



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: Gary Jay Kushner
Martin J. Hahn
Maile G. Hermida
Elizabeth Barr Fawell
Brian D. Eyink

Date: March 19, 2020

Re: COVID-19 Update: Food and Agriculture Critical Infrastructure Sector Classification and State and Local Restrictions and Curfews

As the novel coronavirus crisis continues to escalate, state and local governments have begun implementing increasingly aggressive measures, including restrictions on when and which businesses may operate, quarantines, curfews, and lockdowns. Some measures have been tailored to accommodate continued operation of the food sector, while others are more general. These restrictions risk creating confusion as to whether food sector employees may travel to work or conduct transportation operations during restricted time periods, and companies should expect more such measures in the coming days.

This alert summarizes federal government policy prioritizing the continued operation of the food and agriculture sector and related transportation operations as Critical Infrastructure Sectors and provides template letters companies may wish to use to identify employees, contractors, and carriers as Critical Industry Infrastructure workers.¹

Background on Federal Critical Infrastructure Sector Policy

Under federal emergency preparedness planning, the Department of Homeland Security has prioritized the protection and continued operation during crises of the food and agriculture industry and related transportation activities as “Critical Infrastructure.” The USA PATRIOT Act of 2001 defines “critical infrastructure” as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating

¹ This memorandum, with its enclosed materials, 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. The enclosed letter template cannot guarantee that an individual will be considered exempt from a state or local movement restriction.

impact on security, national economic security, national public health or safety, or any combination of those matters.”² Through the Act, Congress established “the policy of the United States” is “that any physical or virtual disruption of the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States.”³

Presidential Policy Directive 21 identifies 16 Critical Infrastructure Sectors under the USA PATRIOT Act, including “Food and Agriculture” and “Transportation.”⁴ The Department of Homeland Security’s (DHS’s) Cybersecurity & Infrastructure Security Agency (CISA) describes the Food and Agriculture sector as being “composed of an estimated 2.1 million farms, 935,000 restaurants, and more than 200,000 registered food manufacturing, processing, and storage facilities” and having a “critical dependenc[y]” with the Transportation sector for “movement of products and livestock.”⁵ DHS’s *Food and Agriculture Sector-Specific Plan*, developed jointly with the Food and Drug Administration and the U.S. Department of Agriculture, more specifically defines the Food and Agriculture sector as encompassing “the supply chains for feed, animals, and animal products; crop production and the supply chains of seed, fertilizer, and other necessary related materials; and the post-harvesting components of the food supply chain, from processing, production, and packaging through storage and distribution to retail sales, institutional food services, and restaurant or home consumption.”⁶

The sector specific plan identifies eight categories within the Food and Agriculture sector:

- Supply;
- Processing, Packaging, and Production;
- Agricultural and Food Product Storage;
- Agricultural and Food Product Transportation;
- Agricultural and Food Processing Product Distribution;
- Agricultural and Food Supporting Facilities;
- Regulatory, Oversight, and Industry Organizations; and
- Other Agriculture and Food.⁷

CISA describes the Transportation Systems sector as encompassing aviation, highway and motor carrier, maritime transportation, mass transit and passenger rail, pipeline systems, freight rail, and postal and shipping subsectors.⁸ The *Transportation Sector Specific Plan* describes the Transportation Systems sector as a “lifeline function[] deemed essential to the operation of most sectors,” and notes specifically that the food supply chain is dependent on truck, rail, and maritime shipments.⁹

Recent Developments and Communications

There are a number of ongoing efforts at the national level to communicate the need for state and local restrictions, curfews, and lockdowns to allow for the continued operation of food production, processing, distribution, and retail operations and their supporting services, including:

² 42 U.S.C. § 5195c(e).

³ *Id.* § 5195c(c)(1).

⁴ [Presidential Policy Directive 21 – Critical Infrastructure Security and Reliance](#) (Feb. 12, 2013).

⁵ CISA, [Food and Agriculture Sector](#).

⁶ FDA, USDA, DHS, [Food and Agriculture Sector-Specific Plan](#) at 4-5 (2015).

⁷ *Id.* at 4 (2015).

⁸ CISA, [Transportation Systems Sector](#).

⁹ DHS, DOT, [Transportation Systems Sector Specific Plan](#) at 15 (2015).

- In *The President's Coronavirus Guidelines for America*, the White House emphasizes that food industry sector workers should continue to work during the national effort to halt the spread of COVID-19: "If you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as . . . food supply, you have a special responsibility to maintain your normal work schedule."¹⁰
- A coalition of food and agriculture trade associates circulated a letter to federal and state officials reiterating the need to provide clear guidance that curfews and lockdowns should not restrict the food industry's ability to process and distribute food to consumers.
- DHS's Cybersecurity & Infrastructure Security Agency has circulated a proposed list of "Tier 1" exempt workers for Critical Industry Sectors, which the food industry has commented on, in apparent preparation for issuing guidance to state and local authorities.

We anticipate additional federal and state focus in the coming days on how food industry operations fit into state and local restrictions, curfews, and lockdowns.

What Food Companies Can Do

The situation remains dynamic and has been changing by the day and hour. Food companies should continue to monitor developments at the national and state level closely, with an eye toward how restrictions and curfews could affect their operations, working with national or state trade associations when possible to help shape state lockdown policies or guidance issued afterward to ensure the continued operation of all critical food industry functions.

Food companies should anticipate the potential for lockdowns or curfews to affect their employees' or contractors' ability to travel to or from their facilities or their transportation carriers' ability to deliver product to distribution centers, retailers, or consumers. Bear in mind that transportation operations could be affected by any jurisdiction along the driver's route.

Companies may find it useful to provide their employees, contractors, and carriers with a letter confirming that the individual is traveling to or from a food facility or transporting food or materials in the event state or local authorities question whether the individual is in violation of local restrictions. Two sample letters are included as appendices to this memorandum, which companies may adapt to their needs. One covers the transportation of food or materials, and one covers employees commuting to or from their place of work. These templates are designed to inform the reader that the person bearing the letter is a Critical Infrastructure Sector worker, but they do not guarantee that an individual or shipment will be permitted to proceed under any particular state or local restriction. In instances when an employee will be operating in specific jurisdictions with travel restrictions in place, it would be appropriate to modify the template to identify the applicable exemptions in the jurisdiction's order and the employee's qualification for that exemption.

* * *

¹⁰ [*The President's Coronavirus Guidelines for America*](#) (Mar. 16, 2020).

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, please contact us or your trade association so we can inform the enforcement officials of the critical role these employees play in the U.S. infrastructure. If you need assistance, please don't hesitate to contact us.

SAMPLE LETTER TEMPLATE FOR **TRANSPORTATION EMPLOYEE**
PLACE ON COMPANY LETTERHEAD

Critical Industry Employee Authorization to Travel Regardless of the Time of Day

To Whom It May Concern:

The individual in possession of this letter works in the transportation industry and must travel to and from work and engage in transportation activities regardless of the time of day as an employee in a sector that has been deemed by the U.S. Government as critical to the infrastructure of the United States. The transportation industry is essential for the continued function of the economy in this time of crisis. This individual is engaged in transportation services essential to the continued function of multiple Critical Infrastructure Industries, including the transport of foods, beverages, raw materials, agricultural products, and other products needed by the Food and Agriculture industry.

The Transportation Systems industry and Food and Agriculture industries have each been designated a "Critical Infrastructure Segment" under Presidential Policy Directive 21 and Department of Homeland Security emergency readiness programs implementing the USA PATRIOT Act of 2001. 42 U.S.C. § 5195c(e). It is therefore the policy of the United States government that these industries continue to function with minimal disruption in the event of an emergency. Furthermore, in a March 16 guidance, the President of the United States has instructed employees of Critical Infrastructure Industries, including the food and agriculture sector, to continue to perform their normal job functions during the coronavirus pandemic. [The President's Coronavirus Guidelines for America](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (Mar. 16, 2020) (available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf).

The continued operation of the Transportation Sector is vital to the health and wellness of the American people during this emergency.

As such, the individual in possession of this letter is a "critical infrastructure industry employee" of Transportation and Food and Agricultural industry sectors and should be considered exempt from any state or local restrictions such as curfews, shelter-in-place orders, and other mobility restrictions when reporting to, returning from, or performing his or her work functions, and the critical materials conveyed in this shipment should be permitted to proceed. We ask that you allow this individual to continue with his or her job in the interest of protecting public health and security.

Should you have any questions concerning this letter, please contact [NAME], [TITLE], [COMPANY] at [XXX-XXX-XXXX].

Certified by,

[NAME]

[OPTIONAL: IDENTIFYING INFORMATION FOR VEHICLE (E.G., LICENSE NUMBER)]

SAMPLE LETTER TEMPLATE FOR **FOOD/AGRICULTURE EMPLOYEE**
PLACE ON COMPANY LETTERHEAD

Critical Industry Employee Authorization to Travel Regardless of the Time of Day

To Whom It May Concern:

The individual in possession of this letter works in the Food and Agriculture industry and must travel to and from work and engage in his or her work activities regardless of the time of day as an employee in a sector that has been deemed by the U.S. Government as critical to the infrastructure of the United States. The Food and Agriculture industry is essential for the continued function of the economy in this time of crisis. It is essential to the nation's food supply that this individual be permitted to proceed to or from his or her job or to otherwise perform his or her job function.

The Food and Agriculture industry has been designated a "Critical Infrastructure Segment" under Presidential Policy Directive 21 and Department of Homeland Security emergency readiness programs implementing the USA PATRIOT Act of 2001. 42 U.S.C. § 5195c(e). It is therefore the policy of the United States government that these industries continue to function with minimal disruption in the event of an emergency. Furthermore, in a March 16, 2020 guidance, the President of the United States instructed employees of Critical Infrastructure Industries, including the food and agriculture sector, to continue to perform their normal job functions during the coronavirus pandemic. [The President's Coronavirus Guidelines for America](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (Mar. 16, 2020) (available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf).

The continued operation of the Food and Agriculture industry is vital to the health and wellness of the American people during this emergency.

As such, the individual in possession of this letter is a "critical infrastructure industry employee" of the Food and Agriculture industry and should be considered exempt from local restrictions such as curfews, shelter-in-place orders, and other mobility restrictions when reporting to, returning from, or performing his or her work functions. We ask that you allow this individual to continue with his or her job in the interest of protecting public health and security.

Should you have any questions concerning this letter, please contact [NAME], [TITLE], [COMPANY] at [XXX-XXX-XXXX].

Certified by,

[NAME]



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MEMORANDUM

From: Gary Jay Kushner
Martin J. Hahn
Maile G. Hermida
Elizabeth Barr Fawell
Brian D. Eyink

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).

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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.