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THE CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY OF THE DEPARTMENT OF HOMELAND SECURITY UPDATES ESSENTIAL CRITICAL INFRASTRUCTURE WORKFORCE GUIDANCE

To Our Clients and Friends:

On Saturday, March 28, 2020, the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA") revised its list of "Essential Critical Infrastructure Workers," which provides expressly non-binding guidance to state and local authorities on identifying their essential workforce during the COVID-19 pandemic. As explained by CISA Director, Christopher C. Krebs, in his memorandum accompanying the agency's initial March 19 guidance, the list of essential workers was intended to "inform critical infrastructure community decision-making to determine the sectors, sub-sectors, segments, or critical functions that should continue normal operations[.]" CISA's revised guidance further emphasizes its advisory nature, modifying references to the document as "guidance" in the initial March 19 list to "advisory guidance" in the new version throughout. It is therefore critical that businesses do not rely solely on the guidance in making any determinations about continuing operations, and that they first consult any orders and guidance issued by the states and localities in which they operate.

The original March 19 list identified essential workers in 14 industry sectors: (1) Chemical; (2) Communications and Information Technology; (3) Critical Manufacturing; (4) Public Works; (5) Defense Industrial Base; (6) Law Enforcement, Public Safety, First Responders; (7) Energy; (8) Financial Services; (9) Food and Agriculture; (10) Other Community-Based Government Operations and Essential Functions; (11) Healthcare/Public Health; (12) Hazardous Materials; (13) Transportation and Logistics; and (14) Water and Wastewater.

Since CISA released the initial guidance, state and local governments have relied upon it to varying degrees in implementing shelter-in-place and business closure directives. Many states, including Hawaii, Indiana, Minnesota, North Carolina, and California, have expressly incorporated CISA's guidance into their orders, often defining the types of workers and businesses that may continue physical operations based at least in part on the CISA list. Other states, such as Washington, have not expressly incorporated CISA's list into any definitions in their orders, but have mimicked language from the CISA list, or, in the case of Pennsylvania, represented on the state's website that its governing business closure orders conform with CISA's guidance. On the other hand, states such as Virginia and New Jersey do not appear to have made any explicit references to the CISA guidance in implementing their stay-at-home orders.

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The revised guidance adds three news sectors to the list: (1) “Commercial Facilities,” encompassing workers supporting the supply chain of various commercial appliances relating to plumbing, ventilation, and refrigeration, among other things; (2) “Residential/Shelter Facilities and Services,” encompassing workers responsible for leasing residential properties, handling property management, and providing animal shelter and elderly care services, among others; and (3) “Hygiene Products and Services,” encompassing workers who provide laundry and dry cleaning services, produce hygiene products, and install, maintain, and manufacture water heating equipment, among other things. The revised list also expands the types of workers enumerated in the original 14 sectors. For example, the “Public Works” sector has been revised to the “Public Works and Infrastructure Support Services” sector, newly encompassing HVAC technicians, landscapers, and “any temporary construction required to support COVID-19 response.” And the “Energy” sector has been broadened to specify workers supporting the energy sector through renewable energy infrastructure and nuclear re-fueling operations, as well as workers involved in manufacturing and distributing equipment necessary for production at energy sector facilities. Accordingly, we anticipate that states relying more heavily on CISA’s guidance may update their own orders and guidance to reflect the broader scope of the March 28 list of “Essential Critical Infrastructure Workers.”

Businesses in states that rely more heavily on CISA’s guidance should consult the revised list and any subsequent adjustments to their state and local orders in making assessments about their physical operations, and in applying for any waivers from such orders to the extent applicable.

Prior client alerts focusing on New York State’s executive orders regarding in-person workforce restrictions and guidance on essential businesses exempt from those orders may be accessed [here](#), [here](#), and [here](#). Gibson Dunn is continuing to monitor developments relating to the restriction of non-essential business activity in various states. Additional developments can be expected to follow in the coming days and weeks.



*Gibson Dunn lawyers regularly counsel clients on the issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. For additional information, please contact any member of the firm’s **Coronavirus (COVID-19) Response Team**. Please also feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the firm’s **Public Policy Group**, or the authors:*

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