

# California Quickly Adopts DHS Guidance on the Essential Critical Infrastructure Workforce, While New York and Pennsylvania Promulgate Their Own Lists of Essential Businesses



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With various US jurisdictions taking disparate approaches to containing the COVID-19 pandemic, businesses are being forced to navigate a patchwork of orders and declarations dictating which operations are “essential”—and therefore exempt from any closure orders—and which are not.

While federalism concerns prevent the imposition of a nationwide directive limiting the operation of businesses within individual states’ borders, the US Department of Homeland Security (DHS) had attempted to create some consistency through the publication on March 19 of its [Guidance on the Essential Critical Infrastructure Workforce](#) (the DHS Guidance). Though expressly advisory in nature, the Guidance contains a list of “crucial infrastructure sectors and the essential workers needed to maintain the services and functions Americans depend on daily and that need to be able to operate resiliently during the COVID-19 pandemic response.” And in fact, within hours of its official publication, Governor Newsom of California adopted the DHS Guidance as the basis for [Executive Order N-33-20](#), which directs all individuals in California to stay home except as needed to maintain continuity of operations in connection with the sector identified in the DHS Guidance.

New York and Pennsylvania, on the other hand, have issued their own lists of essential services and businesses exempt from their business reduction and limitation orders. In New York, Governor Cuomo issued [Executive Order 202.6](#), modified by [Executive Order 202.7](#) (the New York Orders), which mandate that all businesses—except specific businesses deemed “essential”—reduce their in-person workforces by 75% starting March 20 at 8pm. Statements made by Governor Cuomo today indicate that this will become 100% starting March 22. And in Pennsylvania, Governor Wolf has [ordered](#) the closure of all business that are not “life sustaining” as enumerated on a [list](#) published by the Governor’s office (the Pennsylvania Order). Shortly before publication of this alert, Illinois Governor Pritzker also imposed a state-wide stay-at-home [order](#) prohibiting non-essential activity beginning Saturday, March 21. The Illinois order contains its own list of essential businesses, which (like the New York and Pennsylvania orders) does not directly incorporate the DHS Guidance.

Despite the patchwork nature of the state and local responses to COVID-19, a review of the DHS Guidance (as incorporated by the California Order), the New York Orders and the Pennsylvania Order, reveals significant overlap in the enumeration of essential sectors and businesses that will be permitted to operate despite the significant curtailment of activity in impacted jurisdictions. The following sectors have generally been identified as essential under all three rubrics, though some variances exist, examples of which are included below:

- **Healthcare Operations:** All three lists broadly define essential healthcare operations. One notable variance is that the New York and Pennsylvania Orders include research operations without limitation, while the DHS Guidance limits research operations to those related to the COVID-19 response.

- **Law Enforcement / Public Safety**: All three orders broadly define law enforcement and public safety operations.
- **Food and Agriculture**: All three directives include businesses necessary to the cultivation and/or sale of food, including all stores selling food and beverages (including convenience stores and farmer's markets), businesses engaged in the production and manufacturing of food products (including all farming operations), and any businesses supporting those sectors. All three directives also identify restaurants supplying carry out or delivery.
- **Essential Infrastructure / Natural Resources**: All three lists include utilities, waste collection, chemical and certain natural resource sectors (including water). The DHS Guidance and the Pennsylvania Order specifically include oil and gas production, as well. Interestingly, the DHS Guidance specifically includes forestry, while that sector is specifically excluded from the Pennsylvania Order.
- **Transportation and Logistics**: All three orders include mailing, shipping and delivery services, as well as transportation infrastructure and services, including airports and airlines. However, while the New York and Pennsylvania Order identify air transportation broadly, the DHS Guidance appears limited to cargo air transportation. And the Pennsylvania Order specifically excludes transportation equipment product and parts manufacturing, including aerospace products and parts.
- **Communications and Information Technology**: All three orders identify communications (including telecommunications) and information technology support operations, as well as media services.
- **Manufacturing**: All three lists include manufacturing necessary for the continuity of other essential business operations. The Pennsylvania Order provides a very detailed list of manufacturing operations that are/are not included as essential businesses.
- **Financial**: All three directives include banks and related financial institutions.
- **Other Essential Services**: All three orders include social assistance and caregiving services.

While the Pennsylvania Order does not specifically address government operations, the DHS Guidance and the New York Orders also identify essential government functions, including those supporting defense and national security.

These definitions may see further evolution in the coming days and weeks. DHS has indicated that it will “continually solicit and accept feedback on the list (both sectors/sub sectors and identified essential workers) and will evolve the list in response to stakeholder feedback.” And in New York, businesses that are not otherwise listed on interpretive guidance created by New York’s Empire State Development Corporation (ESDC) but which are arguably “essential” or provide “essential services” may apply to ESDC to be added to the list. The New York Order [specifically empowers](#) ESDC to “review and grant such request, should it determine that it is in the best interest of the state to have the workforce continue at full capacity in order to properly respond to this disaster.”

While the California, New York and Pennsylvania Orders provide a helpful overview of the current landscape, given the jurisdiction-by-jurisdiction approach to defining essential businesses, individual entities should familiarize themselves with any relevant orders or directives applicable to the particular jurisdictions in which they operate.

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