

## IS YOUR BUSINESS “NON-ESSENTIAL”? AMID COVID-19 CRISIS AND STATE RESTRICTIONS, U.S. DEPARTMENT OF HOMELAND SECURITY ISSUES GUIDANCE ON ESSENTIAL INDUSTRIES WITH “SPECIAL RESPONSIBILITY” TO CONTINUE OPERATIONS

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As the coronavirus makes its way across the country, states – beginning with California – have begun ordering residents to stay at home and/or the closure of non-essential businesses to protect the health of their citizens. In these uncertain times, this is yet another COVID-19 issue for businesses to consider. If your state orders a shutdown of all “non-essential” businesses, what does that actually mean? This Client Alert provides an overview of the current guidance issued by the Cybersecurity and Infrastructure Security Agency (CISA) within the U.S. Department of Homeland Security (DHS); however, since there is no one-size-fits-all approach, it is important to consult counsel as you weigh your options. A case-by-case analysis will need to be performed under continually evolving circumstances and guidance.

CISA released its guidance to assist state and local government and private businesses to designate essential workforce as part of the continuing response to the coronavirus (COVID-19) pandemic. CISA’s guidance expands upon White House guidelines, which indicated that employers and employees in a “critical infrastructure industry” have a “special responsibility” to keep their “normal work schedule” and follow CDC guidance to protect health in the workplace.

The CISA guidance identifies 16 critical infrastructure industries that provide resources, networks, and systems deemed essential to U.S. welfare and security, including:

- Healthcare/Public Health
- Law Enforcement, Public Safety, First Responders
- Food Supply & Agriculture
- Energy (e.g., electricity, petroleum, natural and propane gas)
- Water & Wastewater
- Transportation & Logistics (e.g., mass transit, port workers, hazardous waste trucks, auto repair, postal)
- Public Works (e.g., trash collection, traffic signals, sewer/bridge/road maintenance)
- Communications & Information Technology (e.g., engineers and technicians for wire/fiber optic cables, client service centers for critical infrastructure industries, HVAC, repair technicians and dispatch, support for continuity of services, including janitorial support)
- Community-Based Government Operations & Essential Functions (e.g., weather forecasters, hotel workers where hotels are used for COVID-19 response, K-12 and university personnel facilitating remote learning, elections personnel)
- Critical Manufacturing (e.g., products for supply chains for critical industries, nuclear power plants, emergency services)
- Hazardous Materials (e.g., nuclear facilities, medical waste, hazardous material cleanup and management)
- Financial Services (e.g., transaction processing, consumer access to banking – including ATMs, banking information security)
- Chemical (e.g., chemical engineering, cleaning and medical solutions, chemical transportation)
- Defense Industrial Base (e.g., products, materials, and services for U.S. military, Department of Defense)

The guidance provides a non-exhaustive list of the jobs that fall into these categories or play essential supporting roles for these industries.

The federal guidance is “advisory” and provides for state and local governments to take the lead in implementing COVID-19 response measures, with the federal government playing a supporting role. States and localities have indeed taken the lead, with California, Illinois, New York, and Pennsylvania imposing statewide “stay home” or essential-business-only orders over the past week. Businesses must keep abreast of the state-specific intricacies of their respective state measures. For instance, Pennsylvania’s order closes all businesses not deemed “life sustaining,” while exempting “virtual or telework operations (*e.g.*, work from home)” that follow appropriate social distancing and mitigation measures. (See Pennsylvania [Order](#) and [list](#) of Life Sustaining Businesses.)

Yet, with more states and localities taking responsibility for issuing such orders, the CISA guidance will undoubtedly shape those policies. For example, California’s stay-home [order](#) exempted these federally identified critical infrastructure industries. The CISA guidance thus should inform businesses’ responses.

Qualifying employers and employees in critical infrastructure industries that remain operational following shutdown orders, like all operational workplaces, should document their response measures, continue to follow CDC guidance on best practices, and take every precaution to avoid transmission of COVID-19. This includes ongoing monitoring of developments, prompt reporting, and responsive action.

#### ADDITIONAL INFORMATION

Tucker Ellis attorneys are helping clients, boards, and management in considering their best options and in documenting policies, ongoing governance, and continuing business operations in compliance with government mandates and safety measures. For additional information or assistance, please contact:

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