

MEMORANDUM

TO: David Chavern, President & CEO
Danielle Coffey, SVP & General Counsel

FROM: Jeff Carlisle, Lerman Senter PLLC

DATE: March 20, 2020

RE: **Newspaper Productions and Distribution as Critical Infrastructure**

You asked whether the various definitions of “Critical Infrastructure” workers exempted from restrictions established by COVID-19 Federal and State emergency declarations include workers involved in newspaper newsgathering, production and distribution. A plain reading of the Federal and State declarations to date shows that workers involved in newspaper newsgathering, production and distribution are included within the workers exempted from restrictions as workers involved in “media” services.

I. Terms Used by Declarations

Federal

Federal definitions for critical infrastructure are set by the Cybersecurity & Infrastructure Security Agency (CISA) of the Department of Homeland Security, which issued a Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response on March 19, 2020.¹ This memo defines industries “essential critical infrastructure workers” whose work should be protected during the COVID-19 pandemic. The list was developed together with other federal agencies and the private sector, but it is not an exhaustive list and, by its terms, “is advisory in nature. It is not, nor should it be considered to be, a federal directive or standard in and of itself.”

The list of critical sectors includes “Communications and Information Technology,” which further includes workers “who support radio, television, and media service, including, but not limited to front line news reporters, studio, and technicians for newsgathering and reporting.” Under “Critical Manufacturing,” the CISA sector definition includes workers “necessary for the manufacturing of materials and products needed for . . . communications”

California

On March 19, the Governor of California issued Executive Order N-33-20. The order requires all individuals living in the state to remain indoors, with the exception of those working in

¹ C. Krebs, CISA, Memorandum on Identification of Essential Critical Infrastructure Workers During Covid-19 Response, Mar. 19, 2020, available at <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce> (last visited Mar. 20, 2020) (the “CISA Memorandum”).

industry sectors specified by CISA.² The Governor reserved the right to designate additional sectors as critical.

Other emergency orders in California, including one issued by the City of Los Angeles on March 19, exempts essential activities, including “[n]ewspapers, television, radio, magazine, podcast and other media services” and “businesses that supply other essential businesses with the support, services, or supplies necessary to operate, provided that strict social distancing is maintained.”³ Similarly, a directive issued by Sacramento County includes newspapers under “essential sites.”⁴

New York

The Governor of New York issued an Executive Order No. 202.6 on March 18. The order requires all employers to reduce the in-person workforce by 50 percent, with the exception of “any essential business or entity providing essential services.”⁵ The order includes in its list of essential businesses “news media.”

Pennsylvania

The Governor of Pennsylvania issued an Order on March 19 regarding the closure of all businesses “that are not life sustaining.” The order allows “life sustaining businesses” to remain open as long as they practice social distancing and other mitigation measures.⁶ The order included a list of life sustaining businesses, which specifies within the “Information” industry that “newspapers, periodical, book and director publishers” may continue physical operations.⁷

II. Analysis

The CISA definition of workers in the Communications Sector includes workers in “media.” Media is generally understood to encompass all means of mass communication used to

² Note that the Governor’s Executive Order does not reference the CISA Memorandum but instead references a CISA website defining the same sectors.

³ Office of the Mayor, Public Order Under City of Los Angeles Emergency Authority, Mar. 19, 2020, available at https://www.lamayor.org/sites/g/files/wph446/f/article/files/SAFER_AT_HOME_ORDER2020.03.19.pdf (last visited Mar. 20, 2020).

⁴ County Health Officer of the County of Sacramento, Order of the Health Officer of the County of Sacramento, Mar. 19, 2020, available at https://www.sacounty.net/COVID-19/Documents/20200319_HO_Signed_Stay_at_Home_Order.pdf (last visited Mar. 20, 2020).

⁵ Governor of the State of New York, Executive Order, Mar. 18 2020, available at <https://www.governor.ny.gov/news/no-2026-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency> (last visited Mar. 20, 2020).

⁶ Governor of the Commonwealth of Pennsylvania, Order of the Governor of the Commonwealth Regarding the Closure of All Businesses That Are Not Life Sustaining, Mar. 19, 2020, available at <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf> (last visited Mar. 20, 2020)

⁷ Governor of the Commonwealth of Pennsylvania, List of Life Sustaining Businesses, Mar. 19, 2020, available at <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-Life-Sustaining-Business.pdf> (last visited Mar. 20, 2020).

disseminate information to a wide range of people. Any common-sense interpretation of media would thus necessarily include newspaper publishing, which is intended to disseminate news to the public.

Inclusion of newspaper publishing is supported not only by the plain wording of the CISA Memorandum, but also by the place of newspaper publishing in American society. Millions of people across the country rely on newspapers and associated media for crucial news and information. Indeed, to the extent that newspapers now generate content accessible online, Americans increasingly rely on objective reporting from national and local newspapers for everything from the latest Federal and State declarations, to school and business closures, to crucial public health announcements. Millions of Americans without Internet access rely on national and local newspapers as one of their primary sources of information, particularly during a public emergency. It is thus obvious that newspaper publishing must be considered part of the critical “media” covered by the CISA Memorandum.

Moreover, even if there were any question, the inclusion of news publishing in media is supported by analogous use of the term “media” in longstanding Federal law. The Freedom of Information Act states that “examples of news-media entities are publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public.”⁸ 5 U.S.C. § 552 (emphasis added). The Lobbying Disclosure Act states that “[t]he term ‘media organization’ means a person or entity engaged in disseminating information to the general public through a newspaper, magazine, other publication, radio, television, cable television, or other medium of mass communication.”⁹

Thus, the CISA Memorandum, and any State declaration that incorporates reference to the CISA Memorandum or list of critical industries, necessarily includes newspaper publishing. Furthermore, it would be absurd to only apply the definition to workers involved in newsgathering and not apply it to the personnel necessary to print and distribute a newspaper or periodical. It would make no sense to designate newsgathering by newspapers as critical, but then make it impossible to disseminate the news through print media, let alone that newsgathering cannot be considered “critical” if there is no means to disseminate it to the public. This reading is further supported by the CISA’s inclusion of workers necessary for the manufacturing of materials or products necessary for communication.

Accordingly, California’s Executive Order encompasses newspaper publishing as part of the “media,” and under the same reasoning so would New York’s. This interpretation is further bolstered by Pennsylvania’s explicit inclusion of newspapers as life sustaining businesses. Pennsylvania may exclude “printing” from life sustaining businesses, but a reasonable reading of

⁸ 5 U.S.C. § 552. The statute goes on to state: “Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.”

⁹ 2 U.S.C. § 1602.

the list avoids internal inconsistency by considering newspaper printing to be life sustaining, while considering other types of commercial printing – wedding invitations, business cards, etc. – to not be life sustaining. And the explicit inclusion of newspapers by Los Angeles and Sacramento would certainly support the inclusion of newspapers as “media” at the State level in California.

III. Conclusion

The plainest reading of the term “media” as used in the CISA Memorandum and the State orders in California and New York would be to encompass newspaper publishing, which has also been explicitly included as a life sustaining business under the Pennsylvania order. To conclude otherwise would be nonsensical – if the Federal or State governments had intended to exclude newspapers from “media,” it would have made more sense for them to explicitly say so given the common-sense meaning of the term. Moreover, the Federal and State governments could not have meant to exclude printed newspapers as a primary source of information for the millions of Americans who lack Internet access.

Workers involved in newsgathering, production and distribution are thus well within what has so far been established as “critical” or “life sustaining” businesses.