

RICHARD L. FRANK
ARTHUR Y. TSIN
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



— 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
PHILIP C. KARSTING
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

May 29, 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

Food Safety and Inspection Service (FSIS) COVID-19 Conference Call

On May 27, 2020, Dr. Mindy Brashears, Under Secretary for Food Safety, and Paul Kiecker, FSIS Administrator, hosted a call with FSIS-inspected establishments to discuss the agency's response to COVID-19 and answer questions from establishments.

Dr. Brashears opened with a reminder that establishments should be implementing the CDC/OSHA Joint Guidance for Meat and Poultry Workers and Employers. She noted that FSIS will not be enforcing compliance with these recommendations, but inspection personnel will be reporting noncompliance, which may result in a referral to OSHA. She also announced that FSIS is facilitating a call for establishments with OSHA on May 28th (summarized below).

Next, Mr. Kiecker noted that at this time, all FSIS inspection program personnel (IPP) are required to wear face shields as well as face coverings. Establishments should notify IPP if they have particular equipment they are providing to their employees; IPP are expected to wear the same

equipment. If an establishment is not providing face shields or face coverings, FSIS expects IPP to use FSIS-issued face shields and coverings.

Mr. Kiecker also noted the agency is continuing its transition to the PHIS Export Component for handling export certificates. FSIS will be bringing new countries online with the program. FSIS will be working with companies to include digital attestations and digital signatures. Mr. Kiecker said that this transition will assist in streamlining the process to obtain necessary signatures to keep products moving. There have been disruptions in courier services, which has made the need for digital delivery more apparent.

Next, Mr. Kiecker addressed questions from the establishments:

- *If a facility has moved to mandatory COVID-19 testing for its employees, will inspectors be required to also submit to testing?*
 - If an establishment desires to test all of its employees, then it is up to the establishment to determine if it wants to expand the testing to include inspectors. If an establishment requires that inspectors submit to COVID-19 testing, we expect our inspectors to comply.
- *Can you make any comment on the petition submitted by Physicians Committee for Responsible Medicine relating to testing product for the presence of COVID-19?*
 - FSIS is unable to make any comment at this time. We have posted the petition and are accepting public comments on the petition. (Note: the PCRMR petition is detailed below).
- *Is there any possibility that FSIS will move to remote or virtual inspections?*
 - No. FSIS has not had any major issues in performing in-person inspections. While FSIS has made adjustments to meet inspection requirements, we do not have any plans to change the nature of our inspections.

Updated FAQ Guidance

On May 22, 2020, USDA updated the Department's [COVID-19 FAQ Guidance](#) with the following:

- *In some areas of meat and poultry processing facilities, social distancing at 6 feet of distance may not be feasible in order to maintain continued operation at the maximum capacity possible. In these areas, are other controls, based on the hierarchy of controls outlined in the CDC/OSHA guidance, e.g., PPE, acceptable in order to maintain safe operations at the maximum capacity possible?*
 - Employers should use the hierarchy of controls to control hazards and protect workers as outlined in the [CDC/OSHA guidance](#), including by first trying to eliminate hazards from the workplace, then implementing engineering controls followed by administrative controls and safe work practices, and finally using

personal protective equipment. When engineering controls, such as physical barriers, are not feasible in a particular workplace or for a certain operation, other types of controls, including PPE, may be considered in accordance with the hierarchy.

Physicians Committee for Responsible Medicine Petition

On May 20, 2020, Physicians Committee for Responsible Medicine (PRCM), an activist organization that promotes animal rights and vegan diets, submitted a petition to FSIS requesting the agency take several actions in light of COVID-19. These include:

1. Requiring all FSIS-inspected establishments to test their meat and poultry products for the presence of SARS-CoV-2 and to make the results publicly available;
2. Require all FSIS-inspected facilities to make weekly reports to local health departments on the number of workers and the workers' family members that are infected with or have died from COVID-19;
3. Publish a weekly report with the number of workers at FSIS-inspected establishments that have contracted or have died from COVID-19;
4. Amend 9 C.F.R. § 317.2(l)(2) and 9 C.F.R. § 381.125(b) such that all safe handling statements contain the following disclosure: "Warning: Workers in U.S. meat and poultry processing facilities have been sickened or killed by the SARS-CoV-2 virus, and this product has not been certified virus-free."; and
5. Publish and distribute notices to be displayed at retail meat counters and checkouts that read: "Warning: Workers in U.S. meat and poultry processing facilities have been sickened or killed by the SARS-CoV-2 virus, and this product has not been certified virus-free."

On May 22, 2020, FSIS published an [acknowledgement](#) of receipt of the petition. As is standard practice, FSIS has not taken a public position on the petition. However, both USDA and FDA have stressed there is no evidence that COVID-19 can be spread through consuming food or handling food packaging. It is unlikely that FSIS will take any action based on the PRCM petition.

FSIS will be accepting public comments on the petition at fsispetitions@usda.gov.

U.S. Food and Drug Administration

Guidance on Reporting Temporary Closures of Human Food Establishments

On May 27, 2020, FDA published [guidance](#) for FDA-regulated human food facilities and farms to announce a mechanism for these entities to voluntarily report if they are temporarily ceasing production, significantly reducing production, or contemplating ceasing or reducing production.

FDA will use this information to gain a better understanding of the current status of the food supply chain and address challenges facing food producers. FDA-regulated human food facilities and farms can also use the mechanism described in the guidance document to request assistance from FDA in responding to the pandemic.

Establishments that wish to (1) report a voluntary closure or reduction in production or (2) request assistance from FDA, can use the FDA Center for Food Safety and Nutrition (CFSAN) Food and Cosmetic Information Center (FCIC) [web portal](#) and follow its instructions after selecting the option “Is your inquiry specific to Coronavirus?”

The guidance will remain in effect for the duration of the COVID-19 public health emergency. The guidance is not applicable to restaurants or retail food establishments (e.g., grocery stores).

Occupational Safety and Health Administration

Meat and Poultry Industry Stakeholder Call

On May 28, 2020, Chris Brown, Health Scientist with OSHA’s Office of Emergency Management and Preparedness hosted a teleconference for FSIS-inspected establishments to answer questions related to the CDC/OSHA Guidance for Meat and Poultry Workers and Employers. After making a brief introduction, Mr. Brown immediately turned to questions from participants:

- *If an establishment is following the CDC/OSHA Guidance by implementing the hierarchy of controls and installing engineering controls (e.g., physical barriers), can the establishment operate a normal or close to normal operating capacity?*
 - The CDC/OSHA Guidance is not to advise establishments on what their worker capacity or line speed should be. Instead, it provides recommendations on implementing the hierarchy of controls approach to controlling the spread of COVID-19. Employers should assess their individual situation to determine what their capacity should be based on their implementation of the hierarchy of controls, including engineering controls. Some establishments will not be able to properly separate workers, which may lead them to reduce their capacity. However, PPE and face coverings are becoming more available; their use can allow more workers to safely return to manufacturing environments. In short, the capacity or line speed should be dictated by the individual plant conditions.
- *Can face shields (in addition to face coverings) serve as a substitute for installing physical barriers?*
 - Face shields are not a substitute for physical barriers. OSHA encourages establishments to follow the hierarchy of controls approach. The first phase in the hierarchy is engineering controls, which can include physical barriers. Engineering controls are preferred because they are passive and do not require continuous conscious effort on behalf of the employer or employee to work. Other controls, like wearing face coverings or maintaining proper distance while walking through

a hallway require active effort and cooperation. In instances where installing physical barriers is not feasible, the use of face shields and cloth face coverings can provide additional protection.

- *Is each positive case of COVID-19 among our employees supposed to be a “recordable” illness?*
 - A case of COVID-19 in an employee is not automatically recordable; however, all employees are required to make a work-relatedness determination if they learn an employee is sick with COVID-19.
- *What was the process for determining COVID-19 is a recordable illness?*
 - Most infectious diseases are recordable illnesses. 29 CFR § 1904.5 has an exception for the common cold and seasonal flu. COVID-19 is neither of these, so it is considered a recordable illness.
- *If we have administrative controls in place, do we still have to operate under a limited capacity (e.g., minimum number of square footage per employee)?*
 - OSHA does not have any particular limits on worker capacity. Our expectation is that employers are implementing the necessary controls to keep their workers safe.
- *How is OSHA interacting with state and local health officials?*
 - OSHA has numerous types of interactions with state and local health authorities and maintains regular communications. In part, the relationship between OSHA and the state and local health authorities can vary depending on whether the state is one of the 22 states with an OSHA-approved “state plan.” On occasion, OSHA receives referrals from state and local authorities, which prompts OSHA to inspect workplaces.
- *What needs to be in our establishment’s preparedness and response plan?*
 - OSHA recommends that you review the CDC/OSHA Guidance and follow the instructions and recommendations in developing a plan.
- *Under the [revised guidance](#) regarding recording COVID-19, are we required to specifically ask the employee where they believe they contracted COVID-19?*
 - There is no requirement to specifically ask this question. The guidance describes the type of investigation that an employer should be conducting. Employers have the flexibility to determine how to approach determining whether an infection is work-related.

Mr. Brown closed with a discussion of OSHA’s [on-site consultation program](#). Under this program, OSHA or their state counterparts will conduct a virtual or in-person consultation with employers to identify potential hazards and abatement options. This program is typically limited to employers with fewer than 500 employees. However, during the COVID-19, OSHA is allowing employers of

all size to participate. OSHA's consultation program does not report workplace issues to OSHA's enforcement employees.

Dept. of Homeland Security Cybersecurity and Infrastructure Security Agency (CISA)

On Tuesday, May 26, the Department of Homeland Security's (DHS) Cybersecurity and Infrastructure Security Agency (CISA) held a call to discuss recent developments regarding the coronavirus pandemic, supply chain issues, and the federal government's response activities. This call will be held on Tuesdays from 3:00 PM to 4:15 PM EST.

Mr. Bradford Willke, CISA's Acting Assistant Director for Stakeholder Engagement, started the call by informing attendees that a recording of today's call will be made available on the Homeland Security Information Network (HSIN) [portal](#). Mr. Willke also reminded callers that CISA guidance is available at www.CISA.Gov/coronavirus or on the [NBEOC dashboard](#). Individuals with questions regarding DHS' COVID-19 response activities can email cisa.cat@cisa.dhs.gov for assistance or click the "COVID Questions" button on the agency's homepage.

Mr. Willke stated that there are over 5.54 million confirmed cases of COVID-19 and approximately 348,000 deaths attributable to the virus across the world. The number of COVID-19 cases in the United States is currently around 1.71 million, and there have been approximately 100,000 deaths as a result of the pandemic. 17 states and territories have active stay-at-home orders in place, while 24 have lifted them. Many still have social distancing recommendations in place, and several states have opted for regional stay-at-home orders. Mr. Willke continued by saying that many states are lifting restrictions on non-essential businesses and to refer to the National Governor's Association website and FEMA's COVID-19 pages for more information.

On May 15, the President announced operation 'warp-speed' to accelerate the development of a COVID-19 vaccine, therapeutics, and diagnostics. Mr. Wilke urged listeners to refer to federal guidance and information regarding reopening has been issued by the Center for Disease Control (CDC), the Federal Emergency Management Agency (FEMA), the White House Coronavirus Task Force, and other agencies. He specifically referred to the CDC [decision trees that are](#) meant to help organizations determine if it's safe to reopen. On May 20, FEMA announced its [Operational Guidance for the 2020 Hurricane Season](#). On May 19, the Occupational Safety and Health Administration (OSHA) released [Updated Interim Enforcement Response Plan for Coronavirus Disease 2019](#) and [Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019](#). Mr. Wilke concluded his remarks by saying that CISA continues to monitor the digital landscape and that bad actors continue to target COVID-19 research, along with other common digital workplace platforms. They will continue to bring this information to the private sector's attention and press forward on putting stress on the bad actors.

FEMA Update

Mr. John Rabin, the Assistant Administrator for Field Operations, provided an update from FEMA. FEMA recently [released guidance](#) for state and local partners that gives an overview of how

FEMA plans to prepare for and respond to 2020 hurricanes in a COVID-19 environment. While the guidance addresses hurricanes specifically, it is meant to apply to all FEMA emergency incidences. The guidance provides checklists and resources to enable emergency managers to best adapt response and recovery plans. Mr. Rabin said these lists may also be beneficial for private sector partners to consider. The guidance emphasizes communication to help state and local partners think through the complex planning they will need to do that is different than years prior due to COVID-19. Overall, Mr. Rabin said the document addresses the following 3 themes:

- 1) Recognize that FEMA has a ‘no-fail’ mission. As complex as the situation is, FEMA and its partners must and will work through these challenges. The key to doing this will be communication, managing expectations, and being proactive in getting as much work done as possible now to prepare for compounding emergency scenarios.
- 2) FEMA will do what it always does and what it knows how to do, meaning the foundations of the response will be the same. Modifications will take place only to address arising complexities.
- 3) Decisions are best made as close to the ground level as possible. The field is the best place to gather information and make decisions.

National Oceanic and Atmospheric Administration (NOAA) Update

Mr. Steve Goldstine from NOAA gave an overview of the 2020 hurricane season forecast. Activity wise, the Atlantic Ocean will see above average activity this hurricane season. 13 to 19 storms will occur; 6 to 10 storms will become hurricanes, and 3 to 6 will be major hurricanes. The Eastern Pacific Ocean will see low to normal hurricane activity. 11 to 18 mini tropical storms are expected, and 5 to 10 storms will become hurricanes. The Central Pacific Ocean will also see low to normal hurricane activity with up to 6 tropical cyclones forming. To inform these predictions, the NOAA compared historical data to this recent El Nino and La Nina patterns, weather patterns around the Eastern, Southern, and Central United States, and disturbances around the Western Pacific region.

CISA Regional Update

Mr. Alex Joves, the Director of CISA Region V, provided an overview of the emergency response to the flooding in Central Michigan last week in a COVID-19 environment. Last Tuesday, Central Michigan had 5 to 7 inches of rain that caused two dams to breach and significant flooding. 10,000 individuals were evacuated and 6,000 homes were damaged. There have been no reported fatalities from the incident and water levels are going down. On the critical infrastructure and community lifelines front, it was much easier to activate efforts because many emergency functions were already stood up to respond to COVID-19. Local hospitals discharged non-critical patients and transported others to different hospitals. Sanitation centers were stood up in parking lots for employees due to sewer and water lines breaking. Individuals in long-term care facilities were first moved to a middle school and then to alternate facilities. Shelters were stood up by the Michigan Department of Health and Human Services with the American Red Cross. They initially

set up 6 shelters at high schools and community centers. Approximately 200 individuals needed shelter and each was given a health screening and personal protective equipment. They have been able to do move those individuals into non-congregate shelter locations.

Question & Answer

When it comes to hurricanes, how do you plan to balance being proactive on preparations, such as evacuation orders, with the disruption those orders can pose to the local economy when all economies are already struggling?

- The federal government understands the economic challenges of today and recognizes that they can't be discounted. We must be thinking ahead of the trigger being pulled and will be using forecasting 120 hours out of the hurricane reaching landfall to inform decisions.

Given the oversupply of livestock, is there an opportunity to provide flexibilities that allow, for example, more butcher shops to open?

- ESF11 has been activated and is thinking through these issues. Please send your information and details to NBEOC@max.gov.

Resources

- USDA
 - [FAQ Guidance](#)
 - [Temporary Enforcement Discretion on Nutrition Labels, Restrictive Labeling](#)
- FDA
 - [FAQ Guidance](#)
 - [Reporting a Temporary Closure or Significantly Reduced Production by a Human Food Establishment and Requesting FDA Assistance During the COVID-19 Public Health Emergency](#) (May 27, 2020)
 - [Temporary Policy During the COVID-19 Public Health Emergency Regarding the Qualified Exemption from the Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption](#) (May 22, 2020)
 - [Temporary Policy Regarding Certain Food Labeling Requirements During the COVID-19 Public Health Emergency: Minor Formulation Changes and Vending Machines](#) (May 22, 2020)
 - [Memorandum of Understanding between FDA and USDA Regarding the Potential Use of the Defense Production Act with Regard to FDA-Regulated Food During the COVID-19 Pandemic](#) (May 18, 2020)
 - [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](#)
- [What to Do if You Have COVID-19 Confirmed Positive or Exposed Workers in Your Food Production, Storage, or Distribution Operations](#)
- CDC
 - [COVID-19 Employer Information for Office Buildings](#) (May 27, 2020)
 - [Considerations for Restaurants and Bars](#) (Updated May 27, 2020)
 - [CDC/OSHA Guidance for Manufacturing Workers and Employers](#)
 - [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](#)
 - [General Business FAQ](#) (Updated 5/3)
- OSHA
 - [Statement of Enforcement Policy Regarding Meat and Poultry Processing Facilities](#)
 - [Guidance on Preparing Workplaces for COVID-19](#)
 - [Revised Enforcement Guidance for Recording Cases of COVID-19](#) (Updated May 19, 2020)
 - [Updated Interim Enforcement Response Plan for COVID-19](#) (Updated May 19, 2020)
 - [COVID-19 Guidance on Social Distancing at Work](#) (May 28, 2020)
- 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 Following Employee/Customer COVID-19 Positive Test, Symptom Development or Exposure](#) (Updated May 29, 2020)
 - [Considerations for Identifying Exposed Employees as Related to COVID-19](#)
 - [COVID-19 Employee Symptoms/Testing Status-Based Decision Tool for Food Facilities](#)
 - [Food and Beverage Industry COVID_19 Test Method Factsheet](#)

* * *

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