

CLIENT ALERTS

Federal Government Revises its Guidance on the Meaning of Essential Critical Workers

3.30.2020

On Monday, March 23, Governor Whitmer issued Executive Order 2020-21, commonly known as the “Stay Home” Order.[*] It exempts “critical infrastructure workers” from the stay home mandate and incorporates the U.S. Cybersecurity and Infrastructure Security Agency’s (CISA) March 19, 2020 advisory guidance (the “Initial CISA Guidance”) as to which workers are critical. Unfortunately for the automotive supply chain, the Initial CISA Guidance left significant uncertainty as to whether automotive passenger vehicles were critical infrastructure, and, thus, whether workers in the vehicle supply chain are critical infrastructure workers, exempt from Michigan’s Stay Home Order.[†]

On Saturday, March 28, the CISA issued Version 2.0 of its guidance. This Client Alert addresses whether Version 2.0 resolves the uncertainty as to the status of the automotive supply chain. Before turning to Version 2.0 itself, there is a threshold question. The Stay Home Order specifically incorporates only the Initial CISA Guidance. Under ordinary rules of statutory construction, the Stay Home Order would not incorporate Version 2.0, but it is not certain that that same rule would apply to an Executive Order.

Turning to the primary question, Version 2.0 reflects significant and often substantive changes from the Initial CISA Guidance. Some of the changes provide some additional support for the position that automobile manufacturing is permitted and an automotive manufacturer may designate a supplier as a critical infrastructure supplier. Nevertheless, Version 2.0 still does not clearly answer the central question. Stated differently, reasonable arguments can still be raised either way.

This uncertainty is frustrating for automotive suppliers, their workers, and their lawyers. There is no one size fits all answer to the question of whether a supplier may or should conduct

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normal automobile manufacturing operations. The decision involves balancing a number of legal and business risks that cannot be escaped. There are risks of not manufacturing, especially if a customer demands continued supply, and risks of manufacturing. Different businesses have and will reach different decisions. Although there is no clear-cut right answer, that does not mean that the decisions should be made without a sound understanding and careful consideration of the business and legal risks.

Butzel Long's Global Automotive team stands ready to provide advice on these difficult decisions and how to minimize the risks, whichever choice you make, such as documenting and maintaining the reasons for your decision. If you have questions about this Alert or any other aspect of the COVID-19 crisis, please contact your regular Butzel Long attorney or any of the attorneys identified below.

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[*] Since March 23, Butzel Long has issued numerous Client Alerts on various aspects of the Stay Home Order. They are available at its Coronavirus (COVID-19) Resource Page.

[†] It should be kept in mind that although "stay home" or "shelter in place" orders have been entered in many states and municipalities, they do not necessarily incorporate the CISA guidance or track Michigan's Order. Thus, businesses with locations outside of Michigan must conduct a state-by-state analysis. Butzel Long is available to advise on other states' requirements.