This week, we anticipate that states and municipalities will likely issue a number of “stay-at-home orders” that will require the temporary closure of businesses not deemed “essential.” Ohio just put such an order in place, for example. Unfortunately, to date, the direction to stay at home is not being directed by the federal government or in a uniform manner, but rather is being directed by state and municipal governments and piecemeal. The various stay-at-home orders have nuances and must be read individually.

Also, determining whether and to what extent a business’ functions are essential needs to be done on a product-by-product and customer-by-customer basis. For instance, a company that supplies to both automotive OEMs and to the telecommunications industry may well be categorized as “non-essential” as it relates to the automotive business, but “essential” as it relates to
the telecommunications business. Companies supplying to end-uses that are essential are advised to seek confirmation of that fact from their customers in writing.

Finally, on March 19, 2019, the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency (CISA) issued a “Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response.” This Memorandum has been incorporated into a number of stay-at-home orders, but not always in a clear manner. Unfortunately, the CISA website provides a definition of essential businesses that was adopted for other purposes and that does not apply to our current situation – and which has caused significant confusion. The correct CISA guidance memo is located here.

If you are interested in the definition of “essential business” from an European perspective, see our colleague Matthew Kirk’s analysis here.

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