



Hogan Lovells US LLP  
Columbia Square  
555 Thirteenth Street, NW  
Washington, DC 20004  
T +1 202 637 5600  
F +1 202 637 5910  
www.hoganlovells.com

## MEMORANDUM

**From:** Elizabeth B. Fawell  
Brian Eyink  
Leigh G. Barcham

**Date:** March 31, 2020

**Re: COVID-19 Update: CISA Updates Critical Infrastructure Workers Guidance and FDA Issues Additional Guidance for Industry and the Public**

This memorandum summarizes recent actions the federal government has taken in response to the COVID-19 outbreak. First, the Department of Homeland Security's (DHS's) Cybersecurity & Infrastructure Security Agency (CISA) has updated its guidance identifying the types of food and agriculture sector workers who the agency suggests should be exempt from state and local shelter in place orders, curfews, and similar restrictions on movement. <sup>1/</sup> We previously summarized an earlier iteration of the guidance in our memo on March 20, 2020. <sup>2/</sup> Second, FDA supplemented its questions and answers guidance with additional material concerning food packaging, testing food processing facility environments for COVID-19, and flexibility for nutrition labeling of packaged food during the COVID-19 pandemic. <sup>3/</sup> The guidance continues to state that currently there is no evidence of food or food packaging being associated with transmission of COVID-19. Third, FDA's Center for Veterinary Medicine (CVM) has issued a Fact Sheet on how unused human food may safely be used as animal food during the COVID-19 outbreak.

### **CISA's Updated Guidance on Critical Infrastructure Workers**

CISA has updated its *Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response* in response to feedback the agency has received. <sup>4/</sup> CISA's updates to the guidance reiterate that the document is advisory in nature and that its list is not intended to be the exclusive list of critical infrastructure sectors, workers, or functions that should continue during the COVID-19 response. CISA advises that "[d]ecisions informed by this list should

---

<sup>1/</sup> Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (Mar. 28, 2020), available at [https://www.cisa.gov/sites/default/files/publications/CISA\\_Guidance\\_on\\_the\\_Essential\\_Critical\\_Infrastructure\\_Workforce\\_Version\\_2.0\\_Updated.pdf](https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf).

<sup>2/</sup> HL Memo, COVID-19 Update: Supplemental Update on Essential Critical Infrastructure Workers (Mar. 20, 2020), available at <https://www.hfloodlaw.com/2020/03/covid-19-update-supplemental-update-on-essential-critical-infrastructure-workers/>.

<sup>3/</sup> Food Safety and the Coronavirus Disease 2019 (COVID-19) (Mar. 28, 2020), available at <https://www.fda.gov/food/food-safety-during-emergencies/food-safety-and-coronavirus-disease-2019-covid-19>.

<sup>4/</sup> See Frequently Asked Questions (Mar. 28, 2020), available at <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>.

also take into consideration additional public health considerations based on the specific COVID-19-related concerns of particular jurisdictions.” CISA’s changes to the document also clarify that critical infrastructure workers include “workers who support crucial supply chains and enable functions for critical infrastructure.” CISA advises that “while adhering to relevant public health guidance, critical infrastructure owners and operations are expected to use their own judgement on issues of the prioritization of business processes and workforce allocation to best ensure continuity of the essential goods and services they support.”

Appendix 1 to this memo provides a redline comparison of the guidance compared to the version released March 19. The agency’s updates to the Food and Agriculture sector include clarifications that workers for the following entities or operations are considered critical infrastructure workers, among others:

- Convenience stores and other retail that sells human food, animal/pet food, or pet supplies, including vending machines and other unattended retail;
- Dark kitchens and food prep centers;
- Food ingredient production;
- Farmers and agribusiness support services, including those employed in auction sales, grain and oilseed handling, processing, handling and distribution;
- Farmers, farm workers, support service workers and their supplier employees, including those engaged in producing and harvesting field crops;
- Employees and firms supporting the distribution of food, feed, beverages, and ingredients;
- Workers supporting the pest control of all food manufacturing processes and operations from wholesale to retail;
- Employees in cafeterias used to feed employees, particularly employee populations sheltered against COVID-19;
- Workers in animal diagnostic and food testing laboratories;
- Employees of companies engaged in production, storage, transport, and distribution of chemicals, medicines, vaccines, and other substances used by the food and agriculture industry, including seed;
- Animal agricultural workers, including those employed in veterinary health such as emergency veterinary or livestock services, live stock markets, and manufacturers, as well as renderers; and
- Transporters supporting animal agricultural industries, including movement of animal medical and reproductive supplies and materials, animal vaccines, animal drugs, feed ingredients, feed, and bedding, live animals, animal by-products, and deceased animals for disposal.

Within the Healthcare/Public Health sector, the updated guidance also now expressly identifies manufacturers of dietary supplements as critical infrastructure workers.

According to the guidance, CISA will continue to solicit and accept feedback on the list and will refine the list in response to stakeholder feedback. Feedback can be sent to [CISA.CAT@CISA.DHS.GOV](mailto:CISA.CAT@CISA.DHS.GOV).

### **FDA’s Updated COVID-19 Questions & Answers**

FDA has updated its Questions and Answers website concerning COVID-19 and food safety to address three new topics: (1) whether the public should take measures to mitigate the risk of contracting COVID-19 through food and food packaging; (2) whether a food processing facility should test its environment for the SARS-CoV-2 virus after a worker tests positive for COVID-19; and (3) FDA’s temporary flexibility regarding nutrition labeling of packaged food for restaurants and other businesses.

- **COVID-19 and Food and Food Packaging**

FDA addresses the question of whether the public should take measures to mitigate the risk of SARS-CoV-2 (the virus that causes COVID-19) coming into homes on food and food packaging. FDA advises that currently there is no evidence of food or food packaging being associated with the transmission of COVID-19. FDA explains that it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads. FDA also notes that according to the CDC “because of poor survivability of these coronaviruses on surfaces, there is likely very low risk of spread from food products or packaging that are shipped over a period of days or weeks at ambient, refrigerated, or frozen temperatures.” FDA recommends that consumers follow the CDC guidelines on how to protect yourself, especially the advice on frequent handwashing with soap and water for at least 10 seconds and frequent cleaning and disinfecting of surfaces.

If individuals are concerned about contamination of food and food packaging purchased from the grocery store, FDA suggests “wash your hands after handling food and food packages when you return from the grocery store and after removing packaging from food.”

- **Testing Food Processing Facility Environment for SARS-CoV-2 Virus**

FDA explains that because there currently is no evidence of food or food packaging being associated with transmission of COVID-19, FDA does not believe there is a need to conduct environmental testing in food settings for the virus that causes COVID 19 for the purpose of food safety if a worker in a food processing facility tests positive for COVID-19. FDA advises that “[c]leaning and sanitizing the surfaces is a better use of resources than testing to see if the virus is present.” The agency also reiterates that facilities are required to adhere to Current Good Manufacturing Practices (cGMPs) and that maintaining cGMPs in the facility should minimize the potential for surface contamination and eliminate contamination when it occurs. FDA notes that “[w]ith the detection of the coronavirus in asymptomatic people and studies showing survival of coronavirus on surfaces for short periods of time, as an extra precaution, food facilities may want to consider a more frequent cleaning and sanitation schedule for high human contact surfaces.”

- **Flexibility for Nutrition Labeling of Packaged Food for Restaurants and Other Businesses**

FDA acknowledges that as a result of COVID-19, restaurants and food manufacturers may have food not labeled for retail sale that they wish to sell at retail. FDA has issued a guidance document to provide flexibility regarding nutrition labeling so they can sell certain packaged food during the COVID-19 pandemic. <sup>5/</sup> We recently reported on this guidance in a previous memo. <sup>6/</sup>

---

<sup>5/</sup> FDA Provides Temporary Flexibility Regarding Nutrition Labeling of Certain Packaged Food in Response to the COVID-19 Pandemic (Mar. 26, 2020), available at <https://www.fda.gov/food/cfsan-constituent-updates/fda-provides-temporary-flexibility-regarding-nutrition-labeling-certain-packaged-food-response-covid>.

<sup>6/</sup> HL Memo, FDA Announces Temporary Flexibility Regarding Nutrition Labeling Due to COVID-19 Pandemic (Mar. 27, 2020), available at <https://www.hfoodlaw.com/2020/03/fda-announces-temporary-flexibility-regarding-nutrition-labeling-due-to-covid-19-pandemic/>.

## **FDA Fact Sheet for Distributing Unused Human Food for Animal Food Use**

FDA has issued a Fact Sheet on how unused human food may be distributed for animal food use during the COVID-19 outbreak. FDA acknowledges that as a result of COVID-19 and the restrictions on in-store dining, restaurants and restaurant suppliers may have surplus food they cannot use and are looking for ways to repurpose inventory. FDA states the preferred option is to use this food as human food and notes the agency has provided regulatory flexibility for redistribution of food, 7/ but that food that cannot be redistributed for human food use also can be repurposed as animal food to avoid sending it to a landfill.

FDA advises that restaurants, restaurant suppliers, food warehouses, or grocery stores that have unused human food that is not adulterated can send the food directly to a farmer, other animal caretaker, or manufacturer or supplier of manufacturers of animal food for pets, livestock, or other animals.

To distribute unused human food for use as animal food, entities **should**:

- Distribute food that is safe but will not be distributed for human food use because of supply-chain or food quality issues (e.g., stale food, food past its quality date);
- If distributing packaged food, make sure it is labeled with a statement of identity and a list of all ingredients;
- Consider submitting a diversion or reconditioning request if the food is adulterated and needs to be re-processed to be safe for animals to consume, following the instructions in FDA's Compliance Policy Guide Sec. 675.200 8/;
- Hold the food in a way that keeps it safe before it is distributed for use as animal food (e.g., don't put food in a bin that people may mistakenly throw trash or chemicals into); and
- Follow all state and local government regulations for animal food.

FDA also advises that entities distributing unused human food for use as animal food **should not**:

- Distribute food that is toxic to the animals that will be consuming it (e.g., xylitol and chocolate can be toxic to dogs) 9/;
- Distribute food that is adulterated or contaminated with food safety hazards such as chemical, physical hazards, or pathogenic bacteria;
  - FDA notes in particular that packaged food may need to be removed by you or the person(s) to whom the food is being distributed because packaging materials may be a physical food safety hazard for the animals consuming the food;
- Distribute meat products for swine food without following the heating requirements in the Swine Health Protection Act; or
- Distribute foods with mammalian protein for ruminant (e.g., cattle, sheep, goats) food.

Questions about the safety of ingredients for animals or other questions concerning distributing human food for use as animal food can be directed to [askCVM@fda.hhs.gov](mailto:askCVM@fda.hhs.gov).

\* \* \*

---

7/ See Guidance for Industry: Temporary Policy Regarding Nutrition Labeling of Certain Packaged Food During the COVID-19 Public Health Emergency (Mar. 2020), available at <https://www.fda.gov/media/136469/download>.

8/ Compliance Policy Guide 675.200: Diversion of Adulterated Food to Acceptable Animal Feed Use, available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/cpg-sec-675200-diversion-adulterated-food-acceptable-animal-feed-use>.

9/ Questions about the safety of ingredients for animals can be directed to [askCVM@fda.hhs.gov](mailto:askCVM@fda.hhs.gov).

We will continue to monitor FDA's response to COVID-19. Should you have any questions or if we can be of assistance with your COVID-19 response strategy, please do not hesitate to contact us.

## Appendix 1:

### Redline of Food and Agriculture Sector Critical Infrastructure Workers List March 19 compared to March 28

#### FOOD AND AGRICULTURE

- Workers supporting groceries, pharmacies, convenience stores, and other retail (including unattended and vending) that sells human food, animal/pet food and pet supply, and beverage products, including retail customer support service and information technology support staff necessary for online orders, pickup and delivery.
- Restaurant carry-out and quick serve food operations—~~Carry-out,~~ including dark kitchen and food prep centers, and carryout and delivery food employees.
- Food manufacturer employees and their supplier employees—to include those employed in food ingredient production and processing (~~packers, meat processing, cheese plants, milk plants, produce, etc.~~) facilities; livestock, poultry, seafood slaughter facilities; pet and animal feed processing facilities; human food facilities producing by-products for animal food; beverage production facilities; and the production of food packaging.
- ~~Farm~~-Farmers, farm workers, and agribusiness support services to include those employed in auction and sales; grain and oilseed handling, processing, and distribution; animal food, feed, and ingredient production, packaging, and distribution; manufacturing, packaging, and distribution of veterinary drugs; truck delivery and transport; farm and fishery labor needed to produce our food supply domestically and for export.
- Farmers, farm workers, and support service workers, and their supplier employees to include those ~~who engaged in producing and harvesting~~ field crops; commodity inspection; fuel ethanol facilities; biodiesel and renewable diesel facilities; storage facilities; and other agricultural inputs.
- Employees and firms supporting the distribution of food, feed, and beverage distribution and ingredients used in these products, including warehouse workers, vendor-managed inventory controllers and blockchain managers.
- Workers supporting the sanitation and pest control of all food manufacturing processes and operations from wholesale to retail.
- ~~Company cafeterias -- in-plant~~ Employees in cafeterias used to feed employees, particularly employee populations sheltered against COVID-19.
- Workers in animal diagnostic and food testing laboratoriess in private industries and in institutions of higher education.
- Government, private, and non-governmental workers essential for food assistance programs (including school lunch programs) and government payments.
- Employees of companies engaged in the production, storage, transport, and distribution of chemicals, medicines, vaccines, and other substances used by the food and agriculture industry, including seeds, pesticides, herbicides, fertilizers, minerals, enrichments, and other agricultural production aids.
- Animal agriculture workers to include those employed in veterinary health; ~~manufacturing and distribution of animal medical materials, animal vaccines, animal drugs, feed ingredients, feed, and bedding, etc.;~~ transportation of live animals, animal medical materials; transportation of deceased animals for disposal (including those involved in supporting emergency veterinary or livestock services); raising of animals for food; animal production operations; livestock markets' slaughter and packing plants, manufacturers, renderers, and associated regulatory and government workforce.
- Transportation supporting animal agricultural industries, including movement of animal and medical reproductive supplies and materials, animal vaccines, animal drugs, feed ingredients, feed, and bedding, live animals, animal by-products, and deceased animals for disposal.
- Workers who support sawmills and the manufacture and distribution of fiber and forest

- | products, including, but not limited to timber, paper, and other wood and fiber products.
- Employees engaged in the manufacture and maintenance of equipment and other infrastructure necessary ~~to~~ for agricultural production and distribution.