

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
GARY H. BAISE
FREDERICK H. BRANDING*
BRUCE A. SILVERGLADE
JOLYDA O. SWAIM
STEWART D. FRIED
ROGER R. SZEMRAJ
EDWARD J. FARRELL
ELLIOT BELILOS
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

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MEMORANDUM

May 1, 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 recent statements provided by relevant federal agencies regarding COVID-19.

U.S. Department of Agriculture

FSIS Leadership – Industry Conference Call

On April 29, 2020, OFW attended a teleconference between the USDA's Food Safety and Inspection Service (FSIS, or the agency) leadership and FSIS-inspected establishments to discuss the agency's efforts to address COVID-19. Much of the discussion during the call has been addressed in prior OFW memos. However, we have summarized the new material that was discussed during the call.

Under Secretary for Food Safety Dr. Mindy Brashears opened the meeting with a brief discussion of the recent [Executive Order](#) invoking the Defense Production Act to facilitate meat and poultry production during the pandemic. She emphasized that establishments should be utilizing the recently published [CDC/OSHA Guidance](#) to reduce the spread of COVID-19 in plant environments.

Dr. Brashears said that USDA will be forming a task force with the U.S. Department of Labor and CDC that will be consulting with establishments and local governments to ensure continuity of

operations to avoid food shortages. She noted that plans are still in development and that FSIS will share more information in the near future.

Next, FSIS Administrator Paul Kiecker provided some announcements of the agency's efforts to respond to COVID-19. He encouraged establishments to review and follow the new CDC/OSHA guidance issued last weekend. Some of the items he discussed include:

- Promote social distancing in production areas:
 - Where possible, modify work stations to provide at least six feet of distance between workers;
 - Install physical barriers, such as plexiglass and strip curtains;
- Modify common areas:
 - Remove tables to promote spacing;
 - Install plexiglass barriers where necessary;
 - Provide alternate break areas, cafeterias, and locker rooms;
- Add additional lines and shifts if possible;
- Encourage single file movement and visual cues such as floor markings;
- Implement employee screening programs; and
- All employees should be wearing face coverings. Establishments should be providing face masks and have replacements available when they become soiled or wet.

Mr. Kiecker also noted that FSIS will not be enforcing the CDC/OSHA Guidance at establishments, but if inspectors observe health or safety concerns, they will notify plant supervisors. He also encouraged establishments to communicate with inspectors to make sure they are aware of changes to schedules and anticipated line speeds with as much advance time as possible.

Questions

- We understand there are plans for guidelines to encourage implementation of the CDC/OSHA Guidance. When will this be released?
 - USDA is preparing guidelines for industry to follow that aligns with the CDC/OSHA Guidance. Establishments will be expected to have written plans in place to implement the guidance. FSIS inspectors will not be monitoring to determine if the plans are in place and will not be enforcing compliance with the CDC/OSHA Guidelines. These plans will be a tool to work with local health departments to get establishments back in operation if they have been ordered to shut down.

- What is the scope of the supply chain that will be impacted by the Executive Order? The Executive Order refers to the food “supply chain,” which includes a lot of companies that are not directly processing meat and poultry?
 - USDA will be providing more information on implementing the Executive Order in the coming days.
- The Executive Order states that USDA will be affirming that establishments are in compliance with the CDC/OSHA Guidance. What will the affirmation process look like?
 - USDA will be providing clarification on the affirmation process in the coming days.
- The enforcement discretion policy pertaining to selling food service products at retail and without nutrition labels is set to expire on May 22nd. Will this be extended?
 - FSIS will be extending this enforcement discretion policy for another 60 days to July 21st.
- Some inspectors are wearing their own face coverings instead of the ones provided by establishments. Does this align with FSIS leadership instructions?
 - FSIS has instructed inspectors to utilize materials that the establishment is providing. If the establishment provides a face mask, the inspector should wear it.
- Some establishments have been conducting nightly disinfection of non-food production areas through fogging. We have heard concerns from some inspectors that they do not want the USDA office fogged because it irritates their eyes. Should they avoid spraying the USDA offices?
 - Any establishments that encounter pushback on disinfecting inspector offices should contact the Front Line Supervisor (FLS) or the District Office.
- We have been contacted by our District Office to ask if we are testing our employees? Is FSIS monitoring the testing of employees?
 - It is not FSIS’ intent to monitor the testing of employees or get involved in those decisions.
- We cannot find tests for our employees. Our local health department has not been helpful in assisting us. What resources are available?
 - Contact your state health department as a starting point.
- Implementing social distancing has reduced our productivity. We now have to pay overtime, which is causing us to lose money to operate. Are there resources where small plants can access more inspected hours to avoid paying overtime?
 - FSIS is not aware of any resources. FSIS is required to charge overtime for inspection beyond 40 hours a week. There have been discussions on adjusting the overtime rate for very small plants. Congressional action and appropriations is required to change our overtime policy.

- We are posting announcements in our plant when we have an employee test positive. Inspection personnel at our plant is requesting email notifications. Is our posting method sufficient to notify FSIS or do we have to send an email?
 - FSIS does not require an email and does not have a preference in terms of the means of receiving notification. However, inspectors should be notified if they had close contact with an infected individual.
- Our District Office has requested that we notify FSIS in writing of any positive employees and provide an update every single day? Did headquarters instruct the District Offices to ask for this information?
 - No.
- We have heard that FSIS is considering not rotating inspectors on the 4-month interval as is usual. Is this true?
 - FSIS considered pausing rotations. However, it decided against this because inspectors that are subject to rotation are already going into more than one establishment a day. We do not believe that reducing rotations will significantly remove risk.
- Our inspector has criticized us because we are not screening with temperature measurements. Is this a requirement if we don't have any positives?
 - Taking temperature is not mandatory, but if you want to stay ahead of the curve it is a good idea.
- Does FSIS have authority to review our infection control plan?
 - If the infection control plan involves a change to your SSOP, then it should be reviewed by FSIS inspectors. If it doesn't involve changes to your SSOP or HACCP program, then FSIS does not need to review it.

Other USDA Items

- On April 30, 2020, OFW attended a webinar hosted by NYSE ICE Data Services featuring Secretary Perdue, where he discussed the department's response to COVID-19. While much of the discussion was general, Secretary Perdue addressed one aspect of the Executive Order.

He indicated that, due to the Executive Order, USDA will use the Defense Production Act to get involved in directing PPE and face coverings to establishments that need them. He also indicated that USDA will use the Defense Production Act to acquire and distribute tests to establishments if testing is appropriate per [CDC's testing guidelines](#). Meat and poultry workers will be prioritized, along with healthcare workers and first responders.

- The Agricultural Marketing Service’s Commodity Procurement Program has posted a [pre-proposal webinar](#) discussing technical details of the Request for Proposal for the Farmers to Families Food Box Program.
- Terri Nintemann has been named Deputy Administrator of FSIS. She had been serving as Acting Deputy Administrator since March 12, 2020.

U.S. Food and Drug Administration

- On April 24, FDA published a [guide](#) for food facilities that have a COVID-19 confirmed positive or exposed worker in an FDA-regulated food production, storage, or distribution operation. Of note, the guide recommends that facilities with sick employees should:
 - Close off the areas used by the person who is sick,
 - Wait 24 hours, or as long as is practical, prior to cleaning or disinfecting the sick worker’s workspace,
 - If it is possible to maintain compliance with regulatory requirements to maintain a sanitary environment, open doors and windows to increase ventilation, and
 - Collect information about the worker’s close contacts amongst co-workers up to 2 days prior to the onset of symptoms; inform fellow workers of their possible COVID-19 exposure if the worker is confirmed positive.
- [Consumer Update – Tips on Good Nutrition and Using the Updated Nutrition Facts Label During the Coronavirus Pandemic](#). On April 29, 2020, FDA issued a consumer update to educate consumers on the recently updated nutrition facts panel.
- [Consumer Update – Helpful Questions and Answers about Coronavirus \(COVID-19\) and Your Pets](#). On April 30, 2020, FDA issued a consumer update to educate pet owners on issues related to COVID-19 and pets.

Center for Disease Control and Prevention

On May 1, 2020, CDC issued a [Morbidity and Mortality Weekly Report](#) (MMWR) with data on the prevalence of COVID-19 among workers in meat and poultry processing facilities in 19 states. The MMWR highlights the [challenges](#) of controlling COVID-19 in meat and poultry processing plants. The MMWR is accompanied by a [data table](#) identifying the number of impacted plants in the 19 states that have reported data as well as the number of affected workers and fatalities.

In total, the MMWR identifies 115 meat and poultry plants as being affected by COVID-19 infections. Of the 130,578 workers at these plants, 4,913 (3.0%) have tested positive and 20 have died (0.4%). The MMWR does not identify the companies where illnesses have occurred. It also does not contain data from all affected states, such as Indiana.

Occupational Safety and Health Administration

On April 30, 2020, OFW participated in a webinar hosted by Georgia Tech featuring Dr. Chris Brown, Special Assistant at OSHA, and Dr. Doug Trout, Branch Chief, CDC National Institute of Occupational Safety and Health (NIOSH) Health Hazard Evaluations and Technical Assistance Branch. Drs. Brown and Trout primarily discussed the CDC/OSHA Guidance for meat and poultry plants. A few notable observations include:

- Face shields are strongly recommended when their use is appropriate. They can serve as both PPE and source control for COVID-19;
- Screening areas should be designed to provide employees privacy if there is a need to further evaluate them for signs of COVID-19 after temperature checks and interview questions;
- OSHA is working with state/local governments to ensure meat and poultry plants are following CDC/OSHA guidance. However, states/local governments may request measures that are more stringent than CDC/OSHA guidance. State plans only have to be at least equal to OSHA requirements.
- CDC/OSHA does not intend to provide more specific guidance regarding such things as how many handwashing stations or clock stations are necessary based on the number of employees in an area, what is considered adequate ventilation, and how tall and wide barriers should be. Each establishment must determine what is acceptable based on their facility and other measures taken.
- Under the CDC/OSHA guidance, employees do not have to necessarily be removed from the workplace and quarantined if they came into close contact with a person testing positive for COVID-19, provided they have no symptoms and they also have not tested positive for COVID-19. The person could continue working as long as other safeguards are in place, such as social distancing, using face coverings, handwashing, etc.
- Establishments should take into account whether the use of face coverings in a particular workplace environment could introduce another hazards, such as catching on equipment, causing heat stroke, or trapping cleaning chemicals. Based on these hazards, establishments may utilize different types of face coverings or limit the use of face coverings in certain areas.
- The CDC/OSHA guidance currently recommends that employees not take cloth face coverings home for cleaning and that establishments provide clean face coverings every day. However, further discussion is warranted regarding this recommendation as some employees may not want to wear a face covering previously used by another employee.
- The CDC/OSHA guidance supplements, and does not supersede, the [Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19](#).

- State worker safety agencies offer free consultation programs to assist companies in complying with OSHA requirements. These are voluntary consultations and will not result in enforcement actions. Your state consultation office can assist in complying with the CDC/OSHA guidance. These free consultations are generally limited to small and medium-sized employers, but due to the COVID-19 pandemic, OSHA is allowing all employers to participate in the consultation program.
 - If you are interested in learning more about the consultation program, [contact your state office](#).

DHS Security Cybersecurity and Infrastructure Security Agency (CISA)

On Thursday April 30, the Department of Homeland Security's (DHS) Cybersecurity and Infrastructure Security Agency (CISA) held a call to discuss the most recent developments regarding the coronavirus pandemic, supply chain issues, and the DHS response. This call will be held every Tuesday and Thursday at 3:00 PM EST to provide updates on the coronavirus response until further notice.

Mr. Bradford Willke, CISA's Acting Assistant Director for Stakeholder Engagement opened the call by reminding listeners that a recording of today's call will be made available on the Homeland Security Information Network (HSIN) [portal](#) and the National Business Emergency Operations Center (NBEOC) [Dashboard](#). The NBEOC Dashboard serves as a one-stop-shop for federal guidance and information related to the private sector. Individuals with questions regarding DHS' COVID-19 response activities can email cisa.cat@cisa.dhs.gov for assistance. Mr. Willke also recommended that listeners visit www.coronavirus.gov for more information on the federal government's response to the coronavirus.

Mr. Willke stated there are 3 million confirmed cases of COVID-19 and over 207,000 deaths around the world. The number of coronavirus cases in the United States continues to increase, and will soon approach one million. So far, there have been 60,000 deaths attributable to COVID-19 in the United States. According to Mr. Willke, COVID-19 cases in Massachusetts, Minnesota, North Carolina, and Wisconsin have increased, while cases in West Virginia have decreased. Mr. Willke ended his remarks by highlighting that the social distancing guidelines issued by the White House will not be extended, and decisions to reopen non-essential businesses will be made by state governors.

Mr. Rob Glenn from FEMA provided an update on COVID-19 testing and personal protective equipment (PPE) distribution. According to Mr. Glenn, DHS is working to address coronavirus outbreaks at nursing and long-term care facilities, food distribution plants, and on tribal lands by working with the Centers for Disease Control and Prevention (CDC) to increase testing capacity. FEMA and CDC are also working with public health laboratories to increase the availability of antibody tests. The agencies are also working with the Department of Defense to distribute PPE, as well as PPE sanitation systems.

According to Mr. Glenn, on May 1, 100 community-based testing sites will operate across 33 states. Mr. Glenn anticipates that later in May, 200 sites in 49 states and the District of Columbia will test 15,000 patients. FEMA and other federal agencies are working with CVS, Walgreens, Rite Aid, Kroger, and Health Mart to expand testing in areas where the number of COVID-19 cases is high. Mr. Glenn also discussed the distribution of cloth facial coverings to essential critical infrastructure workers. So far, 50 million cloth facial coverings have been distributed to state, local, tribal, federal, and private entities.

Mr. Glenn also drew attention to the Department of Agriculture's (USDA) and FEMA's activation of Emergency Support Function Fourteen (ESF-14), which will work to stabilize the food and agriculture supply chain.

Mr. Willke provided closing remarks where he discussed the topics of upcoming CISA teleconferences. According to Mr. Willke, upcoming calls will discuss United States-Mexico trade, the upcoming hurricane season and COVID-19's impact on preparations, and cybersecurity incidents. The teleconferences will feature representatives from the food, agriculture, chemical, and utilities sectors, as well as FEMA regional officials.

Questions and Answers

- *What is the best way to monitor the COVID-19 pandemic's impact on United States-Mexico trade?*

While FEMA did not recommend a specific resource to monitor international trade and supply chain issues, the Department of State is working with the Mexican government to resolve import/export issues caused by the public health emergency. FEMA also recommends that businesses encountering problems with shipments contact Customs and Border Protection's (CBP) import/export officers for assistance.

- *Does Executive Order 13917 apply to seafood facilities?*

No. While Executive Order 13917 entitled "[Defense and National Security: Defense Production Act of 1950; Delegation of Authority Respecting Food Supply Chain Resources During National Emergency Caused by COVID-19 Outbreak](#)" applies to meat processing facilities, it does not apply to seafood processing facilities. CISA encourages seafood processing facilities affected by the public health emergency to contact them for assistance.

- *What is the status of the American food supply chain?*

The United States has encountered shortages of commodities used by food processing plants, including ethanol, disinfectants, and other chemicals. Foodbanks have encountered shortages due to the increasing number of unemployed individuals. FEMA and USDA are working to address food supply chain issues including a lack of CO₂, PPE, and other commodities necessary for food production.

- *Will FEMA or CISA issue general guidance on reopening non-essential businesses?*

While DHS may issue guidance on reopening non-essential businesses, the agency will prioritize the issuance of guidance that focuses on essential critical infrastructure workers.

Resources

- USDA
 - [FAQ Guidance](#)
 - [Temporary Enforcement Discretion on Nutrition Labels, Restrictive Labeling](#)

- FDA
 - [FAQ Guidance](#)
 - [Temporary Policy Regarding Enforcement of the Egg Safety Rule](#)
 - [Temporary Policy Regarding Egg Packaging and Labeling](#)
 - [Temporary Policy on Onsite Audit Requirements for Receiving Facilities and FSVP Importers](#)
 - [Temporary Policy Providing Flexibility for Nutrition Labeling of Packaged Food for Restaurants and Other Businesses](#)

- CDC
 - [CDC/OSHA Guidance for Meat and Poultry Processing Workers and Employers](#)
 - [Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19](#)
 - [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#)
 - [Cleaning and Disinfection for Community Facilities](#)

- OSHA
 - [Statement of Enforcement Policy Regarding Meat and Poultry Processing Facilities](#)
 - [Guidance on Preparing Workplaces for COVID-19](#)
 - [Enforcement Guidance for Recording Cases of COVID-19](#)
 - [Discretion in Enforcement When Considering an Employer's Good Faith Efforts During the COVID-19 Pandemic](#)

- CISA
 - [Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response](#)

- EPA
 - [List N: Disinfectants for Use Against SARS-CoV-2](#)

- Food & Beverage Issue Alliance
 - [Food Industry Recommended Protocols When Employee/Customer Tests Positive for COVID-19](#)
 - [Considerations for Identifying Exposed Employees as Related to COVID-19](#)

- [COVID-19 Employee Symptoms/Testing Status-Based Decision Tool for Food Facilities](#)

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