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# ADG Insights

State and local government  
shelter-in-place and business  
closure orders

*Special series focused on the impact of the COVID-19 pandemic  
on the Aerospace, Defense, and Government Services industry*

**March 27, 2020**

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*Through ADG Insights, we share with you the top legal and political issues affecting the aerospace, defense, and government services (ADG) industry. Our ADG industry team monitors the latest developments to help our clients stay in front of issues before they become problems and seize opportunities in a timely manner.*

*This issue in our special series on the impact of the novel coronavirus (COVID-19) pandemic focuses on the state and local government orders that are causing many businesses and facilities to cease or limit operations except for certain exemptions that often differ depending on the order. In this publication, we explore the issues relevant to ADG companies associated with these orders.*

### A quickly expanding large number of state and local governments have imposed “shelter-in-place”/“stay-in-place” and other business closure orders to limit the spread of COVID-19.

States including California, Connecticut, Colorado, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Vermont, Washington, West Virginia, and Wisconsin have state-wide orders in place. Cities and counties throughout the country have also imposed their own localized business closure orders. These orders generally require that workers stay at home with certain exceptions. Many state and local governmental orders have exemptions for workers engaged in essential critical infrastructure sector activity, as defined generally in the Department of Homeland Security (DHS) Cybersecurity and Infrastructure Security Agency’s (CISA) guidance on essential critical infrastructure workforce discussed in more detail below. Some state and local governmental orders, however, have adopted different standards and exemptions that require a separate analysis. Depending on whether the work conducted in a company’s facility qualifies for one of

the exemptions, a company may be required to cease or restrict the work being performed. As additional orders and guidelines are issued, ADG companies should continue to monitor developments, but also familiarize themselves with the relevant federal guidance discussed below.

### DHS memorandum on identification of essential critical infrastructure workers

On March 19, 2020, DHS through CISA, issued a memorandum offering strategic guidance regarding essential critical infrastructure workers during the COVID-19 response.<sup>1</sup> The guidance provides an initial list of critical infrastructure sectors and workers to help decision-makers protect their communities while also ensuring continuity of essential functions and critical workforce. The guidance recognizes deference to state/local authorities, as the list is only advisory in nature and does not serve as a federal directive.<sup>2</sup> It can, however, guide state and local officials and private sector leaders as they identify and manage their essential workforce needed to ensure continued operations of critical infrastructure services and functions.

The CISA guidance references 16 critical infrastructure sectors and includes a non-exhaustive list of the types of workers who are considered essential to the following sectors:

- Healthcare/Public Health
- Law Enforcement, Public Safety, First Responders
- Food and Agriculture
- Energy (Electricity industry, Petroleum workers, and natural and propane gas workers)
- Water and Wastewater
- Transportation and Logistics
- Public Works
- Other Community-Based Government Operations and Essential Functions
- Critical Manufacturing
- Communications and Information Technology
- Chemical

- Hazardous Materials
- Financial Services
- Defense Industrial Base

With respect to the Defense Industrial Base (DIB), the guidance identifies the following types of workers as essential critical infrastructure workers:

- Workers who support the essential services required to meet national security commitments to the federal government and 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; and aircraft and weapon system mechanics and maintainers.
- Personnel working for companies, and their subcontractors, who perform under contract to the Department of Defense (DoD) providing materials and services to DoD, and government-owned/contractor-operated and government-owned/government-operated facilities.

CISA expressly invites industry and others to recommend additions to the list of workers identified as essential critical infrastructure sector workers. As mentioned above, the ability of a facility to continue to operate during the COVID-19 crisis may depend on whether the workers at that facility qualify as essential critical infrastructure workers. Contractors should continuously monitor for updates on federal, state, and local policies that could impact the continuity of services throughout the country.

### DoD guidance on essential critical infrastructure workforce for the DIB

On 20 March 2020, Under Secretary of Defense (Acquisition and Sustainment) Ellen Lord issued a memorandum that reinforces that the DIB workforce is essential, encouraging the DIB’s essential critical workers to maintain their normal work schedules.<sup>3</sup> In her memorandum, Under Secretary Lord acknowledges the DIB’s position as a “critical infrastructure sector,” which includes companies



1. Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (Mar. 19, 2020), <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>.

2. *Id.* at 2 (“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.”).

3. Defense Industrial Base Essential Critical Infrastructure Workforce Memorandum (Mar. 20, 2020), <https://media.defense.gov/2020/Mar/22/2002268024/-1/-1/1/DEFENSE-INDUSTRIAL-BASE-ESSENTIAL-CRITICAL-INFRASTRUCTURE-WORKFORCE-MEMO.PDF>.

and their subcontractors that provide products and services under contract to DoD.

The memorandum takes a relatively broad view of what constitutes the DIB, and the workers that are considered to make up the “essential critical infrastructure workforce for the DIB.” Specifically, the memorandum defines the DIB “as the worldwide industrial complex that enables research and development as well as design, production, delivery and maintenance of military weapons systems/software systems, subsystems, and components or parts, as well as purchased services to meet U.S. military requirements.”<sup>4</sup> As for the workforce considered to be “essential critical infrastructure workforce,” the memorandum provides that the category includes “workers who support the essential products and services required meeting national security commitments to the Federal Government and the U.S. Military.”<sup>5</sup> More specifically, the category includes, without limitation, “aerospace; mechanical and software engineers; manufacturing/production workers; IT support; security staff; security personnel; intelligence support, [sic] aircraft and weapon systems mechanics and maintainers; suppliers of medical supplies and pharmaceuticals, and critical transportation.”<sup>6</sup> These personnel may work for companies, including subcontractors, who perform under contract to the DoD. Finally, the memorandum breaks down what constitutes essential critical infrastructure by type of contract or subcontract:

- Support for the development, production, testing, fielding, or sustainment of DoD weapon systems/software systems, or the infrastructure to support those activities, is considered essential critical infrastructure.
- Support for manning, training, equipping, deploying, or supporting the military forces is considered essential critical infrastructure.
- However, performing tasks such as providing office supplies, recreational support, or lawn care is not considered essential critical infrastructure.

Through its guidance, DoD has indicated that it is dedicated to working closely with contractors to ensure the safety of the workforce and maintain its national security mission.

On the same day that Under Secretary Lord issued her memorandum, the Acting Principal Director, Defense Pricing and Contracting (DPC), Kim Herrington, issued a memorandum that provides further guidance for the DIB.<sup>7</sup> The DPC memorandum provides that contractor personnel performing under DO or DX **rated** orders under the Defense Priorities and Allocations System (DPAS) are considered to be part of the essential critical infrastructure workforce. As for personnel performing under **unrated** orders, but that **directly** support mission readiness or national security, “the senior procurement executives and their associated heads of contracting activities, program executive officers, and unit commanders/directors (O-6/civilian equivalent and above) are permitted to determine which contracted functions are part of the Essential Critical Infrastructure Workforce.”<sup>8</sup>

Finally, an independent Air Force memorandum dated March 17, 2020, authorizes program officers to identify and attest to programmatic activities they consider being mission essential to the Air Force.<sup>9</sup> Contractors should find these attestations helpful when engaging with local officials to gain exemption from shelter-in-place orders for their personnel while following all recommended protective measures.

### Department of Justice guidance

On March 20, 2020, the Department of Justice (DOJ) issued a memorandum to United States Attorneys.<sup>10</sup> In that guidance, DOJ directs United States Attorneys to tell state and local law enforcement authorities who are enforcing statewide shutdowns to let federal employees performing critical work get to their job sites. The memorandum states that if federal employees (including contract employees) are traveling for work and local law enforcement stops

them, the employee should show their personal identity verification (PIV) card or common access card (CAC) and explain their reason for travel. Although the memorandum does not fully address a contractor’s workforce, it demonstrates the importance of contractors having their employees equipped to demonstrate their reasons for travel if located in a county or state that is shutdown.

### Key considerations when addressing “Shelter-in-Place”/“Stay-at-Home Orders”

Contractors should be vigilant in monitoring for shelter-in-place type orders that may impact their operations. We recommend that contractors consider the following guidelines:

1. Monitor for orders that may impact your facilities and places of performance. Additionally, monitor for orders that may impact your supply chain.
2. Analyze the requirements and exemptions for those orders that impact places where you or your supply chain perform. Many orders currently follow the CISA guidance on essential critical infrastructure sectors. However, some states include unique requirements that do not directly tie to the CISA guidance. For example, Pennsylvania’s business closure order uses categories tied to the North American Industry Classification System (*aka* NAICS) codes. Thus, for Pennsylvania, the Executive Office of the President, OMB’s NAICS guide is helpful in analyzing whether or not a facility is exempt from the Pennsylvania business closure order.
3. If your place of performance is a government facility, communicate frequently with the leadership of the facility and your customer.
4. Enlist the assistance of government customers, where appropriate, to support a determination that your workforce is essential to one or more of the relevant order’s exemption categories. Contractors may also want to reach out to state or local officials.

5. If your workforce is not explicitly listed in the CISA guidance, consider requesting the addition of the relevant work category to the list, with sufficient justification.
6. Provide your workers, and perhaps your suppliers, letters or policy statements that set forth the basis of your determination that they are engaged in exempt work. Workers should be instructed to provide copies to law enforcement or health officials if questioned, and the letter should contain contact information for one or more employees who can answer questions about the facility’s work and exemption determination.
7. Follow Centers for Disease Control and Prevention guidance for ongoing work. For example, consider staggering shifts and work hours for social distancing.
8. Consider the impact of any restrictions imposed on your business, or that of your supply chain, on your ability to perform. Understand the terms of relevant contracts, including any formal notice requirements to preserve or execute your contractual rights.

In addition, it is important to establish roles and responsibilities and have a plan to address these challenges.

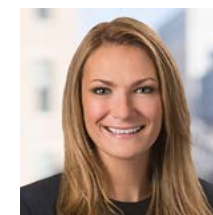


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4. *Id.*

5. *Id.*

6. *Id.*

7. Defense Industrial Base Contract Considerations Memorandum (Mar. 20, 2020), [https://www.acq.osd.mil/dpap/policy/policyvault/Defense\\_Industrial\\_Base\\_Contract\\_Considerations\\_DPC.pdf](https://www.acq.osd.mil/dpap/policy/policyvault/Defense_Industrial_Base_Contract_Considerations_DPC.pdf).

8. *Id.*

9. Department of the Air Force Mission Essential Activities during COVID-19 (Mar. 17, 2020), [https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19-memos/Essential\\_Activities\\_during\\_COVID-19.pdf](https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19-memos/Essential_Activities_during_COVID-19.pdf).

10. Memorandum for All United States Attorneys (Mar. 20, 2020), [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/Memorandum-from-the-Attorney-General-to-All-United-States-Attorneys-3\\_20\\_2020.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/Memorandum-from-the-Attorney-General-to-All-United-States-Attorneys-3_20_2020.pdf).

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