



COVID-19: State and Local Shut-Down Orders and Exemptions for Critical Infrastructure

March 26, 2020

Since the onset of the Coronavirus Disease 2019 (COVID-19) pandemic in the United States, public officials have issued numerous emergency directives closing non-essential businesses and facilities and instructing non-essential workers to stay home. However, these directives have generally included exemptions for essential businesses and other facilities if they are part of a critical infrastructure sector or provide essential services.

Some business leaders have invoked federal authorities and guidelines when contesting state or local orders that would affect their operations. Uncertainty about what systems, assets, and facilities are part of a federally recognized critical infrastructure sector, and what (if any) official status is conferred to a company that is a participant in such a sector, may complicate both administration of emergency directives and impact private-sector management of critical infrastructures and workforces.

This Insight provides an overview of the federal critical infrastructure protection and resilience [policy framework](#) and discusses its relevance and potential application to the management of essential systems, assets, facilities, and workforces subject to state and local emergency orders.

Critical Infrastructure Designations and Workforce Management Decisions

The White House [Coronavirus Guideline for America](#), released on March 16, stated that those working in a critical infrastructure industry as defined by the Department of Homeland Security (DHS) had a “special responsibility” to maintain their normal work schedules. DHS currently recognizes [16 critical infrastructure sectors](#) in manufacturing, emergency services, government, basic utilities, and other areas. On March 19, DHS, through the Cybersecurity and Infrastructure Security Agency (CISA), issued [additional guidelines and a list of critical infrastructure occupations](#) to assist state and local authorities in identifying critical infrastructure assets, facilities, and workforces during the COVID-19 crisis.

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IN11284

Administration officials and business leaders have sometimes cited these White House and agency guidelines as the authoritative basis for their workforce management directives. For example, the Department of Defense (DOD) Undersecretary for Acquisition and Sustainment issued a [memorandum to defense contractors](#) this month citing the guidelines and instructing contractors to maintain normal work schedules if their contracts supported “development, production, testing, fielding, or sustainment of our weapon systems/software systems, or the infrastructure to support those activities....”

Some defense contractors have presented the DOD guidance as binding. For example, General Dynamics Bath Iron Works (BIW), a major shipyard, posted a message to workers that the “federal guidance on dealing with COVID-19 states that critical infrastructure, including defense contractors like Bath Iron Works, must continue to operate in the interest of national security.” [Media sources report](#) that BIW union representatives have expressed safety concerns about continuing manufacturing operations during the pandemic. On March 25, BIW sent [a letter to employees](#) after a worker tested positive for COVID-19, stating, “We remain open because the President of the United States and the United States Navy has mandated that we do so....”

Other defense industry representatives have made statements that appear to concede that DOD invocations of the critical infrastructure status of DIB constitute informal guidance rather than binding directives. On March 20, Eric Fanning, President and CEO of the Aerospace Industries Association, which represents defense contractors, wrote [a letter to congressional leaders](#) requesting legislation or oversight direction to clarify the “essential” status of defense-related industries. He wrote that such actions were necessary “for the purpose of gaining exemptions from state and local orders.”

Some business leaders outside the defense industry have likewise identified their facilities as essential under current federal guidelines, and have sought exemptions from mandatory shutdown orders from state or local authorities. A dispute between Tesla Inc. and local California authorities over a shutdown order received [national media attention](#) in March after the auto manufacturer claimed that DHS had designated a production facility as critical infrastructure. Tesla Inc. [subsequently agreed](#) to scale back the operation of its Fremont facility in compliance with the local order.

The Federal Role in Critical Infrastructure Protection and Resilience

Presidential Policy Directive 21 ([PPD-21](#)), signed in 2013, directs the Secretary of Homeland Security to “promote the security and resilience of the Nation’s critical infrastructure” by providing strategic guidance, promoting national unity of effort, and coordinating relevant federal efforts. Under PPD-21, DHS identified 16 critical infrastructure sectors, which serve to structure voluntary public-private partnerships for infrastructure security and resilience. Critical infrastructure owner-operators may self-identify as part of a critical infrastructure sector and choose to participate in its voluntary coordination bodies, but DHS has generally not construed such actions as conferring any kind of official “critical” status upon private-sector infrastructure and associated workforces.

CISA recognized the essentially voluntary character of the federal critical infrastructure protection and resilience framework when it released its March 19 guidelines for state and local officials. In his statement [upon releasing the guidance](#), CISA Director Christopher Krebs reiterated the earlier White House guidance that critical infrastructure workers had a “special responsibility” to maintain normal work schedules. However, he stated that the CISA list of critical infrastructure workforces “is advisory in nature” only, and therefore state and local authorities should not consider it “a federal directive or standard in and of itself.”

Nonetheless, some states issuing emergency orders have exempted certain categories of businesses, organizations, and other facilities from mandatory shutdowns if they are part of the critical infrastructure sectors identified by CISA. According to an [article](#) in the *National Law Review*, state and local authorities—not federal agencies—assume responsibility for adjudicating claims of criticality made by private sector stakeholders in these cases.

Options for Congress

As Congress considers who and what is essential during the COVID-19 pandemic, some options might include:

- clarifying or modifying federal or state government authorities to designate businesses and production facilities as critical infrastructure or to otherwise allow or require operation during national emergencies; and
- directly designating specific critical infrastructure entities or assets as essential and defining the type and scope of exemptions from state and local emergency orders that apply.

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