

COVID-19 Update for Food Companies Navigating Quarantine Disruption

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Life Sciences

Over the past several weeks, states and localities across the country have implemented wide-ranging quarantines and curfews meant to slow the spread of COVID-19. Some of these measures have impeded food companies' efforts to manufacture and distribute critical goods to their intended destinations. Even as the federal government underscores the importance of food sector businesses continuing normal operations, manufacturers and distributors may continue to face challenges at the state and local level.

This alert explains the basic structure of the U.S. public health emergency system, including that state and local authorities bear much of the responsibility for responding to health emergencies within their own borders, with the federal government playing a supporting role. It then examines the Department of Homeland Security's (DHS) designation of the food and agriculture industry as "Critical Infrastructure Sectors" and the relationship between that designation and state and local law. Finally, this alert explains how companies and their employees can rely on their critical infrastructure entity designations to address any challenges local quarantines pose.

I. Deference to State and Local Governments During Public Health Emergencies

The United States public health system places much of the responsibility for responding to public health emergencies on state and local governments as an exercise of their police powers, with the federal government providing supplemental resources and support. This is why the quarantine and movement restrictions we have seen so far have been imposed at the state and local levels, and not at the federal level.

Federal disaster relief law is designed to defer to local and state officials, with the federal government assisting with funding and coordination. For example, according to the Stafford Act—one of the laws through which President Trump declared a national emergency on Friday, March 13—the role of the federal government is to "supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering."¹ Absent direct conflict, in which there is a specific exercise of federal authority that directly conflicts with state or local law, federal law generally does not preempt local and state law in the context of health emergencies.

¹ Stafford Act Section 102(2) (42 U.S.C. § 5122(2)).

II. The Food Sector’s Designation as a “Critical Infrastructure Sector”

Presidential Policy Directive 21 (PPD-21) identifies 16 critical infrastructure sectors whose assets, systems, and networks are considered so vital that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety.² The Directive identifies the Food and Agriculture sector as one such area of critical infrastructure, and designates the Department of Agriculture as the “sector-specific agency” in charge of coordinating the federal response to a threat. Several other sectors are closely related to food and agriculture, including Transportation and Commercial Facilities.

The Critical Infrastructure (CI) framework set forth in PPD-21 establishes a national policy on protecting critical infrastructure by creating mechanisms for coordination between federal, state, and local officials, as well as public and private owners and operators of critical infrastructure. Under this framework, each designated sector-specific agency drafts plans detailing how the overall National Infrastructure Protection Plan should be implemented within the context of that sector. The Food and Agriculture Sector-Specific Plan is meant less to supersede local and state initiatives than to coordinate among them; it explains that its purpose is to “guide and integrate” the food sector’s efforts to improve security.³ By itself, then, the food and agriculture’s designation as CI would not be likely to preempt state or local quarantine laws that might interfere with food production, distribution, and delivery.

III. Federal Government Guidance on Critical Infrastructure Workers

Although the CI framework does not preempt state and local law, a critical infrastructure designation may be helpful to support the determination that an entity is exempt from a state or local quarantine order as an “essential business.” Critical infrastructure is so designated because of its critical importance to security, national economic security, national public health, or safety. State and local authorities are likely to defer to the federal government’s guidance, even if nonbinding, on who constitutes an essential CI employee, even as state and local authorities exercise their powers to order quarantines, curfews, and other restrictions on movement within their own borders.

In that regard, the federal government recently issued clear guidance that food and agriculture sector workers constitute CI employees for the purposes of addressing the COVID-19 outbreak—and that such businesses must be permitted to continue normal operations. On March 16, for example, the Center for Disease Control issued preliminary guidance stating that “[i]f you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as . . . *pharmaceutical and food supply*, you have a special responsibility to maintain your normal work schedule” (emphasis added).⁴ Several days later, on March 19, the Cybersecurity and Infrastructure Security Agency—the agency within DHS responsible for protecting the nation’s critical infrastructure—underscored the importance of food sector

² The White House, *Presidential Policy Directive – Critical Infrastructure Security And resilience* (Feb. 12, 2013), available at <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil>.

³ *Id.* at 2.

⁴ The White House, *The President’s Coronavirus Guidelines* (Mar. 16, 2020), available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

workers in detailed guidance on identifying critical infrastructure workers during COVID-19.⁵ The guidance states that “CI industries have a special responsibility in these times to continue operations,” and that it 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.”⁶ It lists food and agriculture as one of the essential CI sectors, which includes a wide range of food industry workers, from grocery employees and employees of pharmacies that sell human food, animal/pet food, and beverage products, to restaurant delivery workers, sanitation inspectors, and food growers and producers, among many others.⁷ The Food and Drug Administration (FDA) emphasized this DHS guidance in its own statement on March 23, which notes that “promoting the ability of our workers within the food and agriculture industry to continue to work during periods of community restrictions, social distances, and closure orders, among others, is crucial to community continuity and community resilience.”⁸

Although the DHS guidance emphasizes that it is “advisory in nature” and not binding on state and local officials, it was developed in coordination with such officials and is likely to receive widespread deference from those officials.⁹ Along with the existing sector-specific plan for food and agriculture, the guidance presents significant evidence that food sector companies and employees should not only be allowed but encouraged to continue operations as efficiently as possible.

IV. Recommendations for Food Companies

As federal, state, and local authorities continue to respond to the rapidly evolving challenges posed by COVID-19, food companies should continue to monitor closely developments at all levels.

Companies encountering difficulties at the state and local level in sustaining their operations and getting their goods to market can point to federal guidance to underscore the essential nature of their operations. Companies may wish to provide their employees traveling through or within quarantine and isolation zones with certifications confirming that they are members of the food sector engaging in work DHS considers to be essential critical infrastructure. Such certifications could, for example, note the relevant federal guidance strongly encouraging food sector companies and their employees to continue normal operations amidst widespread restrictions.

Companies may adapt as needed the sample certification [included as an appendix to this alert](#). Employees can present a version of this certification to state and local authorities seeking to bar their movement through quarantine zones. Although these authorities will have the ultimate

⁵ Cybersecurity and Infrastructure Security Agency, *Identifying Critical Infrastructure During Covid-19* (Mar. 19, 2020), available at <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>.

⁶ *Id.*

⁷ *Id.*

⁸ Food and Drug Administration, *Food Safety and the Coronavirus Disease 2019 (COVID-19)* (Mar. 23, 2020), available at <https://www.fda.gov/food/food-safety-during-emergencies/food-safety-and-coronavirus-disease-2019-covid-19>.

⁹ *Identifying Critical Infrastructure During Covid-19*, available at <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>.

authority to determine whether such employees can proceed, the certification can provide helpful support.

FDA has also advised that food sector companies experiencing supply chain, business continuity, or delivery disruptions resulting from state and local quarantines or similar restrictions should contact the FEMA National Business Emergency Operations Center at NBEOC@fema.dhs.gov.¹⁰ FDA notes that this is a 24/7 operation that can assist companies in directing their inquiries to the proper contact.¹¹

Affected businesses should also consider working, alone or as part of trade associations or industry coalitions, with governors, health agencies, and city and county officials to explain how the actions they are taking may affect critical food supply needs, and to urge them to modify such actions when necessary. These companies should also continue to engage with the federal government. Although federal officials cannot mandate particular exercises of state and local authority, they can issue guidance to coordinate efforts across the country. To the extent food companies can work with federal officials responsible for issuing this guidance, they may be able to inform how state and local authorities exercise their authority.

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To best advise our clients on the rapidly evolving public health situation in the United States, our COVID-19 task force is staying abreast of daily developments and tracking the latest federal, state and local policies related to COVID-19. Please feel free to reach out to our team members listed below with any questions, and to visit Covington's website for our [COVID-19: Legal and Business Toolkit](#).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Food, Drugs, and Devices practice:

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**District of Columbia bar application pending; supervised by principals of the firm.*

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¹⁰ *Food Safety and the Coronavirus Disease 2019 (COVID-19)*, available at <https://www.fda.gov/food/food-safety-during-emergencies/food-safety-and-coronavirus-disease-2019-covid-19>.

¹¹ *Id.*