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MEMORANDUM

From: Martin J. Hahn
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Date: March 20, 2020

Re: COVID-19 Update: Supplemental Update on Essential Critical Infrastructure Workers

In our memo of March 19, we summarized federal government policy identifying the Food and Agriculture and Transportation industries as two of the nation's 16 Critical Infrastructure Sectors.¹ In *The President's Coronavirus Guidelines for America*, the government emphasizes that "If you work in a critical infrastructure industry . . . such as . . . food supply, you have a special responsibility to maintain your normal work schedule."² On the afternoon of March 19, the Department of Homeland Security's (DHS's) Cybersecurity & Infrastructure Security Agency (CISA) released guidance identifying more specifically the type of food and agriculture sector workers that should be exempted from state and local shelter in place orders, curfews, and similar restrictions on movement. Although not binding on state and local authorities, the CISA guidance provides a central reference point likely to be instructive as states and localities implement movement restrictions.³

Please see our March 19 memo for considerations in managing operations during movement restrictions, including template certification letters for affected workers.

¹HL Memo, *COVID-19 Update: Food and Agriculture Critical Infrastructure Sector Classification and State and Local Restrictions and Curfews* (Mar. 19, 2020), available at <https://www.hffoodlaw.com/wp-content/uploads/sites/357/2020/03/HL-Memo-COVID-19-Update-Food-and-Agriculture-Critical-Infrastructure-Sector-Classification-and-State-and-Local-Restrictions-and-Curfews.pdf>.

²*The President's Coronavirus Guidelines for America* (Mar. 16, 2020).

³This memorandum is offered for general information and educational purposes. It is not offered as, intended as, and does not constitute legal advice. It is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.

Background and Context for the CISA Essential Workers List

CISA's *Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response* is "intended to support State, Local, and industry partners in identifying the critical infrastructure sectors and the essential workers needed to maintain the services and functions Americans depend on daily and that need to be able to operate resiliently during the COVID-19 pandemic response."⁴ As described in a companion CISA memo, the guidance "identifies workers who conduct a range of operations and services that are essential to continued critical infrastructure viability" across a number of critical sectors, including food and agriculture workers.

Although the guidance represents the federal government's policy, CISA notes that "State, local, tribal, and territorial governments are ultimately in charge of implementing and executing response activities in communities under their jurisdiction" and that the CISA list is intended to "assist prioritizing activities related to continuity of operations and incident response, including the appropriate movement of critical infrastructure workers within and between jurisdictions." CISA prominently discloses, in bold text, that its "list is advisory in nature. It is not, nor should it be considered to be, a federal directive or standard in and of itself." CISA indicates that its list is not exhaustive and that state and local officials and critical infrastructure businesses need to exercise their own judgment "to ensure continued operations of critical infrastructure services and functions."

Finally, CISA encourages industry to share feedback by contacting CISA.CAT@CISA.DHS.GOV.

CISA Essential Food and Agricultural and Related Industry Workers

In its guidance, CISA identifies the following as "essential critical infrastructure workers" in the Food and Agriculture sector:

- Workers supporting groceries, pharmacies and other retail that sells food and beverage products
- Restaurant carry-out and quick serve food operations - Carry-out and delivery food employees
- Food manufacturer employees and their supplier employees—to include those employed in food 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 workers to include those employed in 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
- Farm workers and support service workers to include those who field crops; commodity inspection; fuel ethanol facilities; storage facilities; and other agricultural inputs

⁴ CISA, *Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response* (Mar. 19, 2020), <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>.

- Employees and firms supporting food, feed, and beverage distribution, including warehouse workers, vendor-managed inventory controllers and blockchain managers
- Workers supporting the sanitation of all food manufacturing processes and operations from wholesale to retail
- Company cafeterias - in-plant cafeterias used to feed employees
- Workers in food testing labs in private industries and in institutions of higher education
- Workers essential for assistance programs and government payments
- Employees of companies engaged in the production of chemicals, medicines, vaccines, and other substances used by the food and agriculture industry, including 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; raising of animals for food; animal production operations; slaughter and packing plants and associated regulatory and government workforce
- Workers who support the manufacture and distribution of forest products, including, but not limited to timber, paper, and other wood products
- Employees engaged in the manufacture and maintenance of equipment and other infrastructure necessary to agricultural production and distribution

CISA also identifies as “essential” workers in various other industries supporting the food sector, including truck drivers, port and maritime workers, air and ground carriers, logistics firms, and mechanics and maintenance workers. Also deemed essential as “Critical Manufacturing” workers are “Workers necessary for the manufacturing of materials and products needed for . . . food and agriculture.”

The CISA list also includes workers from additional Critical Infrastructure Sectors.

* * *

Food sector companies should review the CISA guidance carefully to determine whether workers essential to their continued operation are identified. Companies may also wish to make the CISA guidance document available to management employees who may become involved in helping to justify a worker’s movement during a state or local movement restriction. Companies that have concerns that key workers critical to their business are not listed should consider submitting prompt feedback to CISA.

We will continue to monitor this rapidly developing situation. If you become aware of instances when food or transportation employees are prevented from performing their jobs by local or state enforcement officials, or need assistance having key workers added to the list, please don’t hesitate to contact us.