



SACRAMENTO

## MEMORANDUM

TO: Brian Maas and Anthony Bento, CNCDA

FROM: Ben Webster and Kayla Cox

DATE: March 22, 2020

RE: Governor Newsom's March 19, 2020 "Stay at Home" Executive Order N-33-20

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### QUESTION PRESENTED

Are California car salespeople "Essential Critical Infrastructure Workers" pursuant to Governor Newsom's March 19, 2020 "Stay at Home" Executive Order N-33-20 (the "Order")?

### SHORT ANSWER

While the California State Public Health Officer's March 20, 2020 list of "Essential Critical Infrastructure Workers" <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf> (the "List"), in accordance with the Order, specifically identifies "Automotive repair and maintenance facilities" as part of the state's "Essential Workforce," it does not mention car dealers, sales, or leasing. Although it is a very close call, we believe that dealers in California would have a good faith basis to assert that maintaining a skeleton crew of employees to facilitate limited car sales would not be prohibited by the Order.

### SHORT DISCUSSION

The List (p. 8) includes an exemption for "Automotive repair and maintenance facilities."<sup>1</sup> This is identical to the exemption contained in the "Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response," published on March 19, 2020 by the

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<sup>1</sup> A few days before the Order was issued, six Bay Area counties imposed "Shelter in Place" orders which contained exemptions for "Gas stations and auto-supply, auto-repair, and related facilities" (emphasis added). Under these directives, dealers could argue that vehicle sales were covered under the "related facilities" language in connection with the auto supply and repair designation. Despite potentially confusing comments by Governor Newsom in a TV interview on March 21, it appears that while the Order would allow counties or cities to impose *tighter* restrictions on essential businesses (like the Fresno measure requiring the closure of "auto sales"), no California jurisdiction can implement *looser* restrictions.

Cybersecurity & Infrastructure Security Agency (“CISA”) of the U.S. Department of Homeland Security (p. 8), which is also cited in the Order.<sup>2</sup>

Nevertheless, the List includes descriptions of other essential workers, functions, and facilities that can be extrapolated to support an argument that car sales could be viewed as “essential.” The section entitled “Transportation and Logistics – Sector Profile” describes “seven key subsectors, or modes”; the “Highway and Motor Carrier” mode states “Vehicles include trucks,” and refers to “taxis, transportation services including Transportation Network Companies” (*i.e.*, ride-share providers like Uber and Lyft) (p. 7). Under “Transportation and Logistics – Essential Workforce,” the List includes: “Employees supporting...transportation functions, including...workers that maintain...infrastructure” (p. 8), and “Employees who...maintain vehicles...and the...infrastructure that enables operations that encompass movement of...passengers” (p. 8). Further, in the section entitled “Other Community-Based Government Operations and Essential Functions – Essential Workforce,” the List includes: “Workers who are critical to facilitating trade in support of the national, state, and local emergency response supply chain” (p. 10), and “Workers critical to operating Rental Car companies that facilitate continuity of operations for essential forces, and other essential travel” (p. 11).

While the absence of any express reference to car dealers or auto sales is not helpful, the identification of “vehicles,” “employees supporting transportation functions,” and “workers that maintain...infrastructure” arguably could cover workers who sell those vehicles at dealerships that support transportation and are part of an infrastructure of facilities where cars can be purchased. The specific carve-outs for taxis, TNCs, and rental car workers beg the question of where those essential workers would obtain their essential vehicles if not from car dealerships. If workers who operate car *rental* companies are exempt, why not those who operate car *sales* companies? Moreover, if an essential worker needs a vehicle to get to his or her essential job (*e.g.*, a doctor who needs to drive to a hospital, a law enforcement officer who needs to drive to a police station), not to mention people who need to drive to essential locations like grocery stores or pharmacies, it would seem that the ability to purchase a vehicle to facilitate those essential activities could also be deemed essential.<sup>3</sup> *Put another way, if the Order were interpreted to prohibit car sales under any circumstances, that would seem to be an overly restrictive reading of the directive.*

While maintaining a skeleton crew of car dealer employees who could sell a vehicle to a buyer in need of transportation could be justified under the Order, the interpretation discussed above would not support a dealer who wanted to continue with open, traditional in-person sales departments. And dealers should understand that they are taking a risk by keeping any sales open when this activity is not actually listed as an essential service. While enforcement of the current “stay at home” directives has generally not been aggressive, it is likely that state and local authorities may take a more forceful approach in the coming days or weeks. (A county sheriff might be less

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<sup>2</sup> In an interview on News 8 in San Diego, Asm. Todd Gloria described compliance with the Order as a “dynamic situation.... I think that in most cases, it’s fairly black and white but there are exceptions to the rule. You mentioned car dealerships. *Car maintenance is expressly stated as being an essential service. However, car sales don’t seem to be in that same category*” (emphasis added).

<sup>3</sup> Also, it would seem to be easier to maintain minimal sales capabilities at a dealership where the service department remains open and active under the very same roof, performing clearly essential activities. Similarly, Home Depot can remain open because it is an essential “hardware store,” but it is unlikely that sales of plants, lawn furniture, and other non-essential items will be eliminated or curtailed.

persuaded by a “lawyerly” interpretation of the penumbras of the law than by a more “black and white” view like that expressed by Asm. Gloria.) The more dealers can step up online sales or remote deliveries to eliminate or minimize any face-to-face interactions, the easier it will be to justify continuing sales activities during the pendency of the Order (assuming there is no clarification by the Governor, Public Health Officer, or CISA). If most non-service department employees are not on site, no salespeople are standing around the lot, the front doors to the showroom are locked, and signage is posted explaining that regular car sales have been suspended, retaining the ability to have a cross-trained employee conduct a vehicle transaction – with appropriate “social distancing” – to retain a customer who needs to buy a car would not appear to violate the Order. In addition to these precautions, we recommend that dealers explore every option to minimize possible exposure for their employees and customers – *e.g.*, salespeople working from home, moving to online sales only, temperature checks and mandatory personal protection, “deep cleaning” of the worksite and automobiles, “touchless delivery systems.”

Since the Order was issued just three days ago, and the List was published the next day, the meaning and interpretation of the various provisions is very much in flux. (We understand there are efforts in Sacramento to seek clarification of the Order, and in Washington, D.C. to include car dealerships or vehicle sales on the CISA list.) We are sure CNCDA is sensitive to other possible non-legal risks, like the potential for community backlash or “online shaming” that could result from efforts to stay open for business in the face of an unprecedented pandemic.