

CYBERSPACE INFRASTRUCTURE SECURITY AGENCY ISSUES NEW CRITICAL INFRASTRUCTURE GUIDELINES

The CISA issued new Essential Critical Infrastructure guidelines, clarifying in some cases and substantially changing in other cases the definition of Essential Critical Infrastructure. As most business owners and operators navigating the COVID-19 crisis know, Gov. Whitmer's Stay At Home Order incorporates the CISA Guidelines issued March 19, 2020. Those guidelines describe what essential critical infrastructure is in sixteen industrial sectors.. On Saturday, March 28, 2020, the CISA updated those guidelines. There are changes within each sector, generally described below. Notably, as of this writing, Gov. Whitmer's Stay At Home Order continues to incorporate only the March 19, 2020 guidelines. Those guidelines remain the starting point for determining critical infrastructure in the state of Michigan.

In many sectors, it is clear that the CISA guidelines have been clarified, often to address gaps or perceived gaps, for example, in COVID-19 support activities. Just as clearly, in other sectors the guidelines have been expanded and, to the extent applicable to Michigan, could potentially authorize the restarting of automotive production and most construction (arguably construction for disadvantaged persons was always included within critical infrastructure). Below is an update by sector.

HEALTHCARE / PUBLIC HEALTH

With exception to optometrists and chiropractors, the amendments to this sector primarily identify other healthcare fields that would commonly fall into this sector, such as nursing care facilities and medical supply companies. Pharmacy employees are added as critical. The amendments now include coffin makers along with mortuary workers.

LAW ENFORCEMENT, PUBLIC SAFETY, AND OTHER FIRST RESPONDERS

The categories of Law Enforcement, Public Safety, And Other First Responders workers have been expanded, including workers to maintain, manufacture, or supply equipment and services supporting emergency personnel and electronic property and life security.

Now included are workers supporting firearm and ammunition including shooting ranges and firearm manufacturers, retailers, importers, and distributors. The guidelines now cover public agency workers responding to abuse and neglect of children, elders, and dependent adults and workers who support weather disaster/natural hazard mitigation and prevention.

FOOD AND AGRICULTURE

The Food and Agriculture sector received additional clarification but little new breadth. Animal food was expanded.

ENERGY

The Energy sector gained substantial more specificity but not much additional breadth. The Energy sector as described in the 3/19 guidelines was very broad and seemed to include all workers necessary to support the production, refinement, and transportation of all energy sources (plus associated safety and security). The March 28 guidelines provide mostly just greater detail. However, workers that support (not directly in) the Energy sector are now clearly covered. Notably, there are carve outs for certain non-essential services, for example environmental remediation is limited to immediate critical needs.

WATER AND WASTEWATER

Water and Waste Water was broadened to include chemical and equipment supplies to water and waste water systems whereas in the early version this subsection was limited to “disinfectant”.

TRANSPORTATION AND LOGISTICS

The Transportation sector was substantially modified in the March 28 guidelines. In some cases those changes were clarification. For example, employees enabling transportation functions were covered in the 3/19 guidelines but those have been amplified to make it clear that “truck drivers” and “bus drivers” are also included. Employees transporting food, medical supplies, fuels, chemicals, etc., are specifically covered in the transportation area. Any employees supporting commercial transportation services (taxis, Uber) are now specifically included within the guidelines. Employees that support such operations are covered.

Most notable in the Transportation sector was that automotive repair was previously covered but has been expanded to now be “automotive repair, maintenance and transportation equipment manufacturing and distribution facilities”.

PUBLIC WORKS AND INFRASTRUCTURE SUPPORT SERVICES

The Public Works sector was modified to include “Infrastructure Support Services” and expanded to include additional categories of workers such as builders, contractors, HVAC Technicians, and landscapers, along with any service providers who provide services to maintain the safety, sanitation, and essential operation of businesses and buildings such as hospitals, senior living facilities, and any temporary construction required to support COVID-19 responses.

Also added are landfill operations and workers who support the inspection and maintenance of aids to navigation, as well as other government provided services that ensure continued maritime commerce.

COMMUNICATIONS AND INFORMATION TECHNOLOGY

In the Communications sector, the new guidelines specifically add retail customer service personnel at “critical service center locations” to ensure that front-line employees are able to obtain the products and support needed to operate remotely and external affairs personnel to assist in coordinating with government units to address Covid-19 communication needs. As for Information Technology, the updated guidelines make explicit that they apply to information technology workers in “all industries (including financial services).” Notably, the updated guidelines specifically add the types of workers that have been critical in enabling remote functioning during the recent lock-downs, such as those required to support remote working, performance of business operations, distance learning, media services, digital health offerings, or support crucial for business continuity and connectivity.

OTHER COMMUNITY-OR GOVERNMENT-BASED OPERATIONS AND ESSENTIAL FUNCTIONS

One of the most significant changes to this sector is the modification of the title. In the 3/19 version it was not clear whether the title had the effect of limiting the sector to government activity. Clearly now it does not. The sector has also been broadened to include census workers and clergy along with government offices who perform title services, notary and recording services plus services that support settlement of commercial transactions.

CRITICAL MANUFACTURING

Critical Manufacturing which was very brief in the 3/19 version has been substantially changed. It now consists of four bullet points. The second, third and fourth bullet points should not be controversial. The second bullet point relates to the support of medical equipment. The third bullet point covers mining and all supporting workforces, although notably it includes the words “critical” and “essential” with respect to mining production. The fourth bullet point covers activities to support a remote workforce.

The first bullet point will surely be the most controversial. It includes production of materials, products and associated supply chains for transportation, (and other industries already covered in other sectors). Critical Manufacturing also includes workers “necessary to maintain manufacturing operations in a warm standby”.

HAZARDOUS MATERIALS

Hazardous Materials has been clarified to more specifically cover things such as test kits.

FINANCIAL SERVICES

The March 28 guidelines provide greater breadth to the types of workers considered to be “critical infrastructure workers” in the financial services sector. In particular, the updated guidelines specifically contemplate workers needed to maintain orderly market operations, support in continued production and distribution of debit and credit cards, and support in providing electronic point of sale capabilities for essential businesses and workers. In addition, the March 28 guidelines clarify that workers supporting business and commercial banking and lending services, and not just consumer banking as stated in the 3/19 guidelines, are considered, critical. Notably, the March 28 guidelines specifically account for workers needed to support the financial services sector through systems processing, call center staffing and providing physical security.

CHEMICAL

Chemical has had slight reorganization and the notable inclusion of fragrances and paintings and coatings.

DEFENSE INDUSTRIAL BASE

Defense Industrial Base has been clarified but those clarifications do not seem to reflect any real change.

COMMERCIAL FACILITIES

Many of the activities listed in the Commercial Facilities sector generally speaking support activities related to sale and the distribution of building materials, consumer electronics and technology, appliances, cabinets, paint, drywall, and HVAC equipment are allowed. Note that these services include through “application/installation”. Furthermore work related to distribution, installation, repair and maintenance of HVAC equipment, boilers, furnaces and similar systems is also considered authorized activity, along with e-commerce support functions (including distribution, warehouse and call center facilities).

RESIDENTIAL/SHELTER FACILITIES AND SERVICES

A new “Residential/Shelter Facilities and Services” category was added to the 3/19 guidelines. The March 28 guidelines now allow for the following types of activities: (1) dependent care services for individuals and groups, (2) residential support of handicapped, disabled or needy individuals, and services for and support of the elderly and disabled, (3) work in animal shelters, (4) work related to leasing of residential property, (5) property management, maintenance and related services calls for emergency “at home” situations, (6) work supporting the construction of housing, including governmental functions such as building inspections, permitting activities and the like. Most notably the March 29 guidelines include work involving housing construction activities to ensure “additional units can be made available to combat the nation’s housing shortage”.

HYGIENE PRODUCTS AND SERVICES

This entire sector is new although in some respects it reflects reorganization from other areas. It makes clear that hygiene products and services are covered including dry cleaning.

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