

Providing Essential Supplies to Americans in the Time of COVID-19

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PRACTICES Hospitality, Procurement and Supply Chain Management, Pharmaceuticals, Food, Beverage and Restaurant, Franchise and Distribution, Healthcare and Life Sciences, Labor and Employment

In less than a week, SARS-CoV-2, the novel coronavirus that leads to COVID-19, has upended American lives and livelihoods. But while many are taking an unwanted break from business as usual, “essential businesses” are working overtime to rise to the critical call of keeping Americans healthy, safe, and fed while the nation shuts down and the virus spreads.

First, each business must determine whether – and to what extent – it is essential. Then, it must determine what suppliers may need to be notified of their potential part in sustaining operations. Third, essential businesses should understand the widespread regulatory relief available to them and should not hesitate to demand that ordinary barriers be relaxed or waived. Finally, each business must do what it can to protect employees and flatten the curve.

Essential Businesses

First, every business should understand that to the extent work can be done or the business can be ‘open’ remotely, with employees working from home, such activities remain permissible under the so called ‘shelter in place’ orders that state and local governments have issued so far.

Apart from remote work that may keep the ‘doors open’ during this crisis, every business should consider whether, and to what extent, its activities make it an ‘essential business.’ For some, the essential nature of business activities, such as providing food or non-elective healthcare, will be obvious. For others, this will require a review of the types of businesses that purchase products and services to determine whether business activities are covered, in part, due to such support.

The Department of Homeland Security (“DHS”) has issued [Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response](#), [1] but it is advisory in nature and designed to guide states and municipalities in deciding which businesses are and are not essential for purposes of protecting public health. The Guidance states that “[r]esponse efforts to the COVID-19 pandemic are locally executed, State managed, and federally supported.” Accordingly, whether a business is essential will largely depend on the policy of the state or municipality issuing the applicable closure policy.

Most of the existing state and local guidance on the topic defines “essential businesses” broadly, with many apparently utilizing or incorporating the federal Guidance. The federal Guidance focuses on workers needed to keep infrastructure stable within 16 [critical infrastructure sectors](#), which are those “whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.” Specifically, DHS expressly recognizes the following critical infrastructure sectors related to the food, healthcare, and retail industries:

- [Food and Agriculture Sector](#) – In its [Food and Agriculture Sector-Specific Plan](#), DHS describes this sector as follows: “Agriculture comprises establishments primarily engaged in growing crops, raising animals, harvesting timber, and harvesting fish and other animals from a farm, ranch, or their natural habitats. Food establishments transform livestock and agricultural products into products for intermediate or final consumption. The industry groups are distinguished by the raw materials (generally of animal or vegetable origin) processed into food and beverage products. The food and beverage products manufactured in these establishments are typically sold to wholesalers or retailers for distribution to consumers.” Food laboratories are also included, as are other operations that support the food industry or that sell end products, such as grocery retailers.
- [Chemical Sector](#) – DHS divides this sector into five main segments, including the pharmaceutical and consumer product segments, which may cover manufacturers of certain important consumer products sold at retail. In its [Chemical Sector-Specific Plan](#), DHS elaborates that the pharmaceutical segment includes products like “[m]edicines, biological products, diagnostic substances, & vitamins” and the consumer products segment includes products like “soaps, detergents, bleaches, toothpaste, cosmetics, perfume, & paints.”
- [Healthcare and Public Health Sector](#) – In its [Healthcare and Public Health Sector-Specific Plan](#), DHS notes that this sector is large and diverse, made up of eight subsectors, including, among others, the “Laboratories, Blood, and Pharmaceuticals” subsector, which includes “pharmaceutical manufacturers” and “drug store chains.”

The “16 critical infrastructure sectors” also currently include the: [Commercial Facilities Sector](#); [Communications Sector](#); [Critical Manufacturing Sector](#); [Dams Sector](#); [Defense Industrial Base Sector](#); [Emergency Services Sector](#); [Energy Sector](#); [Financial Services Sector](#); [Government Facilities Sector](#); [Information Technology Sector](#); [Nuclear Reactors, Materials, and Waste Sector](#); [Transportation Systems Sector](#); and [Water and Wastewater Systems Sector](#).

Efforts to clarify the boundaries of which businesses are “essential” continue. Many industry associations, such as the [Council for Responsible Nutrition](#), [Natural Products Association](#), [Retail Industry Leaders Association](#), and [International Dairy Foods Association](#) have been pushing for clearer guidance designating businesses in the food, pharmaceutical, dietary supplement, consumer health product, and cosmetics industries as essential and thus exempt from closures. The [U.S. Chamber of Commerce](#) has also requested federal guidance on the topic.

Businesses should look to local guidance issued by the states and municipalities in which they are trying to continue operating for further clarity on whether their business is essential under the state or municipality’s specific closure policy.

Supply Chains

Many businesses will easily and readily recognize that their activities put them squarely within the definition of an “essential business” under applicable local and state orders. In doing so, however, such businesses should also consider whether, or to what extent, *their* essential suppliers may or may not recognize the need for continued support. For example, a supplier of a component may not realize the product into which the component is ultimately incorporated is a life-saving medical device. Or, a software company may not be fully aware of how the software is used in an essential

business. Essential businesses should also consider whether it is helpful or even critical to issue a clear communication regarding the essential nature of the supplier's support.

Over the past week, many companies have begun issuing form letters to protect the shipment or production of supplies related to critical infrastructure. While best practices for such form letters are still evolving, as are assessments of potential risks, businesses issuing such letters should consider the following:

- Each supplier needs to be advised by its own counsel on whether, and to what extent, it is an essential business. This is especially true where the supplier is in a different city or state, given the deference granted to local and state governmental authorities to define "essential business." That is, there could be risk to an essential business if it undertakes to determine, on behalf of a given supplier, the extent to which the supplier's activities are exempt or excluded from an order to shelter in place that contains exceptions for essential businesses.
- Form letters should be crafted keeping mind the risk of making legal conclusions on another party's behalf, and an essential business may wish to advise of its own activities and the role it believes the supplier may have, without asserting a conclusion.
- An essential business that opts to use form letters to confirm that a supplier supports essential business activities may consider including language disclaiming any obligation to look after the safety of the supplier's workers.

Regulatory Relief

Ordinary life may be on hold, but regulators are pushing down ordinary barriers as businesses are taking extraordinary measures to support Americans. Any business that can make the supplies that Americans really need right now – hand sanitizer, personal protective equipment, ventilators, and more – should seek out and understand the regulatory relief available. If express relief has not yet been granted by the applicable governmental agency, it is worth making direct phone calls to understand what regulatory relief is possible, as regulators are more than ever working to help essential businesses.

Protecting Employees

As the federal Guidance notes, "[e]veryone should follow guidance from CDC, as well as State and local governmental officials, regarding strategies to limit disease spread." Essential businesses are not exempt from considering and implementing strategies to slow the spread and flatten the curve. Practical tips and guidance abound. As always, when implementing strategies to protect employees from COVID-19, an employer must comply with local, state, and federal employment, labor, and privacy laws. Here are a few strategies for consideration by those involved in essential, critical infrastructure:

- Reduce the number of employees in the workplace by implementing a partial remote work policy, where feasible. Focus on core business activities and all other activities "should be delayed until the resumption of normal operations," in accordance with the Guidance.
- Keep employees six feet apart. (Note that this also may be required by a local or state shelter in place order.)
- Review and update sick leave policy to address the current situation.

- Limit or exclude visitors and consider implementing a standard, uniformly-applied employee screening policy
- Increase the frequency of cleaning procedures to frequently sanitize common areas (including high-contact surfaces, like doorknobs) in all facilities (if possible, use cleaning products that are on the list of [EPA-approved Disinfectants for Use Against SARS CoV-2](#)).
- Require all personnel to wash hands for at least 20 seconds with soap and water before entering and exiting facilities; before and after eating; after using the restroom; after stepping away from their work station; and after blowing their nose, coughing, or sneezing.
- Provide tissues and hand sanitizer and provide instructions to properly dispose of tissues immediately in lined waste bins and to wash their hands and don new gloves after sneezing, coughing, or otherwise using tissues.
- Limit, if possible, the use of shared contact items, such as pens used to fill out forms.

Finally, where shelter in place orders apply, businesses may consider issuing a standard letter for each employee that must show up to work in an essential business (e.g., in a food warehouse) in the event proof of the employee's activities may be requested.

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Until and long after this is a distant memory, essential businesses will keep Americans healthy, safe, and fed. In the meantime, as we all look for the helpers, American essential businesses are showing up and getting the job done.

[1] Referred to in this paper as the "Guidance".