

RICHARD L. FRANK  
ARTHUR Y. TSUEN  
STEPHEN D. TERMAN  
MARSHALL L. MATZ  
MICHAEL J. O'FLAHERTY  
DAVID L. DURKIN  
BRETT T. SCHWEMER  
TISH E. PAHL  
EVAN P. PHELPS  
GARY H. BAISE  
FREDERICK H. BRANDING\*  
BRUCE A. SILVERGLADE  
JOLYDA O. SWAIM  
STEWART D. FRIED  
ROGER R. SZEMRAJ  
EDWARD J. FARRELL  
ELLIOT BELLIOS  
LADD WILEY  
JOHN G. DILLARD  
J. MASON WEEDA\*  
KRISTEN L. O'BRIEN



OLSSON FRANK WEEDA TERMAN MATZ PC

2000 PENNSYLVANIA AVENUE NW  
SUITE 3000  
WASHINGTON, DC 20006

(202) 789-1212 • FAX (202) 234-3550  
WWW.OFWLAW.COM

**John G. Dillard - Principal**  
**Direct (202) 518-6349 / jdillard@ofwlaw.com**

DARREN H. WEBB\*  
*COUNSEL*  
ANDREW S. M. TSUI\*  
*OF COUNSEL*  
KENNETH D. ACKERMAN  
NANCY A. NORD  
EDWARD R. TEITEL, MD, JD\*  
PARKER DOUGLAS\*  
*SENIOR POLICY ADVISORS*  
JOHN R. BLOCK  
JAY VROOM  
ELIZABETH H. STOWER  
MOLLY S. O'CONNOR  
*SENIOR SCIENCE ADVISOR*  
NINA V. FEDOROFF, PhD  
*SENIOR TECHNICAL ADVISOR*  
J. J. CAPONE, MS, PhD

\*PRACTICE WITHIN THE DISTRICT OF COLUMBIA  
IS LIMITED TO MATTERS AND PROCEEDINGS  
BEFORE FEDERAL COURTS AND AGENCIES

## **MEMORANDUM**

March 27, 2020

### **BY ELECTRONIC MAIL**

FROM: Olsson Frank Weeda Terman Matz PC

RE: COVID-19: Food Industry Update

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OFW is continuing its efforts to provide timely updates on the actions of food-related regulatory agencies in response to the SARS-CoV-2 (COVID-19) pandemic caused by the coronavirus.

Below is a summary of the statements provided by relevant federal agencies regarding COVID-19 as well as some recent regulatory developments taken in response to the outbreak.

### **U.S. Department of Agriculture Food Safety and Inspection Service (FSIS)**

#### **Leadership – Industry Conference Call (3/26/20)**

On March 26, 2020, FSIS leadership hosted a conference call for industry to provide an update on FSIS' response to the COVID-19 outbreak and answer questions from industry.

#### **Inspection Matters**

Administrator Paul Kiecker opened the meeting by pointing to [recently updated CDC guidance](#) for businesses. He noted that FSIS is recommending establishments follow the CDC's new guidance for sanitation and disinfecting equipment and work spaces. He also recommended that establishments continue to emphasize hand washing and to implement social distancing in the plant environment to the extent it is possible.

Mr. Kiecker also requested that establishments communicate openly with inspectors if there has been an employee that has tested positive for COVID-19; FSIS will return the courtesy by

notifying establishments if there has been a sick inspector. Mr. Kiecker emphasized that establishments and inspectors can share information to protect employees while still respecting their privacy.

Mr. Kiecker reminded participants that the Department of Homeland Security has [designated workers in the food and agriculture sectors as “critical infrastructure.”](#) He noted that FSIS is committed to keeping inspections moving forward and that planning for absenteeism is part of the agency’s job. FSIS has identified employees that work in the District Offices as well as FSIS headquarters that can be called on to provide inspection services. The agency has also requested volunteers to work over time.

Mr. Kiecker said that FSIS continues to regularly communicate with its inspectors on how to protect their health and slow down the spread of COVID-19 through email communications and online town halls. Some of the recommendations they have made to inspectors includes:

- Stay home if you are sick; leave and go home if you become sick on the job;
- Practice social distancing to the extent it is possible while you are in plants. Line inspectors are advised not to stand shoulder-to-shoulder with trimmers;
- Engage in as few conversations with others as possible and avoid meetings with large groups of people;
- FSIS is not recommending that inspectors wear face masks, but inspectors are allowed to wear their own if they would like;
- If an establishment requires that employees and others onsite wear face masks, inspectors are instructed to comply; and
- Inspectors will provide oral answers to health questionnaires and submit to having their temperature taken with a forehead thermometer, but they will not sign or fill out any written questionnaires.

Mr. Kiecker encouraged establishments that are conducting health screenings for individuals entering plants to keep social distancing in mind. Screening should not be set up in a manner that causes individuals to congregate close together.

#### Labeling – Enforcement Discretion

Next, Jeff Canavan, Deputy Director, Labeling and Program Delivery Staff (LPDS) discussed the [recent announcement](#) that the agency will be exercising enforcement discretion with respect to labeling on products that were originally destined for hotel, restaurant, or other institutional (HRI) use that have been diverted to retail sales. Of note, for a 60-day period, FSIS will not require nutrition information on labels when it would otherwise be required. Moreover, the agency will allow container with limited use statements, such as “For School Foodservice Only,” to be shipped to retail locations.

Mr. Canavan indicated that FSIS will clarify in a forthcoming Constituent Update that the agency will exercise enforcement discretion with respect to existing products and new products that are

produced until May 22, 2020. The initial Constituent Update had limited the enforcement discretion to products produced on or before March 23rd.

Mr. Canavan noted that LPDS is fielding numerous questions on unique scenarios with respect to redirecting products to retail sales. For instance, he noted that there were several inquiries about products that had originally been labeled for export sale but were being diverted for domestic retail sales. LPDS will be reviewing these requests on a case-by-case basis.

### Questions

FSIS leadership fielded several questions from industry, which are summarized below:

- *Has FSIS experienced any instances where local or state authorities have shut down establishments to enforce social distancing?*
  - Mr. Kiecker noted that he was unaware of any instances where an establishment had been shut down by state or local authorities. FSIS has instructed inspectors to carry a copy of the DHS critical infrastructure designation document (referenced above) when they are traveling in areas subject to curfews and travel restrictions to show that they are considered part of the critical infrastructure. They have also been instructed to call their supervisor or District Manager if law enforcement will not allow them to continue to travel after showing their documentation.
- *I would like to temporarily provide more office space for USDA inspectors to accommodate social distancing. What is the procedure for notifying FSIS?*
  - Mr. Kiecker recommended notifying the Inspector-in-Charge or the Front Line Supervisor. Dr. Hany Sidrak, Deputy Assistant Administrator, Office of Field Operations, also cautioned that the distance from the temporary USDA office to the plant floor should be taken into consideration due to “donning and doffing” time.
- *Who at FSIS should be notified if an establishment has had an employee test positive for COVID-19?*
  - This should be reported to the Inspector-in-Charge or the Front Line Supervisor.
- *We have heard that an inspector was not happy with our observation of social distancing and recommended that an employee call the Governor’s office to bring in law enforcement. What is the agency advising inspectors to do if they see employees working closely together?*
  - FSIS has not advised employees to contact state agencies or recommend that plant employees call state agencies. Our recommendation is to raise concerns with their

supervisors. If you are aware that inspectors are encouraging bringing in state officials, notify the Front Line Supervisor or Inspector-in-Charge immediately.

- *How is FSIS planning to deal with situations where an inspector has fallen ill with COVID-19? What actions will be taken with respect to other inspection personnel?*
  - FSIS inspectors are being instructed to use social distancing to the extent possible. The agency is also evaluating its work areas to see if there are improvements that can be made to avoid passing along the coronavirus. If there is a sick inspector, FSIS will evaluate the level of contact other inspectors had and evaluate accordingly.
- *It is difficult to apply new labels to frozen products. Has FSIS considered other options for diverting frozen HRI products for retail sale?*
  - Under the temporary enforcement discretion policy, a retailer would be allowed to thaw and re-package or re-label products. For products that must stay frozen, the retailer or establishment could place them in a clear plastic bag with a new label. Otherwise, LPDS will evaluate scenarios on a case-by-case basis.
- *What happens if my inspectors don't show up for their shift?*
  - Mr. Kiecker responded that FSIS will ensure there are inspectors available to cover inspections.

## **Food and Drug Administration**

### **Updated FAQ Guidance**

The U.S. Food and Drug Administration (FDA) has updated its [FAQ guidance](#) for the food industry with respect to COVID-19. Some of the responses relevant to food and feed manufacturers is included below:

*How do I maintain social distancing in my food production/processing facility and food retail establishment where employees typically work within close distances?*

To prevent the spread of COVID-19, CDC is recommending individuals employ social distancing or maintain approximately 6 feet from others, when possible. In food production/processing facilities and retail food establishments, an evaluation should be made to identify and implement operational changes that increase employee separation. However, social distancing to the full 6 feet will not be possible in some food facilities.

The risk of an employee transmitting COVID-19 to another is dependent on distance between employees, the duration of the exposure, and the effectiveness of employee hygiene practices and

sanitation. When it's impractical for employees in these settings to maintain social distancing, effective hygiene practices should be maintained to reduce the chance of spreading the virus.

Maintaining social distancing in the absence of effective hygiene practices may not prevent the spread of this virus. Food facilities should be vigilant in their hygiene practices, including frequent and proper hand-washing and routine cleaning of all surfaces.

Because the intensity of the COVID-19 outbreak may differ according to geographic location, coordination with state and local officials is strongly encouraged for all businesses so that timely and accurate information can guide appropriate responses in each location where their operations reside.

Sick employees should follow the CDC's [What to do if you are sick with coronavirus disease 2019 \(COVID-19\)](#).

*A worker in my food production/processing facility/farm has tested positive for COVID-19. What do I need to do to continue operations while protecting my other employees?*

All components of the food industry are considered critical infrastructure and it is therefore vital that they continue to operate.

The Occupational Safety and Health Administration (OSHA) issued Guidance on [Preparing Workplaces for COVID-19](#) that includes information on how a COVID-19 outbreak could affect workplaces and [steps all employers can take to reduce workers' risk of exposure to SARS-CoV-2 \(COVID-19\)](#).

Food production/processing facilities/farms need to follow protocols, including cleaning protocols, set by local and state health departments, which may vary depending on the amount of community spread of COVID-19 in a given area. These decisions will be based on public health risk of person-to-person transmission – not based on food safety.

If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality about individual employees' identities. Sick employees should follow the CDC's [What to do if you are sick with coronavirus disease 2019 \(COVID-19\)](#).

CDC's [Interim US Guidance for Risk Assessment and Public Health Managements of Persons with Potential Coronavirus Disease 2019 \(COVID-19\) Exposures: Geographic Risk and Contacts of Laboratory-confirmed Cases](#), provides a framework for assessing and managing risks of potential exposures to SARS-CoV-2.

*Will FDA/EPA approve off-label use of quaternary ammonium sanitizer at 200 ppm as a hand sanitizer for checkers and customers? It is currently on the EPA approved list for use in retail to*

*sanitize food prep areas, dishes etc., and we would like to use it instead of gel hand sanitizer due to the lack of availability.*

We are aware of temporary out-of-stock conditions of alcohol-based hand sanitizers. Several manufacturers of these products have indicated that they are working to replenish supplies. In addition, the FDA has issued guidance for the temporary compounding of certain alcohol-based hand sanitizers by pharmacists in state-licensed pharmacies or federal facilities and registered outsourcing facilities. See [Immediately in Effect Guidance for Industry: Policy for Temporary Compounding of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency](#). FDA has also issued guidance for the temporary preparation of certain alcohol-based hand sanitizer products by firms during the public health emergency (COVID-19). See [Guidance for Industry: Temporary Policy for Preparation of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency \(COVID-19\)](#).

Hand sanitizers are not intended to replace [handwashing in food production and retail](#) settings. Instead, hand sanitizers may be used in addition to or in combination with proper handwashing. CDC recommends that everyone wash their hands with plain soap and water. Alcohol-based hand sanitizers may be used if plain soap and water are not available.

As an interim measure, we understand some food establishments have set up quaternary ammonium hand-dip stations and sprays at 200 ppm concentration. These products are intended for use on surfaces, and as such, may not be formulated for use on skin. FDA is aware of adverse event reports from consumers using such products as a replacement for hand sanitizers and advises against using these products as replacements for hand sanitizers.

### **Temporary Guidance for Nutrition Labeling of Packaged Food**

As is the case with FSIS-inspected products, FDA has recognized that there is demand to divert food intended for foodservice to retailers. To facilitate these sales, FDA has released [temporary guidance](#) indicating it will not require that nutrition facts be displayed on products if they were originally labeled for restaurant use but re-routed for retail sale. The labels must contain all the other required elements of a food label, such as a statement of identity and allergen declarations.<sup>1</sup>

### **Center for Disease Control**

The Center for Disease Control (CDC) has recently updated its [guidance for businesses and employers to plan and respond to COVID-19](#). Some of the new suggestions in the guidance include:

- Coordinate with state and local health officials to receive timely and accurate information informing the company's response. Local conditions will influence the decisions that public health officials make regarding community-level strategies.

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<sup>1</sup> OFW will be distributing a more fulsome analysis of this guidance document shortly.

- If you have employees that are at higher risk due to their age or chronic medical conditions, consider minimizing face-to-face contact between these employees or assign work tasks that allow them to maintain a distance of six feet from other workers.
- Clean AND disinfect frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, and doorknobs. Dirty surfaces can be cleaned with soap and water prior to disinfection. To disinfect, use products that meet EPA's criteria for COVID-19 that are appropriate for the surface.
- Avoid using other employee's tools and equipment, when possible, as well as phones, desks, and offices. If it is necessary to share, clean and disinfect them before and after use.
- Practice social distancing by avoiding large gatherings and maintaining distance (approximately 6 feet) from others when possible.
- Plan for how your business will operate if absenteeism spikes due to increases in sick employees or those who have to stay home to care for a relative or watch children. For instance, cross-training employees can ensure tasks will be covered if there are absences.
- If feasible, increase ventilation rates and the percentage of outdoor air that circulates into the system.
- Provide disposable wipes so that commonly used surfaces can be wiped down by employees before each use. Disinfect with EPA-approved products.
- If a sick employee is suspected or confirmed to have COVID-19, CDC recommends [enhanced cleaning and disinfection](#).

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We trust this update has been helpful. If you have any questions, please do not hesitate to contact us.