

Bay Area Businesses Face Uncertainty Over Conflicts Between State and Local Reopening Guidelines

By [Jonathan August](#) and [Manuel Fishman](#)

On July 17, San Francisco Mayor London Breed announced that due to a rapid rise in new COVID-19 cases in the last month, and because San Francisco was listed on the State's County Monitoring List (the "Monitoring List") for three consecutive days, San Francisco was halting all reopening procedures indefinitely beginning on Monday, July 20.¹ This action to stop further reopening in San Francisco means that for many individuals and businesses, life will return to the way it was before the County's prior major reopening which occurred on June 15.

The two biggest changes as a result of San Francisco's latest decision are that indoor malls and all non-essential businesses must close, subject to the right of these businesses to conduct Minimum Basic Operations.² Previously, indoor malls could apply for an individual variance to reopen their doors so that retail tenants without direct access to public sidewalks could operate, while non-essential offices were permitted to reopen to a maximum of 20% of personnel who could not otherwise work remotely. Additionally, all places of worship must once-again close. Implementation of these modifications is a direct requirement from the State of California due to a county remaining on the Monitoring List for more than three consecutive days. The immediate impact of the new County rules is that certain previously reopened businesses and offices will be required to close once again. For example, retail businesses may now only open if they have direct access to a public sidewalk, and restaurants may now only serve patrons via pick-up, deliver, or outdoor dining.

When the announcement to stop reopening plans was made on July 17, Mayor Breed and Public Health Director Grant Colfax indicated that the two largest sources for the increased rise in positive cases were public gatherings with individuals not following mask and social distancing protocols and individuals returning to their non-essential workplaces that had recently been reopened.

San Francisco's decision to halt all reopening procedures indefinitely is bound to create confusion because the new County rules are effective even though, as of today, July 20, San Francisco has been taken off the Monitoring List and thus is no longer subject to the State's mandated closures. San Francisco appears to be taking a more conservative approach to reopening than other counties in the Bay Area by implementing a "roll back" of reopening procedures not otherwise required by State proclamations. While more restrictive, the rules adopted by San Francisco do provide clear guidance for businesses.

¹ Factors that are used to determine if a county will be placed on the Monitoring List are: (1) a positive testing rate that exceeds 100 cases or more per 100,000 residents over a two-week period or greater than 25 cases per 100,000 residents with an overall positivity rate greater than 8% over a trailing seven-day period; (2) more than a 10% increase in hospitalization rates over a three-day average; (3) under 20% of ICU beds are available; and (4) under 25% of ventilators are available. For further information, please click [here](#).

² See definition of Minimum Basic Operations contained in the latest Shelter-in-Place Order [here](#).

Unlike San Francisco, however, other Bay Area counties have not adopted the same approach, leading to significant upheaval for businesses in those counties. Due to the fluid nature of the Monitoring List, which changes on a daily basis, the State's mandated closure rules are only in effect so long as an applicable county remains on the list. Santa Clara County, for example, has been placed and removed from the Monitoring List numerous times since the Monitoring List's introduction on July 1. Many covered businesses in Santa Clara – including gyms, salons, non-essential offices, and indoor retail – were initially allowed to open, only to be required to close again just days later once the County was placed back on the Monitoring List. All other Bay Area counties have remained on the Monitoring List since initially being placed thereon, but may soon suffer a similar fate if they begin to come-and-go off the Monitoring List as positive cases fluctuate.³

The end result for businesses within these counties is one of uncertainty as the start-stop nature of being placed on, and subsequently being taken off, the Monitoring List requires looking online every day to see if one's doors may open. For many business owners, the uncertainty of knowing whether and for how long they will be able to open is simply untenable as it is not feasible to call employees to either come to work or stay home at unknown intervals, as well as to incur reopening and closing costs.

In addition, many Bay Area retail and office tenants had previously negotiated short-term rent relief packages for the first months of the pandemic, eyeing reopening in June and July as a means to slowly recover lost income. Recent events highlight the need to reconsider these rent deferrals and abatement discussions.

Buchalter advises clients on complex issues such as these with a broad range of relevant expertise for commercial property owners and managers in these challenging times. Please contact one of the following attorneys with follow up questions.



Jonathan August

Real Estate, San Francisco

(415) 227-3558

jaugust@buchalter.com



Manuel Fishman

Real Estate, San Francisco

(415) 227-3504

mfishman@buchalter.com

This communication is not intended to create or constitute, nor does it create or constitute, an attorney-client or any other legal relationship. No statement in this communication constitutes legal advice nor should any communication herein be construed, relied upon, or interpreted as legal advice. This communication is for general information purposes only regarding recent legal developments of interest, and is not a substitute for legal counsel on any subject matter. No reader should act or refrain from acting on the basis of any information included herein without seeking appropriate legal advice on the particular facts and circumstances affecting that reader. For more information, visit www.buchalter.com.

³ We note that San Mateo County is the only Bay Area county yet to be placed on the Monitoring List, but that there are growing fears the recent rise of cases in the county will inevitably place it on the Monitoring List in short order.