

DME SUPPLIERS AND “ESSENTIAL SERVICES”

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DME Suppliers and “Essential Services”

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This white paper provides guidance on which businesses and personnel will be considered “essential” by the federal government, as well as by state and local governments, as these entities consider “shelter in place” or other lockdown orders in the face of the COVID-19 crisis. This analysis is important as it is relevant to the laws, regulations and executive orders being promulgated to manage this pandemic, most of which refer to terms such as “essential services” or “healthcare provider.” Unfortunately, while these terms are being used, they have not been well defined in many cases. Accordingly, we must look to ancillary sources as well as some of the orders themselves for clarity.

Homeland Security/ CISA Guidance

The Cybersecurity and Infrastructure Security Agency (“CISA”) of the U.S. Department of Homeland Security recently published a Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (the “CISA Memo”). While this document is not binding on any state or federal agency, it has been given great weight and will likely be relied upon by many federal and state agencies where ambiguity regarding essential services exists. Importantly, the CISA Memo specifically includes in its definition of essential functions all of the following (emphasis added):

*Caregivers (e.g., physicians, dentists, psychologists, mid-level practitioners, nurses and assistants, infection control and quality assurance personnel, pharmacists, **physical and occupational therapists and assistants**, social workers, speech pathologists and **diagnostic and therapeutic technicians and technologists**).*

*Workers in other medical facilities (including Ambulatory Health and Surgical, Blood Banks, Clinics, Community Mental Health, Comprehensive Outpatient Rehabilitation, End Stage Renal Disease, Health Departments, **Home Health care**, Hospices, Hospitals, Long Term Care, Organ Pharmacies, **Procurement Organizations**, Psychiatric Residential, Rural Health Clinics and Federally Qualified Health Centers).*

Manufacturers, technicians, logistics and warehouse operators, and distributors of medical equipment, personal protective equipment (PPE), medical gases, pharmaceuticals, blood and blood products, vaccines, testing materials, laboratory supplies, cleaning, sanitizing, disinfecting or sterilization supplies, and tissue and paper towel products.

It is hard to imagine that many in the health care industry would fall outside of one of the above definitions. In the Federal Government’s view, the vast majority of individuals employed in the health care supply chain are considered essential as any potential disruption could have far-reaching and, at times, unintended effects. Based solely on the CISA memo, we can conclude that employers in the DME space, and other post-acute health care providers, will likely satisfy the definition of “essential services” and “essential personnel.” Importantly, this would include employees whose jobs could not be performed from home.

State Executive Orders

Additional examples that bolster the above analysis, and are of particular interest at this time, are executive orders promulgated by several state governors. For example, Governor Cuomo of New York issued Executive Order 202.6 which defines “essential business” to include: medical wholesale and distribution, home health care workers or aides for the elderly and medical supplies and equipment manufacturers and providers.

In Executive Order N-33-20, Governor Newsom of California issued an executive order including a shelter in place mandate in response to COVID-19. In accordance with the Order the State Public Health Office issued a list of “essential critical infrastructure workers” that utilized the list from the CISA Memo nearly in its entirety.

In Illinois, Governor Pritzker issued a “stay at home” order (Executive Order 2020-10) that specifically exempted medical device and equipment operations, health care manufacturers and others in the supply chain, home health care service providers, providers of ancillary health care services and all industries related to medical equipment and gases. The Order went on to direct that “Healthcare and Public Health Operations shall be construed broadly to avoid any impacts to the delivery of healthcare, broadly defined.”

In sum, the above executive orders demonstrate the broad interpretation of necessary healthcare personnel and services being used in the current environment.

Conclusion

Federal, state and local governments should, and very likely will, define “Essential Services,” “Essential Personnel” and “Health Care” very broadly. The CISA Memo is a good place to look for guidance and appears to have been utilized in the executive orders detailed above. Although one cannot guarantee that a federal or state governmental agency will not conclude otherwise, it appears that DME suppliers (including O & P suppliers) can credibly take the position that they are excluded from state lockdown or shelter in place orders.

THIS ARTICLE DOES NOT CONSTITUTE LEGAL ADVICE. THIS ARTICLE WAS PREPARED ON A SPECIFIC DATE. THE LAW MAY HAVE CHANGED SINCE THIS ARTICLE WAS WRITTEN. BEFORE ACTING ON THE ISSUES DISCUSSED IN THIS ARTICLE, IT IS IMPORTANT THAT THE READER OBTAIN ADVICE FROM A HEALTH CARE ATTORNEY.

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