the Order. This includes reading over any mandatory social distancing requirements the Order is imposing on all businesses, even if you fall under an exception.**
  - Keep in mind that all social distancing guidelines should be followed, regardless of whether your business is exempt for shelter in place orders.
- 6. Determine if the Order has an exception for non-essential businesses that supply products or services to essential businesses, as this may be a more straight-forward way to justify continued operations.**
  - Even if you don’t fall directly under an essential business classification, if you support one this may be an option to maintain operations
- 7. If you determine your business is non-essential, determine if the Order has a minimum business operations provision, and if your business needs a minimum number of in person workers to preserve the value of your inventory or the business itself.**
  - This may take a deeper analysis individual orders, though in most cases there seem to be exemptions for maintenance.
- 8. Consider involving legal counsel in your analysis, especially if the exceptions you are relying upon are ambiguous or restrictive. Strongly consider consulting with counsel if you are considering requesting an exemption or waiver from an Order, and understand that filing such a request could be deemed an admission that your business is non-essential.**
  - Conversations involving legal counsel should help clarify any ambiguous direction contained in individual jurisdictional orders.
- 9. Keep a written record of the process your business has engaged in to determine if your business is essential so that it will be readily available to present to enforcement authorities if they challenge your**

**operations. Having evidence of good faith operations can often be the difference between mild and more severe penalties.**

- A file with correspondence with legal counsel to determine essential status, for example.

**10. Check back daily to look for updates and clarifications of existing Orders.**

- Many jurisdictions are regularly adjusting the scope and applicability of their orders.