



Interpretation Guide for CISA's Identification of Essential Critical Infrastructure Workers Version 2.0 (March 28, 2020)

Introduction:

As you are all aware the COVID-19 virus has created unprecedented circumstances and these circumstances remain especially challenging given the unknown and fast-developing nature of COVID-19 and the constant corresponding changes by federal, state and local governments.

In this regard, to help state and local agencies develop protocols to prevent the spread of COVID-19 the Cybersecurity and Infrastructure Security Agency (CISA) of the Department of Homeland Security has issued guidance, which it continues to revise, stating its view of essential critical infrastructure workers. See: <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>

This memorandum is intended to provide a summary of how to interpret CISA's guidance as you assess whether your employees and operations fall within a critical infrastructure industry. (Note, the CISA guidance speaks in terms of essential workers rather than businesses.)

Paints and Coatings:

On March 28, 2020, CISA updated its coronavirus guidance to Version 2.0. Significantly, while prior versions of the guidance implicitly identified workers in the paints and coatings as essential, Version 2.0 makes that designation express. ***Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response Version 2.0*** identifies workers in the paints and coatings industry as a critical infrastructure sector and essential to maintain the services and functions needed to operate resiliently during the COVID-19 pandemic response.

In Version 2.0, Chemicals sector, CISA identifies the workers and producers of industrial and consumer paints and coatings as essential critical infrastructure, in the same category as workers and producers of food, food additives, pharmaceuticals, textiles, building materials, and paper products. CISA Guidance specifically provides as follows:

- Workers supporting the chemical and industrial gas supply chains, including workers at chemical manufacturing plants, workers in laboratories, workers at distribution facilities, workers who transport basic raw chemical materials to the producers of industrial and

consumer goods, including hand sanitizers, food and food additives, pharmaceuticals, paintings and coatings (sic – “paints and coatings”), textiles, building materials, plumbing, electrical, and paper products.

See Version 2.0 (emphasis added).¹

Additionally, in Version 2.0 Commercial Facilities section, CISA further identifies the paints and coatings workers as essential, stating:

- Workers who support the supply chain of building materials from production through application/installation, including cabinetry, fixtures, doors, cement, hardware, plumbing, electrical, heating/cooling, refrigeration, appliances, paint/coatings, and employees who provide services that enable repair materials and equipment for essential functions.

See Version 2.0 (emphasis added). Accordingly, all workers in the paints and coatings industry, supplying industrial, architectural or specialty paints and coatings can be considered essential based upon the CISA guidance.

CISA’s guidance is further replete of other essential worker categories where paints and coatings and its workers are essential. These include:

- workers needed to maintain continuity of critical manufacturing and associated supply chains, such as metals, medical, energy, food, and chemical manufacturing. (Critical Manufacturing);
- workers in hardware and building materials stores (Commercial Facilities);
- workers necessary to maintain the safety, sanitation and operation of residences, businesses and buildings (Public Works and Infrastructure Support Services);
- automotive repair, maintenance, and transportation equipment manufacturing (Transportation and Logistics);
- workers performing and supporting the construction of housing (Residential/Shelter Facilities and Services);
- supplier employees to food manufacturer, such as beverage and food packaging (Food and Agriculture);
- manufacturing and distribution necessary to the maintenance of energy sector facilities (Energy); and
- employees needed to maintain drinking water and wastewater infrastructure (Water and Wastewater).

Nevertheless, due to the varying nature of state orders, and their respective interpretation, businesses are encouraged to carefully review each category of Essential Critical Infrastructure Workers listed in

¹ Despite a potential literal reading of the language which seems to qualify paints and coatings to “workers who transport” raw materials for these industries. It would be illogical that if it were essential to transport raw materials to the producers of paints and coatings, that the further manufacture and distribution would not also be essential. Undeniably, such a reading is applicable to all the products exemplified in the text.

Version 2.0 with reference to the industry sectors they support and which are direct or indirect end-users of the products they manufacture or distribute to identify as many essential sectors they serve as possible.

Applying the Guidance:

First, the CISA Guidance is a 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.” **It is meant to inform and not be definitive nor exhaustive. It is also not “a federal directive or standard.”**

Second, the CISA’s guidance is to be applied to “balance public safety while ensuring the continued delivery of critical infrastructure services and functions.” CISA advises that state and local officials, as well as, **critical industry partners will need to use their own judgment, informed by this list, to ensure continued operations of critical infrastructure services and functions.** CISA advises owners and operators that **all decisions should appropriately balance public safety, the health and safety of the workforce, and the continued delivery of essential critical infrastructure services and functions.** CISA acknowledges that the reality that some workers engaged in activity determined to be essential may be unable to perform those functions because of health-related concerns.

Third, CISA offers nine “key principles” to consider when identifying essential employees. Notable among these are:

- Workers should be encouraged to work remotely when possible **and focus on core business activities.**
- When continuous remote work is not possible, businesses should **enlist strategies to reduce the likelihood of spreading the disease.** This includes but is not limited to separating staff by off-setting shift hours or days and/or social distancing. These steps can preserve the workforce and allow operations to continue.
- All organizations should **implement their business continuity and pandemic plans** or put plans in place if they do not exist.
- In the modern economy, reliance on technology and just-in-time supply chains means that **certain workers must be able to access certain sites, facilities, and assets to ensure continuity of functions.**
- When government and businesses engage in discussions about critical infrastructure workers, they **need to consider the implications of business operations beyond the jurisdiction where the asset or facility is located.**

Businesses are advised to adhere to the key principles and include them as they assess whether their employees, facilities, products, or operations are essential.

Other Identified Essential Critical Infrastructure Workers:

Version 2.0 contains eleven pages of listed Essential Critical Infrastructure Workers (“ECIW”). Businesses should carefully review the entire list considering the industry sectors they support, or which are direct or indirect end-users of the products they manufacture or distribute. The more specific

and greater number of essential activities which can be identified and supported the stronger position the business will possess in the event of varying applications of CISA's guidance or more restrictive state orders.

For example, as to Critical Manufacturing CISA provides:

- Workers necessary for the manufacturing of metals (including steel and aluminum), industrial minerals, semiconductors, materials and products needed for medical supply chains, and for supply chains associated with transportation, energy, communications, information technology, food and agriculture, chemical manufacturing, nuclear facilities, wood products, commodities used as fuel for power generation facilities, the operation of dams, water and wastewater treatment, processing and reprocessing of solid waste, emergency services, and the defense industrial base. Additionally, workers needed to maintain the continuity of these manufacturing functions and associated supply chains, and workers necessary to maintain a manufacturing operation in warm standby.

See Version 2.0 (emphasis added). Based upon the above a paint and coating businesses supplying the food or medical industry would possess another basis to claim its workers as essential in addition to those portions of the guidance which specifically reference paint and coatings.

Applying CISA's Key Principles:

Adhering to CISA's stated key principles requires businesses to assess and perhaps differentiate between categories of employees, facilities, product lines and individual operations. To balance public safety, the health and safety of the workforce, and the continued delivery of essential services requires careful consideration of each business's unique situation. For example, it may not include all employees, notably those who can work remote rather than need to be in the facility. Further, there may be mitigation measures which can be implemented to necessary activities which reduce the likelihood of spreading the disease. This is part of a business's duty to "balance public safety while ensuring the continued delivery of critical infrastructure services and functions" which is the goal of CISA guidance.

Communication & Demonstration:

A business is well advised to have a reasoned, demonstrable and supportable basis in the event of an inquiry or challenge. Businesses are encouraged to communicate upstream with customers to identify listed essential critical infrastructure activity which their products or services support. Manufacturers should ask their customers to document their critical activity and the use of the manufacturer's product in such activity. Likewise, manufacturers can share this information downstream with their suppliers to document each link in the subject supply chain supporting an essential critical infrastructure activity.

A documented supply chain link to an essential critical infrastructure activity would be an important component of such demonstrable basis.² Businesses who can credibly demonstrate they have made a good faith assessment of their options and strived to "balance public safety while ensuring the

² ACA asks that you continue to share non-confidential information evidencing these essential critical infrastructure activity support roles played by our industry. Examples of such are important to support ACA continued advocacy as to these COVID 19 emergency orders. Such information may be sent to hmcauliffe@paint.org.

continued delivery of critical infrastructure services and functions” will be better served in the event that their judgment is challenged by government officials or others.

Aside from governmental agencies, employers may be well served to explain to their employees that such an assessment has been done and the role they play in supporting critical infrastructure services and functions. This is not always obvious to employees. Similarly, information on strategies to reduce the likelihood of spreading the COVID 19 virus and business continuity plans should also be shared with affected employees.

Importantly, please be aware that some states, California, Illinois, Ohio and Pennsylvania included have established their own categorizations of essential, nonessential or life sustaining businesses. A list of these can be found <https://www.paint.org/state-emergency-orders-legislation-regarding-business-closures-due-to-coronavirus-concerns/?highlight=COVID> . While many have adopted the CISA guidance, some have not or have adopted with modification. You are encouraged to check your state’s government orders.

Additionally, it is recommended that businesses review and follow:

- the CDC Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> and
- OSHA Guidance to Employers on Preparing Workplaces for COVID 19 <https://www.osha.gov/Publications/OSHA3990.pdf>.

A review of the above will help businesses to appropriately achieve the sought-after balance of public safety, the health and safety of the workforce, and the continued delivery of essential critical infrastructure services and functions desired by CISA and other agencies.

Finally, businesses that have questions for CISA may direct them to CISA.CAT@cisa.dhs.gov. In addition, businesses are also encouraged, in the absence of clear exemptions, to communicate with CISA or other state agencies the basis upon which they believe their activities and employees fall within the enumerated Essential Critical Infrastructure Workers or state counterpart definitions.

If you have questions, please contact either Heidi McAuliffe hmcauliffe@paint.org or Bob Hecht rhecht@paint.org.