



Federal DHS & DOD Guidance Regarding "Essential Businesses" That Are or May Be Expected to Continue Operations Under State Shutdown Orders

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In the face of increasing state shutdown orders regarding the COVID-19 pandemic, many companies serving the private sector and public sector are inquiring if they will be forced to shut down operations. In the last week, the Department of Homeland Security (DHS) and the Department of Defense (DOD) have issued useful guidance on the subject. The DHS Guidance identifies business sectors and industries that might be deemed "essential businesses" by states when they issue shutdown orders. The DOD issued a policy memorandum which declares most DOD contractors and subcontractors to be "essential businesses." The Government emphasizes that shutdown orders are matters to be addressed at the state level, of which there are several examples (*e.g.*, New York Gov. Cuomo's Order). In addition, there may be shelter-in-place restrictions issued at a more local level, such as in the Bay Area of California.

DHS/CISA "Guidance" On Essential Businesses

On March 19, 2020, the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) issued a [Guidance document](#) for use by businesses and states when states are issuing shutdown orders. CISA bases its Guidance on the President's March 16, 2020 updated Coronavirus Guidance for America. That Guidance states: "If you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule."

CISA is charged with executing the Secretary of Homeland Security's responsibilities as assigned under the Homeland Security Act of 2002 to provide strategic guidance, promote a national unity of effort, and coordinate the overall federal effort to ensure the security and resilience of the Nation's critical infrastructure. In accordance with this mandate, and in collaboration with other federal agencies and the private sector, CISA developed an initial list of "Essential Critical Infrastructure Workers" to help State and local officials as they work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security. The list can also inform critical

infrastructure community decision-making to determine the sectors, sub-sectors, segments or critical functions that should continue normal operations, appropriately modified to account for Centers for Disease Control and Prevention (CDC) workforce and customer protection guidance.

CISA explains that the guidance list identifies workers who conduct a range of operations and services that are essential to continued critical infrastructure viability, including: staffing operations centers, maintaining and repairing critical infrastructure, operating call centers, working construction and performing management functions, among others. The industries they support represent, but are not necessarily limited to, medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works.

CISA emphasizes that state, local, tribal and territorial governments are ultimately in charge of implementing and executing response activities in communities under their jurisdiction, while the Federal Government is in a supporting role. Accordingly, the CISA 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’s preliminary group of sectors and identified essential critical infrastructure workers are viewed as an initial recommended set and are intended to be overly inclusive reflecting the diversity of industries across the United States. Essential critical infrastructure workers include communications; dams; chemical; commercial facilities; critical manufacturing; defense industrial base; emergency services; energy; financial; food and agriculture; government facilities; healthcare and public health; information technology; transportation systems; nuclear reactors, materials and waste; and water.

The workers fall within the following sectors which encompass essential businesses, with more specific business descriptions being set forth as subcategories under each heading.

- Healthcare/public health
- Law enforcement, public safety, first responders
- Food and agriculture
- Energy
- Water and wastewater
- Transportation and logistics
- Public works
- Communications and information technology
- Other community-based government operations and essential functions
- Critical manufacturing
- Hazardous materials
- Financial services
- Chemical
- Defense industrial base

Faced with a state's shutdown order, companies will need to review the state's order to determine their "essential business" status. For those businesses that are not specifically listed in a state order's essential business category list, state orders may include a process by which a company can apply for coverage. However, as discussed below, those companies operating under a Defense Department government prime contract or subcontract are expected to continue operations as "essential businesses."

Separate from the state-level orders, companies must be mindful of more localized orders and guidance, which may be issued by cities or other governmental bodies.

DOD Memorandum Directs That Most Defense Contractors Are Deemed Essential Businesses As Part Of the Defense Industrial Base

On March 20, 2020, the Undersecretary of Defense for Acquisition and Sustainment, Ellen Lord, issued a Memorandum For Defense Industrial Base, "[Defense Industrial Base Essential Critical Infrastructure Workforce.](#)" The Memorandum declares a broad swath of the Defense Industrial Base (DIB) to be "Essential Businesses" under the DHS CISA Guidelines for "Essential Businesses" (discussed above). This, effectively, includes most Defense Department contractors.

The Memorandum takes a broad view of what businesses are encompassed as essential. It explains that the Essential Critical Infrastructure Workforce for the DIB includes workers who support the essential needs and services required to meet national security commitments to the Federal Government and the U.S. Military. These individuals include, but are not limited to, aerospace; mechanical and software engineers; manufacturing/production workers; IT support; security staff; security personnel; intelligence support; aircraft and weapon systems mechanics and maintainers; suppliers of medical supplies and pharmaceuticals; and critical transportation. Importantly, they include personnel working for companies, and their subcontractors, who perform under contract to the Department of Defense providing materials and services to the Department of Defense and government-owned/contractor-operated and government-owned/government-operated facilities.

Summarizing further, the Memorandum states: "If your contract or subcontract supports the development, production, testing, fielding, or sustainment of our weapon systems/software systems, or the infrastructure to support those activities, (sic) [they] are considered Essential Critical Infrastructure. If your efforts support manning, training, equipping, deploying, or supporting our military forces, your work is considered Essential Critical Infrastructure. If you are performing such tasks as providing office supplies, recreational support, or lawn care, they are not considered part of the Essential Critical Infrastructure Workforce."

In short, the Memo suggests that almost all defense contractors, subcontractors and their employees are essential under the current environment.

A Note Of Caution – Businesses Will Still Need To Check At The State Level

As discussed above, the decision on which entities are "essential" will be determined on a state-by-state

basis. In some instances, it will be clear that a specific business type is covered by a general exemption or a specifically listed category. However, in other situations the resolution may be less clear and open to interpretation. By way of example, one state issued a travel ban. One exception was very broad and covered any business needed to maintain a safe transportation network. However, it was unclear whether a business that operates tow trucks and service vehicles, and also operates repair shops, was covered. In sum, there may be room for nuance. Accordingly, companies with questions may want to check with a trade or professional association that represents their interests in each state to assess if their situation has been or is being addressed in their state. As noted above, it may be possible for a business to request coverage under an order. Such an effort may prove more successful if carried out on an industry-wide basis.

Williams Mullen will endeavor to update these alerts as appropriate. We are available to assist you with specific questions about this and related subject areas. For more information, please contact Tony Anikeeff at aanikeeff@williamsmullen.com or at (703) 760-5206.

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