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MEMORANDUM

April 10, 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 COVID-19 pandemic.

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 (4/8/20)

On April 8, 2020, FSIS leadership hosted a conference call with industry to provide an update on FSIS' response to the COVID-19 outbreak. FSIS invited every FSIS-inspected establishment to participate in the call.

Inspection Matters

FSIS Administrator Paul Kiecker opened the meeting by noting that it was the first time the agency had hosted a conference call open to all FSIS-inspected establishments. He then provided an overview of the agency's efforts to respond to the coronavirus. He noted that FSIS recently reviewed and updated its human pandemic response plan and the agency has plans in place to ensure that absenteeism does not hinder inspection services.

FSIS received an appropriation of \$33 million in the Coronavirus Preparedness and Response Supplemental Appropriations Act. The agency will be using these funds to ensure continuity of

inspections. This includes overtime payments, hiring temporary inspectors, and relocating inspectors as needed. The appropriations will also be used to cover additional laboratory and inspection costs.

Mr. Kiecker explained FSIS' response to the [Center for Disease Control's recommendation](#) that the general public wear face coverings in circumstances where social distancing cannot be maintained. FSIS has prepared [Notice 19-20](#) (summarized below), which provides instructions on how to make and use face coverings. Mr. Kiecker also stated that FSIS takes the position that if an establishment provides face coverings for its employees, the agency expects the establishment to provide inspectors with a face covering. However, he noted that the agency also understands that the quantity of face coverings available may be limited. He stated that any face coverings provided should be sanitary and washable.

In addition to the recommendation on using face masks, Mr. Kiecker noted FSIS is still emphasizing hand washing and social distancing. Inspectors are expected to maximize their work area, not engage in long conversations, and adjust rotation schedules to limit the number of people the inspector comes into contact with. Line inspectors are also not expected to stand shoulder-to-shoulder with trimmers. The agency is also making sure inspectors know to stay home when they are sick and to leave if they become ill during a shift.

Questions

- *We have requested that FSIS limit inspectors from coming from other plants to conduct non-essential tasks and personnel, such as training. Our Front Line Supervisor (FLS) agreed, but the Deputy District Manager overrode the FLS and has someone from another plant training inspectors. What is USDA's policy on inspection personnel from other establishments conducting non-essential tasks?*
 - It depends on the situation. FSIS does not intend to have someone come to a facility that is nonessential. There may be times when the agency needs to train backup inspectors to ensure that they can provide inspection services. FSIS consider this essential.
- *Is the agency observing that more active chemicals are more effective at sanitizing and disinfecting establishments? If we have a sick employee, are we expected to use heavier strength disinfectants?*
 - Based on recommendations from CDC, FDA, and state and local health authorities, FSIS believes that standard cleaning chemicals are effective against the coronavirus. Experience shows that the virus is not very hardy.
- *Can we force an inspector to go home if their temperature exceeds the same standard we use to exclude our employees (e.g., 100.4° F)?*
 - Yes. FSIS supports screening efforts and expects its inspectors to comply.

- *As critical infrastructure employees, will food industry workers receive priority when it comes to accessing COVID-19 tests?*
 - This is beyond the scope of what FSIS can address. This is an issue that is sorted out at the state and local level.
- *We have one inspected shift. We are requiring our workers to physically distance, which necessitates slowing production. Will we be charged overtime if we need to use it due to social distancing?*
 - Yes, FSIS will charge overtime if an establishment exceeds its shift. This is because Congress' appropriations do not allow inspectors' overtime to be paid with appropriated funds.
- *Does FSIS have any documentation/credentials that establishment employees can carry with them if they are traveling in an area that has a curfew or stay-at-home order?*
 - FSIS District Offices and headquarters has provided its employees documentation to show to local authorities. However, this documentation is to be used by FSIS personnel only. Establishments should consider their own documentation in consideration of orders implemented at the state and local level.
- *Are inspectors going to be monitoring to ensure plant employees maintain proper social distancing or are wearing face coverings?*
 - No. FSIS expects establishments to follow proper social distancing to the best of their ability and to follow other CDC guidance, but this type of guidance is not enforced by FSIS.
- *Will there be any leeway for inspectors to stay on shifts that go beyond 12 hours?*
 - This is something that should be discussed with the Front Line Supervisor (FLS) to determine how the shift can be covered.
- *We have an inspector that covers multiple establishments in a day. We typically screen our employees for COVID-19 at the beginning of the shift. How do we coordinate with our inspector to ensure they are screened if they arrive after the beginning of a shift?*
 - The recommendation is to ensure you have someone there to screen the inspector when the inspector arrives at the establishment. Inspectors are not required to announce when they will be arriving at an establishment. You can ask inspectors to coordinate with you, but it is up to them. It is ok if the inspector has to wait 5-10 minutes until someone is free to perform the screening.
- *If we have to add a second shift, would FSIS provide inspection to support that with limited notice?*
 - Contact your District Office. They will evaluate if there is a legitimate need for a second shift.

- *Are state inspectors that conduct federal inspections pursuant to a cooperative agreement provided the same guidance as FSIS inspectors?*
 - Yes.
- *Will inspectors at plants that have been shuttered due to COVID-19 be transferred elsewhere? Will they notify us if that is the reason they are coming to our establishment?*
 - FSIS expects sick inspectors to stay home. If they don't have symptoms and don't need to quarantine, they will be redeployed. FSIS is trying to detail inspectors such that they don't have to travel. FSIS will have to temporarily relocate inspectors if there is a high absenteeism rate.
- *If an establishment provided COVID-19 tests for employees, would FSIS allow inspectors to be tested?*
 - FSIS would likely allow voluntary testing of inspectors and would expect the local health authority to be involved.
- *Does FSIS have thoughts on using UV treatment to kill coronavirus?*
 - CDC, FDA, and EPA websites have information on what treatments are effective. FSIS recommends following this guidance.
- *If an establishment has an employee that has tested positive for COVID-19, is it required to notify FSIS or is it a recommendation to notify FSIS?*
 - FSIS will notify the establishment if inspection personnel test positive for COVID-19, and there is an expectation that the establishment would reciprocate if a plant employee tests positive for the disease. However, there is not a requirement to notify.
- *If FSIS inspection personnel self-quarantined because they may have been in contact with a person suspected of being infected with COVID-19, would FSIS proactively notify the establishment?*
 - No, FSIS would not notify the establishment unless the inspection personnel tested positive for COVID-19. FSIS would likewise not expect an establishment to notify FSIS if an establishment employee self-quarantines without evidence of COVID-19 infection.

Updated FAQ Guidance

USDA maintains a department-wide [FAQ document](#) with guidance pertinent to COVID-19. Below, we have summarized some of the recent guidance USDA has provided for FSIS establishments.

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

- Workers in the food and agriculture sector fill critical and essential roles within communities. To prevent spread of COVID-19, CDC is recommending individuals employ social distancing or maintaining 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.

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.

- *Should employees in food production settings wear face coverings to prevent exposure to COVID-19?*
 - On Friday, April 3rd, the Centers for Disease Control and Prevention (CDC) released an [updated recommendation](#) on the use of cloth face coverings to help slow the spread of COVID-19.

CDC is recommending the voluntary use of cloth face coverings in public settings where other social distancing measures are difficult to maintain, especially in areas of significant community-based transmission. Per the CDC, the purpose of wearing a face covering is to help prevent the transmission of coronavirus from individuals who may be infected, but are not showing symptoms.

Additional information on how to make and wear cloth face coverings is available on the [CDC website](#).

- *Are meat, poultry, and processed egg products inspection services and the issuance of export documentation being discontinued by the Coronavirus Disease (COVID-19) Outbreak?*
 - No. Meat, poultry, and processed egg inspection services, including export certification services, continue as normal. Planning for absenteeism is a part of normal FSIS operations and as such, FSIS is closely monitoring and tracking employee absenteeism to plan for and minimize impacts to operations. FSIS is working to prioritize inspection at establishments based on local conditions and resources available.

- *Have any of FSIS' audits of foreign countries' (or foreign countries auditing the U.S.) food safety systems been delayed due to COVID-19?*
 - As USDA's public health agency, FSIS is committed to ensuring the safety and wholesomeness of all imported meat, poultry, and processed egg products for American families. For the safety of our auditors, FSIS does not provide the dates when the auditors are scheduled to conduct in-country equivalence audits in a foreign country. FSIS has delayed both U.S. and foreign country audits in accordance with the State Department's guidance. FSIS continues to monitor the situation and will evaluate the feasibility of its upcoming audits as the situation evolves, including reviewing State Department guidance on foreign travel.

Notice 19-20 – Use of Protective Coverings to Reduce the Spread of COVID-19

On April 9, 2020, FSIS issued [Notice 19-20](#), "Use of Protective Coverings to Reduce the Spread of COVID-19" (Notice 19-20). In light of CDC's recent guidance encouraging individuals to wear face coverings in public settings where it is difficult to maintain social distancing, Notice 19-20 provides guidance to FSIS inspectors and personnel on the voluntary use of protective face coverings.

Notice 19-20 states that FSIS expects establishments that require their employees to wear face coverings will also distribute face coverings to FSIS inspection program personnel (IPP) when available. The Inspector in Charge (IIC) will initiate this discussion with establishment management.

Notice 19-20 also notes that FSIS personnel that cannot obtain surgical masks will be required to provide their own face coverings. The agency recommends the masks meet the following criteria:

- Fit snugly but comfortably against the side of the face;
- Be secured with ties or ear loops;
- Include multiple layers of fabric and
- Allow for breathing without restriction.

U.S. Food and Drug Administration (FDA)

Remote FSVP Inspections

On April 3, 2020, FDA published a [Constituent Update](#) announcing that importers send records required under the Foreign Supplier Verification Programs for Importers of Food for Humans and Animals (FSVP) rule electronically as FDA is conducting these inspections on a remote basis during the COVID-19 pandemic.

Typically, FSVP inspections have been conducted at an importer's place of business; however, the rule allows FDA to collect this information electronically. Due to travel restrictions and social

distancing, FDA has postponed routine onsite inspections and is transitioning to remote inspections.

FDA will be prioritizing the inspections of FSVP importers of food from foreign suppliers whose onsite food facility or farm inspections have been postponed due to COVID-19. FDA will also be conducting previously assigned routine and follow-up inspections. Importers that will be the subject of remote inspections will be contacted by an FDA investigator who will explain the process for remote inspections and make written requests for records.

FDA will still conduct an onsite inspection if circumstances warrant one. For instance, if there is an outbreak of foodborne illness, FDA inspectors will make arrangements to conduct an onsite inspection while maintaining social distancing.

Best Practices for Retail Food Stores, Restaurants, Food Pickup/Delivery

FDA has released [guidance on best practices](#) to protect the safety of workers and consumers while operating retail food stores, restaurants, and associated pick-up and delivery services during the COVID-19 pandemic (Retail Guidance). The Retail Guidance addresses several aspects of foodservice operations, including:

- Managing Employee (and Contractor) Health
 - Instruct employees to notify a manager if they are sick. If an employee becomes ill, send them home and immediately clean and disinfect surfaces in their workspace;
 - Inform employees if they have been in close contact with someone who has tested positive or shown symptoms of COVID-19; and
 - Implement workplace controls to reduce transmission among employees, including:
 - Pre-screening (e.g., take temperature and assess symptoms prior to starting work). Regularly self-monitor conditions;
 - Disinfect and clean work spaces and equipment, consider a more frequent cleaning schedule;
 - Follow CDC, FDA, and OSHA guidance on sanitation and hygiene.
- Personal hygiene for employees
 - Emphasize effective hand hygiene including washing hands for at least 20 seconds, especially after going to the bathroom, before eating, and after blowing your nose, coughing, or sneezing;
 - Always wash hands with soap and water. If soap and water are not readily available, use alcohol-based hand sanitizer;
 - Avoid touching your eyes, nose, and mouth;
 - Use gloves to avoid direct bare hand contact with ready-to-eat foods; and
 - Use a tissue to cover coughs or sneezes and immediately dispose of the tissue.
- Managing operations in a foodservice establishment or retail food store

- Continue to follow established food safety protocols and best practices for retail food establishments;
 - Frequently disinfect surfaces repeatedly touched by employees or customers, such as door knobs, equipment handles, and check-out counters using EPA-registered disinfectants; and
 - Assist customers in maintaining social distancing by discontinuing salad bars, buffets, and beverage service stations, encourage spacing in lines and checkout areas.
- **Managing Food Pick-Up and Delivery:**
 - Observe established food safety practices for time/temperature control, preventing cross contamination, cleaning hands, sending ill employees' home, and storage of food;
 - Establish designated pickup zones for customers to help maintain social distancing;
 - Practice social distancing when delivering food, such as “no touch” deliveries and text alerts to notify a customer their food has arrived;
 - Evaluate the establishment to determine physical changes that can be made to better accommodate social distancing; and
 - Routinely clean and sanitize coolers and insulated bags used for delivery.

FDA has prepared a [summary of this guidance](#) in the form of a poster that can be displayed at retail food establishments.

U.S. Center for Disease Control (CDC)

On April 9, 2020, CDC issued [new interim guidance](#) for critical infrastructure workers (including food production) that have been exposed to a person with suspected or confirmed COVID-19. CDC is advising that critical infrastructure workers that have had close contact (within 6 feet) with an individual that is exhibiting symptoms or has tested positive for COVID-19 may continue to work, but employers should adhere to the following practices prior to and during their work shift:

- **Pre-Screen:** Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility.
- **Regular Monitoring:** As long as the employee doesn't have a temperature or symptoms, they should self-monitor under the supervision of their employer's occupational health program.
- **Wear a Mask:** The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages.
- **Social Distance:** The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
- **Disinfect and Clean work spaces:** Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.

If the employee becomes sick during the day, CDC recommends that the employee be sent home immediately and any surfaces in their workspace should be cleaned and disinfected. CDC also recommends that establishments compile information on people who had contact with the employee on the day they were sick and two days prior. Those that had close contact with the employee should be considered exposed and adopt the same precautions listed above.

U.S. Department of Transportation

On April 8, 2020, the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) [extended its national emergency declaration](#) until May 15, 2020. FMCSA issued its Emergency Declaration No. 2020-002 (the Emergency Declaration) on March 13, 2020. The Emergency Declaration was initially intended to expire on April 12, 2020. In light of the ongoing COVID-19 pandemic, FMCSA has extended the sunset period to May 15, 2020.

The Emergency Declaration exempts motor carriers from numerous FMCSA regulations (49 C.F.R. Parts 390 – 399), including hours of service limitations, for drivers that are providing direct assistance to the response to the COVID-19 pandemic. This includes drivers engaged in hauling food to distribution centers and retailers, human food ingredients, and livestock.

FMCSA has provided guidance on interpreting the Emergency Declaration [here](#).

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