

MEMORANDUM

From: Elizabeth Barr Fawell
Brian D. Eyink
Leigh G. Barcham

Date: April 20, 2020

Re: COVID-19 Update: CISA Updates Critical Infrastructure Workers Guidance to Provide Additional Recommendations for Government and Businesses and Clarify Scope of Food and Agriculture Sector

The Department of Homeland Security's (DHS's) Cybersecurity & Infrastructure Security Agency (CISA) revised its interim guidance identifying critical infrastructure workers who the agency suggests should be exempt from state and local shelter in place orders, curfews, and similar restrictions on movement. ^{1/} We previously summarized the two earlier iterations of the guidance in our memoranda on March 20 and March 28, 2020. ^{2/} The most recent update provides additional key principles for consideration by government and businesses, including recommended precautions for protecting workers. It also provides minor clarifications on the scope of the food and agriculture sector. This memorandum provides highlights of the changes made in this latest version of the guidance, which is non-binding on industry and government.

CISA's Updated Critical Infrastructure Guidance

CISA updated the guidance document's section on "Considerations for Government and Business" to include the following:

- Employers must comply with applicable Occupational Safety and Health Administration (OSHA) requirements for protecting critical infrastructure workers who remain on or return to the job during the COVID-19 pandemic;
- Businesses may continue to implement organization-specific measures, which protect the workforce while meeting mission needs;

^{1/} Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response, Version 3.0 (Apr. 17, 2020), available at https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_2.pdf.

^{2/} HL Memo, COVID-19 Update: Supplemental Update on Essential Critical Infrastructure Workers (Mar. 20, 2020), available at <https://www.hfoodlaw.com/2020/03/covid-19-update-supplemental-update-on-essential-critical-infrastructure-workers/>; COVID-19: CISA Updates Critical Infrastructure Workers Guidance and FDA Issues Additional Guidance for Industry and the Public (Mar. 31, 2020), available at <https://www.hfoodlaw.com/2020/03/covid-19-update-cisa-updates-critical-infrastructure-workers-guidance-and-fda-issues-additional-guidance-for-industry-and-the-public/>.

- The guidance cross references the Centers for Disease Control and Prevention (CDC) recommendations on the use of cloth face coverings, noting that critical infrastructure employers must consider how best to implement this recommendation in the workplace;
- CISA advises government and businesses should consider the impact of workplace sick leave policies that may contribute to an employee decision to delay reporting medical symptoms and notes that sick employees should not return to the workplace until they meet the criteria to stop home isolation;
- The guidance advises that “critical infrastructure has an obligation to limit to the extent possible the reintegration of in-person workers who have experienced an exposure to COVID-19 but remain asymptomatic in ways that best protect the health of the worker, their co-workers, and the general public. An analysis of core job tasks and workforce availability at worksites can allow the employer to match core activities to other equally skilled and available in-person workers who have not experienced an exposure.” The guidance references CDC’s guidance on this topic;
- CISA explains essential critical infrastructure workers need continued and unimpeded access to sites, facilities, and equipment within quarantine zones, containment areas, or other areas where access or movement is limited to perform functions for community relief and stability; public safety, security, and health; and maintaining essential supply chains and preserving local, regional, and national economic well-being and should be exempted from curfews, shelter-in-place orders, and transportation restrictions or restrictions on movement; and
- CISA recommends that local jurisdictions should consider aligning access and movement control policies with neighboring jurisdictions to reduce the burden of cross-jurisdictional movement of essential critical infrastructure workers.

The revised interim guidance also includes changes to clarify the scope of the food and agriculture sector. The changes to the food and agriculture portion of the guidance are provided in Appendix 1 of this memorandum.

* * *

We will continue to monitor the federal government’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 28 compared to April 17 ^{3/}

FOOD AND AGRICULTURE

- Workers supporting groceries, pharmacies, convenience stores, and other retail (including unattended and vending) that sells human food, animal and /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, including dark kitchen and food prep centers, and carry-out and delivery food ~~employees~~workers.
- Food manufacturer ~~employees~~workers and their supplier ~~employees~~workers ~~including~~ ~~—to include~~ those employed in-at food ingredient production and processing facilities; aquaculture and seafood harvesting 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.
- Farmers, farm and ranch workers, and agribusiness support services to include those employed in auction and sales; grain and oilseed handling, storage, processing, and distribution; animal food, feed, and ingredient production, packaging, and distribution; manufacturing, packaging, and distribution of veterinary drugs; and truck delivery and transport; ~~farm and fishery labor needed to produce our food supply domestically and for export~~.
- Farmers, farm and ranch workers, and support service ~~workers~~, and ~~their~~ supplier workers producing food supply domestically and for export, ~~employees~~ to include those engaged in raising, cultivating, producing and harvesting, packing, storing, or delivering to storage or to market or to a carrier for transportation to market any agricultural or horticultural field crops; commodity for human consumption; agricultural inspection; fuel ethanol facilities; biodiesel and renewable diesel facilities; storage facilities; and other agricultural inputs.
- ~~Employees-Workers~~ and firms supporting the distribution of food, feed, and beverage 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.
- Workers supporting the growth and distribution of plants and associated products for home gardens.
- Workers ~~Employees~~ in cafeterias used to feed ~~employees~~workers, particularly employee worker populations sheltered against COVID-19.
- Workers in animal diagnostic and food testing laboratories ~~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-Workers~~ 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 (including those involved in supporting emergency veterinary or livestock services); raising, caring for and management of animals for food; animal production operations; livestock markets' slaughter and packing plants, manufacturers, renderers, and associated regulatory and government

^{3/} The guidance was uniformly updated to use the term “workers” to include both employees and contractors.

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, as well as manufacture and distribution of products using agricultural commodities.
- Employees-Workers engaged in the manufacture and maintenance of equipment and other infrastructure necessary for agricultural production and distribution.