Published on *The National Law Review* https://natlawreview.com

Update for Mortgage Lender Operations in California

Article By:

Sherwin F. Root

John C. Dineen

Mark G. Rackers

On the evening of March 19, 2020, the Governor of California issued an order which requires all individuals living in the State to stay home or in their place of residence, except as needed to maintain continuity of operations of the federal critical infrastructure sectors, which include the financial services industry. Governor Newsom issued a list of Essential Critical Infrastructure Workers "to help state, local, tribal, and industry partners as they work to protect communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security." The Mayor of Los Angeles issued a "Safer at Home" Order which temporarily prohibits events and gatherings of 10 persons or more in Los Angeles County. "Non-Essential Retail Businesses" were ordered to be immediately closed. "Essential Retail Businesses," which include banks, credit unions and related financial institutions, are permitted to stay open, provided they comply with the following rules:

(1) Practice social distancing within the confined space by requiring attendees to be separated by six (6) feet;

(2) Provide access to hand washing facilities with soap and water or hand sanitizer that contains at least 60 percent alcohol;

(3) Post a sign in a conspicuous place at the public entry to the venue instructing members of the public to not attend if they are experiencing symptoms of respiratory illness, including fever or cough; and

(4) Adhere to communicable disease control recommendations provided by the Los Angeles County Department of Public Health.

Just days before, on March 16, 2020, seven Bay Area counties (Contra Costa, Santa Clara, San Mateo, San Francisco, Marin, Alameda and Santa Cruz) and the City of Berkeley each issued orders to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue. Essential Businesses, which include banks and other financial institutions, are permitted to stay open. To the greatest extent feasible, Essential Businesses are to comply with Social Distancing Requirements, which are somewhat different than the Los Angeles requirements set forth above, and the Bay Area requirements include the following:

(1) Maintaining at least six-foot social distancing from other individuals;

(2) Washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer;

(3) Covering coughs or sneezes (into the sleeve or elbow, not hands);

(4) Regularly cleaning high-touch surfaces; and

(5) Not shaking hands.

Mortgage Lenders are grappling with the impact of these orders on their business. Below please find a discussion of some of the frequently asked questions facing members of the industry along with some initial thoughts on how best to comply with State and County orders.

Can We Continue Doing Business From Our Office Locations?

Based on the definition of the financial services sector set forth in the orders, we anticipate that Mortgage Lenders are considered part of the financial services industry, and are therefore permitted to continue doing business. That said, there have been no case decisions or judicial interpretations of the orders and there is some risk that later clarifications or judicial interpretations could change this answer. We recommend that you reach out to consult with one of our team members to discuss the particularities of your individual situation.

In all events, we believe that if a Mortgage Lender decides to continue operations, then it should otherwise comply with the state and county requirements, by doing the following things:

– Only conducting activities that are truly essential and cannot be easily postponed or outsourced;

– All employees must be given the option to work at home – no employees can be forced to come in to the office;

– Anyone who believes they may have been exposed to the novel coronavirus must stay home, and if any member of the workforce is diagnosed with the novel coronavirus, all employees must be given notice and the opportunity to decide whether they want to come to work.

– All employees are directed to follow the guidelines applicable to the county where their offices / operations centers are located, as set forth above, and if there is no order associated with the county where your offices / operations centers are located, do your best to follow the guidelines anyway, including the six feet of distancing between employees if at all possible.

-If gloves and/or masks are available, they are made available to on-site employees (shortages may make this suggestion impossible for most, so it applies only if your company happens to have those on site)

– If possible, limit the number of employees in any one room to fewer than 10.

Can Mortgage Loan Originators, Underwriters and Loan Processors be Permitted to Work from Home?

In the past, Loan Originators ("LO's") generally could not work from home unless the LO's home was licensed as a branch office by the California Department of Business Oversight ("DBO"). A number of states have recently taken a different approach in light of this crisis or have otherwise provided guidance to LO's on this issue. The NMLS has put together a compilation of state regulator responses. In general, many state regulators that have addressed this issue have permitted LO's to work from home without the home address being licensed as a branch, provided certain conditions are met. The conditions vary widely from state to state and can include some or all of the following: (1) additional data security requirements such as device encryption and connectivity using a virtual public network (VPN); (2) prohibition on meeting with consumers at the unlicensed location; (3) a prohibition on advertisements that include the unlicensed location's address; (4) prohibition on storing physical business records at the unlicensed location; (5) prior notice to the regulator of the unlicensed locations from which business will be conducted; and (6) additional disclosures to consumers.

Unfortunately, as of the close of business on March 20, 2020 the California DBO has not provided any updated guidance or advice on this issue. We anticipate that the DBO will address this critical issue soon. In the meantime, without clear guidance from the DBO, there are risks to California LO's who work from home. Please reach out to one of our team members if you have particularized questions about your situation.

It is possible that some companies may have more flexibility with underwriters and loan processors (assuming they are not otherwise licensed), but first you must ensure that processors and/or underwriters can actually perform their jobs from home while maintaining adequate protections for customer's private information. We recommend that you ensure that your information technology team is using appropriate safeguards, and you may want to consider consulting with a security specialist to address your individual circumstances.

If We Are Servicing Mortgage Loans, Can We Continue to do That?

Loan servicing is a critical component of the mortgage lending operation. However, if you have a servicing center in California, you must comply with State (and County or City, if you are in Los Angeles or one of the seven Bay Area counties mentioned above or Berkeley) requirements, and we recommend you follow our six suggestions set forth above. In addition, though, there are other servicing issues arising from the spread of the coronavirus of which you must be aware, including moratoriums on foreclosure activity. For example, on March 18, the Federal Housing Finance Agency announced that all foreclosures and evictions on loans that had been sold to Fannie Mae or Freddie Mac will be suspended for the next 60 days (and has since updated that guidance to allow some borrowers to defer payments for up to a year). In addition, on the same day HUD announced that it would also suspend evictions and foreclosures for homeowners with FHA-insured mortgages for the next 60 days. The VA has not mandated, but strongly encourages a foreclosure moratorium. The FHA has also issued a COVID-19 Questions and Answers page on its website. This is a fluid situation and we anticipate additional restrictions on a state by state basis (e.g. New York's 90 day foreclosure moratorium), or even a city by city or county by county basis. For example, on March 17, the San Diego City Council voted to support a temporary moratorium on evictions for residents and businesses in the city. Courts are also closing, which would impact any judicial foreclosures and unlawful detainer actions. Mortgage loan servicers who are servicing for private investors should monitor such restrictions in their areas and be proactively contacting the investors to determine how the investors want the servicers to proceed going forward.

Are There Any Other Issues of Which We Should be Aware?

Yes. You will still generally need to have homes appraised in connection with your new originations of mortgage loans. Will appraisers feel comfortable traveling into areas that may have high rates of infection? Consumers may not want an appraiser coming into their home. Also, anecdotal evidence indicates that verifications of employment *are* becoming harder to complete, and the increase in the number of people out of work or in fear of being out of work for a significant period of time will have an impact on underwriting. Some county recorders' offices are also temporarily closed, which will necessarily impact retrieving records and having deeds and other documents recorded.

As we are sure you all can appreciate and understand, things are changing quickly and there is no clear-cut authority or bright line rules. This is not an unequivocal statement of the law, but instead represents our best interpretation of where things currently stand. This article does not address other the potential impacts of the numerous other local, state and federal orders that have been issued in response to the Covid-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

National Law Review, Volume X, Number 83