

Several States Adopt CISA Guidance Giving 'Essential Critical Infrastructure' Exemption for Energy Sector under COVID-19 'Shelter-in-Place'

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PRACTICES Energy, Power and Natural Resources, Energy Regulatory, Project Finance and Development, Offshore Oil and Gas, Oil and Gas, Oilfield Services

Several state and local governments have issued “shelter in place” orders and undoubtedly more will follow. All have various exemptions for “essential businesses” and many rely on exemptions outlined in the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (“CISA”) [guidance](#) on critical infrastructure workers. According to this guidance, which was issued on March 19, 2020 (the “**CISA Memorandum**”):

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.

The Department of Homeland Security developed this initial list of “Essential Critical Infrastructure Workers” to assist states in protecting “their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security.” The list includes the energy sector, in addition to operations and services that support medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, water and wastewater, law enforcement, and public works industries.^[1]

The CISA Memorandum defines the energy sector as divided into three interrelated segments: electricity, oil, and natural gas. The memorandum further describes critical workers in the energy sector, including workers in the electricity, petroleum and natural and propane gas areas. Specifically, it identifies:

- **Electricity industry:**
 - Workers who maintain, ensure, or restore the generation, transmission, and distribution of electric power, including call centers, utility workers, reliability engineers and fleet maintenance technicians
 - Workers needed for safe and secure operations at nuclear generation
 - Workers at generation, transmission, and electric blackstart facilities
 - Workers at Reliability Coordinator (RC), Balancing Authorities (BA), and primary and backup Control Centers(CC), including but not limited to independent system operators, regional transmission organizations, and balancing authorities
 - Mutual assistance personnel
 - IT and OT technology staff – for EMS (Energy Management Systems) and Supervisory Control and Data Acquisition (SCADA) systems, and utility data centers; Cybersecurity engineers; cybersecurity risk management
 - Vegetation management crews and traffic workers who support the electricity industry
 - Environmental remediation/monitoring technicians
 - Instrumentation, protection, and control technicians

- ***Petroleum workers:***
 - Petroleum product storage, pipeline, marine transport, terminals, rail transport, road transport
 - Crude oil storage facilities, pipeline, and marine transport
 - Petroleum refinery facilities
 - Petroleum security operations center employees and workers who support emergency response services
 - Petroleum operations control rooms/centers
 - Petroleum drilling, extraction, production, processing, refining, terminal operations, transporting, and retail for use as end-use fuels or feedstocks for chemical manufacturing
 - Onshore and offshore operations for maintenance and emergency response
 - Retail fuel centers such as gas stations and truck stops, and the distribution systems that support them

- ***Natural and propane gas workers:***
 - Natural gas transmission and distribution pipelines, including compressor stations
 - Underground storage of natural gas
 - Natural gas processing plants, and those that deal with natural gas liquids
 - Liquefied Natural Gas (LNG) facilities
 - Natural gas security operations center, natural gas operations dispatch and control rooms/centers Natural gas emergency response and customer emergencies, including natural gas leak calls
 - Drilling, production, processing, refining, and transporting natural gas for use as end-use fuels, feedstocks for chemical manufacturing, or use in electricity generation
 - Propane gas dispatch and control rooms and emergency response and customer emergencies, including propane leak calls
 - Propane gas service maintenance and restoration, including call centers
 - Processing, refining, and transporting natural liquids, including propane gas, for use as end-use fuels or feedstocks for chemical manufacturing
 - Propane gas storage, transmission, and distribution centers

STATE BY STATE

However, this list of “essential businesses” may or may not be adopted by a state or municipality when making a stay-at-home or shelter-in-place order. The CISA memorandum also states:

We recognize 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. As State and local communities consider COVID-19-related restrictions, CISA is offering this list to assist prioritizing activities related to continuity of operations and incident response, including the appropriate movement of critical infrastructure workers within and between jurisdictions.

As states have taken different approaches, multiple groups have advocated for greater consistency both within states, such as the TXOGA letter to Governor Abbot, and the API letter to President

Trump, both calling for greater uniformity in the definition of “essential.” Below are some of the state specific activities and actions applicable now.

- **Texas**

Governor Abbott’s Executive Order of March 19, 2020, states that “critical infrastructure,” including enclosed well sites and oil and gas production facilities, must “remain operational.” The order also referred to the legal definition of critical infrastructure, which includes oil and gas drilling sites and wellheads, as well as oil, gas, or chemical production facilities. This order also permits the following industries to continue: a petroleum or alumina refinery; electrical power generating facility, substation, switching station or electrical control center; a liquid natural gas terminal or storage facility, and any gas processing plant, including a plant used in the processing, treatment or fractionation of natural gas.

- **California**

In California, on March 19, 2020, Governor Newsom issued Executive Order N-33-20, which requires all individuals living in the State of California to stay home or at their place of residence except “as needed to maintain continuity of operations of the federal critical infrastructure sectors,” as outlined by the CISA Memorandum. Because the California Order uses the CISA Memorandum definitions described above, the California Order permits electricity, petroleum and natural and propane gas workers to continue to support the essential work of these entities.

- **Pennsylvania**

Governor Wolf’s Executive Order of March 19, 2020 states that “oil and gas extraction” are exempt from his stay-at-home Order, as are “electric power generation, transmission and distribution.” Related services such as pipeline transportation of crude oil and natural gas are also exempted. To the extent that an activity is not clearly within the scope of the Governor’s list of allowed businesses (which is based on NAICS codes), an [online](#) application has been made available to seek an exemption. In seeking an exemption, the Governor has advised they may be guided by the CISA framework.

MUNICIPALITIES

Many municipalities have also published orders to stay-at-home or shelter-in-place. While some have adopted the CISA Memorandum, others have not. If your municipality has announced a stay-at-home or shelter-in-place order but has not yet published the terms, while the CISA Memorandum may be informative, the best course of action remains to wait for official word from your municipality or actively seek guidance from the municipality or legal counsel.

If you perceive a conflict between a state directive and a municipal directive – for example, if you believe that you are exempt under a state executive order but not exempt under a municipal executive order – please contact counsel to explore how to navigate these complex situations.

COMMUNICATION

For essential businesses, consider providing your employees with a memo that details their essential status and applicable exemptions from stay-at-home or shelter-in-place orders. In your

memo, include:

- The employee's name
- The work site address
- A point of contact for the company who can confirm employment
- The nature of the company's work
- The language of the order or orders classifying the work as exempt

Advise employees to carry their work identification, government-issued identification (such as a drivers' license or passport) and a copy of the memo described in this paragraph. If work will occur using company vehicles or away from a central office location, consider creating placards that contain the company's name, its exempt status and a contact number for a responsible person who can confirm the nature of the business.

SAFETY

Essential business employers must consider safety and health issues if their employees will be frequently interfacing with the public given the COVID-19 concerns prompting shelter in place orders. In other words, employees who are interfacing with the public should, if not already, be subject to some form of job hazard assessment. It may be, particularly with employers who are already following the CDC and other relevant government guidance, that no further action is necessary regarding protective measures. However, it seems prudent for employers to at least ensure that this hazard assessment has occurred, that it is current given the recent shelter in place orders, and that the controls designed to protect employees are working. Whether in a state or federal OSHA jurisdiction, employers who operate essential businesses under shelter in place orders should at least ensure that they have considered whether appropriate hazard assessments have been conducted and whether additional controls are necessary.

WHAT'S NEXT?

It remains to be seen how these issues will play out over the next few weeks and into the future. Some in the Energy industry are concerned that the availability of employees, foreign travel bans and availability of supplies will impact their ability to comply with routine reporting and maintenance regulations as they respond to this crisis. So far, there has been no national relief offered. Some states, like Texas and Louisiana, are offering limited extensions of time to file reports. Also, as shelter in place goes on for prolonged periods there may be conflicts between local ordinances and state and federal law. If you have questions about how any of this impacts your business, the team at Haynes Boone is happy to help you work through particular issues as they arise.

[1] Please note that the CISA Memorandum differs from the 16 categories of infrastructure that CISA generally identifies on its current website.