

Summary: Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19

COVID19, Employment Law / April 29, 2020 / Darren S. Harrington

An **executive order** ("Order") was signed by President Trump on April 28, 2020 addressing the recent closures of many meat and poultry processing plants. Based on initial reports, the President appears to have issued the Order in response to concerns raised by Tyson Foods regarding potential liability to its workers from COVID exposure. As discussed below, the Order does not make it clear how much protection, if any, is actually being provided to employers in this regard or whether a new obligation is being imposed on the employer.

Brief Overview of the Order's Legal Authority:

The President's power to order meat processing plants to remain open derives from the Defense Production Act codified as 50 USC App. §§2061 -2071 (the "Act") which grants the president certain powers in order to respond to natural and/or man-made disasters for the purpose of providing for and otherwise supporting domestic critical infrastructure operations. The term "critical infrastructure" means any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety.

The Act also authorizes the President to requisition property, force industry to expand production and the supply of basic resources, impose wage and price controls, settle labor disputes, control consumer and real estate credit, establish contractual priorities, and allocate raw materials towards national defense. "The Defense Production Act: Choice as to Allocations". *Columbia Law Review*. New York City: Columbia Law Review Association, Inc. 51 (3): 350-361. March 1951. doi:10.2307/1119288

The Order:

Contrary to early reports, the Order does not compel plants to stay open, but rather it appears to exempt meat and poultry processing plants from complying with closure orders by state and/or local level governments. The rules and regulations related to the Order are to be promulgated by Secretary Perdue and will presumably be issued shortly. These rules and regulations will likely better define how much protection is actually being afforded employers from liability regarding employee exposure to COVID-19 and what, if any, new safety and health obligations are being imposed on the employer.

The Order issued pursuant to the Act only preempts other laws to the extent a conflict exists, therefore OSHA rules and regulations will remain in effect to the extent that they do not otherwise conflict with the Order. Finally, the Order will remain in effect until it is remanded by the President.

Compliance with the Order:

The Order requires meat and poultry producers to operate “consistent with the guidance for their operations jointly issued by the CDC and OSHA.” The Order is not clear whether it intends to create a new obligation for the employer to follow this guidance from the CDC and OSHA that does not otherwise exist. The challenge in following this edict of the Order is that the guidance provided by the CDC and OSHA is primarily advisory in nature with very few mandates setting forth actions that are actually “required” by the employer. In some instances, the guidance will require an abatement measure where “possible” but much more frequently it only requires that its recommendations be adopted where “feasible;” which is a completely different legal analysis.

Notably, OSHA does not have a specific standard on point for many of the recommended abatement measures in its guidance and would therefore need to rely on the General Duty Clause. This is significant because the courts have generally prohibited OSHA from using the General Duty Clause to enforce advisory standards (i.e., standards which use terms such as “should” or “may”) that are published by government agencies and/or industry associations.

Perhaps the rules and regulations promulgated by Secretary Perdue will shed some light on what is actually being *required* of the meat or poultry employer in order to operate consistent with the guidance from the CDC and OSHA. Until further direction is provided, the employer’s best course of actions is to give proper consideration to the recommendations in OSHA’s guidance, adopt the recommendations wherever feasible, adopt alternatives where the recommendations are not feasible, and document its reasons for any determination that a suggested abatement method is not feasible or otherwise possible.

To read the full Executive Order, [click here](#).

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Darren S. Harrington

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