Interpretation Guide for CISA’s Identification of Essential Critical Infrastructure Workers

Introduction:

As you are all well 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 posted guidance listing its view of essential critical infrastructure workers. See:  https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce

This memorandum is intended to provide short 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.)

Although “employees in the paint and coatings manufacturing, distribution and retail industries” are not identified categorically as essential, nevertheless an examination of the listed essential workers does include many employees in the paint and coatings industry. Businesses will need to carefully review each category of Essential Critical Infrastructure Workers listed with reference to the industry sectors they support and which are direct or indirect end-users of the products they manufacture or distribute.

Interpreting the Guide:

First, the CISA’s list is an “initial 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.

Third, CISA offers nine “key principles” to consider when interpreting the list as discussed below. 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.

**Identified Essential Critical Infrastructure Workers:**

The Guidance *Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response* Version 1.0 (March 19, 2020) contains seven pages of listed Essential Critical Infrastructure Workers (“ECIW”). Businesses should carefully review the list giving consideration to the industry sectors they support, or which are direct or indirect end-users of the products they manufacture or distribute. In this regard, a review of customers, product lines and markets served would be useful to an informed review of the list.

In this regard, 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 review of each listed ECIW is not practical, nor is a definitive examination of even one possible. For example, to evaluate any of the listed ECIW categories, and adhere to the limitation of “necessity” requires businesses to assess and perhaps differentiate between categories of employees, facilities, product lines and individual operations. Therefore, assessing whether, and to what extent, a business’s operations, facilities, employees and products are necessary to critical infrastructure industry is dependent upon the unique circumstances specific to each business.

By way of example only, one of the listed ECIW categories likely to be of most interest to our membership is:

**CRITICAL MANUFACTURING**

• **Workers necessary for the manufacturing of materials and products needed for medical supply chains, and for supply chains associated with transportation, energy, communications, food and agriculture, chemical manufacturing, nuclear facilities, the operation of dams, water and wastewater treatment, emergency services, and the defense industrial base. Additionally,**
workers needed to maintain the continuity of these manufacturing functions and associated supply chains.

A plain reading of the above supports the conclusion that coating manufacturer workers supplying materials and products needed to the food or medical industry would be ECIW. However, applying the noted key principles likely requires further assessment for possible differentiation among employees, product lines and other aspects of the business. Accordingly, such a manufacturer would be advised to move forward with a focus upon what is “necessary” to such support. 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:

A business is well advised to have a reasoned, demonstrable and supportable basis in the event of an inquiry or challenge. A documented supply chain link to an essential critical infrastructure activity would be an important component of such demonstrable basis. ACA asks that you share non-confidential information evidencing these essential critical infrastructure activity support roles played by our industry. Examples of such are important as ACA advocates with federal, state and local governments for improved clarity related to these emergency orders. Such information may be sent to hmcauliffe@paint.org.

Businesses who can credibly demonstrate they have made a good faith assessment of their options and strived to “balance public safety while ensuring the 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 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. The assessment approach outlined above can be applied to those orders.

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.