

RICHARD L. FRANK  
ARTHUR Y. TSIEN  
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 BELIOS  
LADD WILEY  
JOHN G. DILLARD  
J. MASON WEEDA\*  
KRISTEN L. O'BRIEN



— L A W —  
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 19, 2020

### **BY ELECTRONIC MAIL**

FROM: Olsson Frank Weeda Terman Matz PC

RE: COVID-19: Food Industry Update

---

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.

Federal health authorities do not believe there is any risk of COVID-19 spreading through the food supply. However, there are concerns related to the effect of COVID-19 and the availability of inspection staff and plant personnel if the spread of infections require inspectors and employees to be quarantined. There are also concerns about how food manufacturing plants and distribution centers will be impacted by state and local “lockdown” orders and “gathering” bans.

Below is a summary of the statements provided by relevant federal agencies regarding COVID-19 as well as some best practices for companies to adopt to manage COVID-19.

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

#### **Agency Guidance**

USDA has updated its [FAQ](#) document on the Department’s website to address questions related to COVID-19. The FAQ document still includes a blanket response to several food safety related questions (below):

*We are not aware of any reports at this time of human illnesses that suggest COVID-19 can be transmitted by food or food packaging. However, it is always important to follow [good hygiene practices](#) (i.e., wash hands and surfaces often,*

*separate raw meat from other foods, cook to the right temperature, and refrigerate foods promptly) when handling or preparing foods.*

The USDA FAQ document includes new responses from USDA regarding various aspects of COVID-19 as it relates to food safety. The Department's guidance is summarized below:

- *Can COVID-19 Spread Through Touching Food, Food Packaging, or Food Contact Surfaces?*
  - There is no evidence demonstrating that COVID-19 has spread through food or food packaging. It is possible for coronavirus, like other viruses, to survive on surfaces or objects. Sanitary best practices should be used to prevent infection spread by surfaces.
- *If an inspector or employee at an establishment is determined to have COVID-19, is the meat or poultry produced at the establishment safe to eat?*
  - Because there is no evidence COVID-19 can be spread through food, the establishment would not be expected to place product on hold or initiate a recall. Infected employees should be excluded from work activities and quarantined in accordance with CDC recommendations.
- *Effect of Local and State Governments*
  - USDA recommends that establishments follow protocols established by local and state health departments, like any other business. County and state health departments have the authority to order an FSIS-regulated establishment to close; FSIS will comply with state and local health department decisions.<sup>1</sup>
- *Sanitation in the Event of COVID-19 Infection*
  - Per FSIS regulations, establishments are required to have Sanitation SOPs in place. The same procedures that are required under the establishment's Sanitation SOPs should be effective at killing the coronavirus. EPA has published a [list of disinfectants](#) that should be effective at killing the virus.

### **What happens if an FSIS inspector in your establishment shows symptoms of or tests positive for COVID-19?**

OFW has had discussion with FSIS officials regarding the agency's approach in the event an FSIS inspector is diagnosed with or is suspected of having COVID-19. We have summarized the discussion below:

---

<sup>1</sup> There is currently an effort underway by numerous food industry trade associations to seek clarity on the impact of local curfews and gathering bans and whether they apply critical infrastructure, such as the food and agriculture industries. Based on a discussion with USDA officials, Secretary Perdue is scheduled to have a call with state governors on March 19th to discuss ways to ensure plant employees, inspectors, and support staff can access food manufacturing plants and distribution warehouses.

As an initial matter, should an establishment have a case of COVID-19 at its plant or a suspected case of COVID-19, FSIS intends to continue to provide inspection services at the establishment, even if it means pulling inspection resources from other plants, calling in relief inspection personnel, or utilizing Front Line Supervisors and other trained FSIS personnel. The agency is committed to protecting the critical infrastructure of our food and agriculture industries and will take the necessary steps to ensure inspection services continue at establishments affected by COVID-19.

If an inspector becomes ill and has symptoms that are consistent with COVID-19 or is diagnosed with COVID-19, the agency would expect that the inspector would quarantine at home pending testing for COVID-19. The agency would not automatically quarantine all other inspection personnel that work at the establishment. The agency would conduct a risk assessment to determine what level of contact that the ill inspector may have had with other inspection personnel. The agency would determine whether the level of contact was “high, medium, or low” and make decisions based on the level and whether other inspection personnel may also be experiencing any symptoms. If the level of contact was high or medium, the agency could order other inspection personnel to quarantine, despite no symptoms, pending testing. However, if the level of contact was considered “low”, the agency would not order a quarantine of other inspection personnel unless they developed symptoms. If any inspection personnel are quarantined, the agency would ensure that the plant receives “substitute” inspection personnel to ensure the plant can continue to operate.

If inspection personnel become ill with symptoms of COVID-19 or are tested positive COVID-19, the agency would expect that establishments would conduct a similar risk assessment in determining whether any plant employees had close contact with the ill inspection personnel and should be quarantined. If it is determined that establishment employees may have been exposed to COVID-19, the agency would expect the establishment to follow CDC guidelines for quarantining persons that may have been exposed to COVID-19. The agency would also expect the establishment to conduct cleaning and sanitizing of the facility to minimize the risk that other employees and inspection personnel could be infected.

According to the FSIS official, at least one inspector-in-charge in the U.S. has tested positive for COVID-19. In that case, the IIC and the Public Health Veterinarian were ordered to quarantine at home. However, other inspection personnel were allowed to continue working because they had not been in close contact with the IIC. The establishment at issue decided to close the facility for a day to conduct a comprehensive cleaning and sanitizing and reopened the next day.

### **Establishment Health Questionnaires**

Some establishments have been requiring visitors and employees to complete health questionnaires prior to entering establishments. There had been some uncertainty with respect to whether FSIS inspectors and Agricultural Marketing Service graders were required to complete these questionnaires prior to entering an inspected establishment.

On March 13, 2020, Phil Bronstein, Assistant Administrator of the Office of Field Operations, issued a memorandum stating that due to privacy laws, the USDA Office of General Counsel has advised USDA employees not to complete and sign questionnaires about their medical conditions or attest to their medical conditions.

## **Food and Drug Administration**

### **Food Industry Briefing**

The U.S. Food and Drug Administration (FDA) hosted a COVID-19 briefing for the food industry on March 18, 2020.

Frank Yiannas, Deputy Commissioner, Office of Food Policy and Response, opened the discussion by stating that FDA is committed to ensuring a safe food supply and a supply chain robust enough to meet our country's needs. He also noted the following items:

- FDA has issued a new [FAQ document](#) to address numerous food safety-related questions (discussed below);
- He emphasized that there is no evidence coronavirus is transmitted through food or food packaging. **FDA is not advising companies who have employees that test positive for COVID-19 to place food on hold or initiate recalls due to concerns over spreading the coronavirus;**
- FDA is working with the White House, USDA, CDC, the Department of Homeland Security, state governments, and the private sector to ensure that we have a safe and functional food supply chain; and
- FDA is working with its federal and state partners to ensure that travel restrictions and quarantines do not hinder the food supply chain.

Next, Michael Rogers, Assistant Commissioner for Human and Animal Food Operations, Office of Regulatory Affairs, addressed some of the changes that have been implemented for inspections:

- FDA will be limiting inspections of food facilities to “mission critical” and “for cause” inspections. Mr. Rogers defined mission critical inspections as those that are not routine inspections. Mission critical inspections includes those that are initiated in response to food-borne illness outbreaks and Class I recalls;
- While the COVID-19 outbreak is ongoing, FDA will take the workforce's safety into account when conducting inspections. For instance, the majority of domestic inspections will be pre-announced to ensure proper precautions are in place. The agency will also take into account a facility's operating status;

- FDA is [temporarily suspending many of most onsite audits](#) to enforce supplier verification requirements for three regulations promulgated under the Food Safety Modernization Act:
  - Current Good Manufacturing Practice, Hazard Analysis and Risk-Based Preventive Controls for Human Food;
  - Current Good Manufacturing Practice, Hazard Analysis and Risk-Based Preventive Controls for Food for Animals; and
  - Foreign Supplier Verification Programs for Importers of Food for Humans and Animals.

The agency will not engage in onsite audits of food suppliers if other supplier verification methods are used instead.

- FDA is pausing routine inspections for the rest of the fiscal year. The agency will reassess this decision as the situation evolves; and
- The agency is postponing foreign facility inspections through at least April.

Dr. Susan Mayne, Director, Center for Food Safety and Applied Nutrition (CFSAN) spoke on some of the work CFSAN is doing to respond to the COVID-19 outbreak:

- CFSAN is working with CDER to better understand hand sanitizer products;
- CFSAN is working with state, tribal, and local authorities on hygiene education for the public.
- Dr. Mayne also recommended implementing social distancing, suspending buffet and self-service food stations, following CDC guidelines when assessing sick employees, and increasing sanitation activities in facilities where a sick employee has been present.
- Dr. Mayne fielded a question on whether state or local governments have the authority to shutdown food facilities as part of quarantine efforts. She recommended that facilities contact [FEMA's National Business Emergency Operations Center](#) if they encounter issues with state or local orders that necessitate shutdowns or transportation restrictions or otherwise affect the supply chain.
- If companies have any food safety related questions, they should be directed to the [FDA Food and Cosmetic Information Center](#).

### **New FAQ Guidance**

FDA has established a new FAQ Guidance page to address numerous food industry-related questions regarding COVID-19. We have excerpted notable portions below:

- **A worker in my food processing facility/farm has tested positive for COVID-19. What steps do I need to take to ensure that the foods I produce are safe?**

Coronaviruses are generally thought to be spread from person-to-person through respiratory droplets. Currently, there is no evidence to support transmission of COVID-19 by food. Unlike foodborne gastrointestinal (GI) viruses like norovirus and hepatitis A that often make people ill through contaminated food, SARS-CoV-2, which causes COVID-19, is a virus that causes respiratory illness. Foodborne exposure to this virus is not known to be a route of transmission.

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. Sick employees should follow the CDC's [What to do if you are sick with coronavirus disease 2019 \(COVID-19\)](#). Employers should consult with the local health department for additional guidance.

While the primary responsibility in this instance is to take appropriate actions to protect other workers and people who might have come in contact with the ill employee, facilities should re-double their cleaning and sanitation efforts to control any risks that might be associated with workers who are ill regardless of the type of virus or bacteria. For example, facilities are required to maintain clean and sanitized facilities and food contact surfaces. See: [FSMA Final Rule for Preventive Controls for Human Food](#).

- Food facilities are required to use EPA-registered “sanitizer” products in their cleaning and sanitizing practices.
  - In addition, there is a list of EPA-registered “disinfectant” products for COVID-19 on the [Disinfectants for Use Against SARS-CoV-2 list](#) that have qualified under EPA’s [emerging viral pathogen program](#) for use against SARS-CoV-2, the coronavirus that causes COVID-19.
  - **IMPORTANT:** Check the product label guidelines for if and where these disinfectant products are safe and recommended for use in food manufacturing areas or food establishments.
- **Do I need to recall food products produced in the facility during the time that the worker was potentially shedding virus while working?**

We do not anticipate that food products would need to be recalled or be withdrawn from the market because of COVID-19, as there is currently no evidence to support the transmission of COVID-19 associated with food or food packaging.

Additionally, facilities are required to control any risks that might be associated with workers who are ill regardless of the type of virus or bacteria. For example, facilities are required to maintain clean and sanitized facilities and food contact surfaces.

- **If a worker in my food processing facility/farm has tested positive for COVID-19, Should I close the facility? If so, for how long?**

Food facilities need to follow 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.

- **What steps do I need to take to clean the facility/equipment to prevent the spread of COVID-19?**

FDA-regulated food manufacturers are required to follow Current Good Manufacturing Practices (CGMPs) and many have [food safety plans](#) that include a hazards analysis and risk-based preventive controls. CGMPs and food safety plans have requirements for maintaining clean and sanitized facilities and food contact surfaces. See: [FSMA Final Rule for Preventive Controls for Human Food](#).

- Food facilities are required to use EPA-registered “sanitizer” products in their cleaning and sanitizing practices.
- In addition, there is a list of EPA-registered “disinfectant” products for COVID-19 on the [Disinfectants for Use Against SARS-CoV-2 list](#) that have qualified under EPA’s [emerging viral pathogen program](#) for use against SARS-CoV-2, the coronavirus that causes COVID-19.
- **IMPORTANT:** Check the product label guidelines for if and where these disinfectant products are safe and recommended for use in food manufacturing areas or food establishments.
- We encourage coordination with local health officials for all businesses so that timely and accurate information can guide appropriate responses in each location where their operations reside.
- Food facilities may want to consider a more frequent cleaning schedule.

### **U.S. Department of Transportation**

On March 13, 2020, President Trump declared an emergency pursuant to 42 U.S.C. § 5121, et seq. and directed the Federal Motor Carrier Safety Administration (FMCSA) to exempt certain commercial vehicle drivers from normal hours of service limitations, which are specified in 49 C.F.R. Parts 390 through 399. On March 18, 2018, FMCSA expanded this emergency declaration to broaden its scope.

The [FMCSA Emergency Declaration](#) applies to commercial motor vehicle operations that are providing direct assistance in support of emergency relief efforts related to the COVID-19 outbreaks. The emergency declaration applies to the following cargo:

- (1) Medical supplies and equipment related to the testing, diagnosis and treatment of COVID-19;
- (2) Supplies and equipment necessary for community safety, sanitation, and prevention of community transmission of COVID-19 such as masks, gloves, hand sanitizer, soap and disinfectants;

- (3) Food, paper products and other groceries for emergency restocking of distribution centers or stores;
- (4) Immediate precursor raw materials-such as paper, plastic or alcohol-that are required and to be used for the manufacture of items in categories (1), (2) or (3);
- (5) Fuel;
- (6) Equipment, supplies and persons necessary to establish and manage temporary housing, quarantine, and isolation facilities related to COVID-19;
- (7) Persons designated by Federal, State or local authorities for medical, isolation, or quarantine purposes; and
- (8) Persons necessary to provide other medical or emergency services, the supply of which may be affected by the COVID-19 response.

The FMCSA Emergency Declaration does not apply to routine commercial deliveries or transportations of mixed loads including both emergency supplies and non-emergency cargo.

Given the demand-driven shortages at some grocery stores and warehouses, the FMCSA Emergency Declaration provides flexibility for the food industry to move goods through the supply chain. We are still in the process of determining the extent that “immediate precursor raw materials” applies to food ingredients or animal feed. However, Livestock Marketing Association has posted a [press release](#) that asserts, based on communications with the Office of the Secretary of Transportation, that all shipments of livestock fall under the FMCSA Emergency Declaration because livestock are deemed “immediate precursor raw materials” of food.

### **Equal Employment Opportunity Commission**

The U.S. Equal Employment Opportunity Commission (EEOC) has [updated its guidelines for employers to comply with the Americans with Disabilities Act and the Rehabilitation Act in light of COVID-19](#). In general, the Acts provide employees and prospective employees with privacy protections with respect to medical examinations.

EEOC has provided the below guidance regarding screening employees for symptoms of COVID-19, such as taking body temperature measurements:

#### **For Current Employees:**

- **How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?**

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

- **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?**

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

- **Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?**

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

- **When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?**

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

#### For Prospective Employees

- **If an employer is hiring, may it screen applicants for symptoms of COVID-19?**

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

- **May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

- **May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**



Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

- **May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?**

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

\* \* \*

OFW is actively monitoring the COVID-19 situation and will provide periodic updates to our food clients. Please let us know if you have any questions or if we can provide assistance on any matter.