Guidance to Determine Essential Employees

I. Determination of an Essential Employee

The guidance from Illinois, the federal government, and other states indicates that determining "essential employees" is a discretionary task. However, the U.S. Department of Justice (DOJ) has set forth clear limitations and the federal Office of Management and Budget (OMB) and Office of Personnel Management (OPM) have provided additional recommendations. Our survey of states that have experienced or faced looming shutdowns due to a budget impasse found that those states generally follow the federal interpretations. Some states have established policies that govern procedures for identifying essential employees. Most states give discretion to agency or department heads to designate which personnel are essential or non-essential, with an emphasis on protecting public health and safety. States without formal policies for designating essential personnel seemed to engage in a chaotic, ad hoc process.

A. Illinois Law

No Illinois statutes or caselaw directly address who is defined as an essential employee. Several administrative decisions of the Illinois Labor Relations Board (the Board) under the Illinois Public Labor Relations Act, 5 ILCS 315/1 *et seq.* (IPLRA), offer guidance on how an agency might determine who is an essential employee. Specifically, in the context of defining which employees may be prevented from striking, the IPLRA defines essential employees as those "public employees performing functions so essential that the interruption or termination of the function will *constitute a clear and present danger to the health and safety of the persons affected in the community.*" 5 ILCS 315/3(e) (emphasis added).

In its decisions, the Board has generally designated three groups of employees as essential: (1) employees who work in operations that usually provide services necessary to public health and safety 24 hours per day or involve public security[1]; (2) employees who have specialized training or unique knowledge of a system, process, or record that is essential to maintaining the public health and safety[2]; or (3) employees whose responses are time-sensitive and tied to dangerous public emergencies[3].

Even if some public services are necessary to the public health and safety, the Board has never agreed that *every* employee of a particular public service was essential. Instead, given the context in which the Board considers these issues (determining which employees are prevented from striking), it has focused its determinations on the *minimum* number of essential employees necessary to avoid "clear and present danger to the health and safety of the public." 5 ILCS 315/18(a).

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[1] *See, e.g., City of Naperville and International Brotherhood of Electrical Workers, Local 9*, 7 PERI ¶ 2033 (1991); *City of Pana v. Crowe*, 57 Ill.2d 547 (1974).

[2] *See, e.g., Clerk of the Circuit Court of Adams County and International Association of Machinists and Aerospace Workers, Local 822*, 21 PERI ¶ 161 (2005).

[3] *See, e.g., County of Will and American Federation of State, County, and Municipal Employees, Council 31*, 30 PERI ¶ 143 (2013).

B. Federal Law

In 1981[4] and 1995[5], the DOJ issued opinions that define essential employees. These opinions chiefly interpret the Antideficiency Act, 31 U.S.C. §§ 1341, 1342, which expressly prohibits the federal government from employing services, voluntary or otherwise, that "exceed[ ] that authorized by law *except for emergencies involving the safety of human life or the protection of property*." 31 U.S.C. § 1342 (emphases added). Generally, the DOJ advises that federal agencies may continue to operate without appropriations under five major exceptions: (1) activities under multi-year or indefinite appropriations (including, for example, continuing to issue social security benefit checks); (2) activities expressly authorized by law that indicate the agency is to continue operations despite an appropriations lapse; (3) activities necessarily implied by law (or, put another way, functions that must continue even without appropriations); (4) activities necessary to discharge constitutional duties and powers; and (5) activities necessary to protect life and property.

The fifth category is generally similar to the essential employee analysis under the IPLRA. To determine what circumstances might rise to the level of necessary activity, the DOJ recommended agencies apply a two-part test: "First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some *significant* degree, by delay in the performance of the function in question."[6] The 1995 DOJ letter stated that necessary agency activities in this category require "that there be a threat to human life or property of such a nature that immediate action is a necessary response to the situation."[7]

Using the DOJ opinions as a guide, both the federal OMB and OPM have provided recommendations for agencies making determinations regarding essential employees. In a 1981 memorandum, the OMB indicated that in the absence of appropriations, agencies may continue to "[c]onduct essential activities to the extent that they protect life and property."[8] The OMB further outlined eleven specific services that it deemed necessary to protect life and property: "a. Medical care of inpatients and emergency outpatient care; b. Activities essential to ensure continued public health and safety, including safe use of food and drugs and safe use of hazardous material; c. The continuance of … transportation safety functions and the protection of transport property; d. Border and coastal protection and surveillance; e. Protection of [government] lands, buildings, waterways, equipment and other property owned by the [government]; f. Care of prisoners and other persons in the custody of the [government]; g. Law enforcement and criminal investigations; h. Emergency and disaster assistance; i. Activities essential to the preservation of the essential elements of the [financial system], including borrowing and tax collection activities of the Treasury; j. Activities that ensure production of

[4] Available at http://www.justice.gov/sites/default/files/olc/opinions/1981/01/31/op-olc-v005-p0001.pdf.
[5] Available at http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1995-08-16-lapse-in-appropriations.htm.
[6] See note 5, *supra* (emphasis added).
[7] *Id.*
[8] OMB Memorandum, *Agency Operations in Absence of Appropriations* (Nov. 17, 1981). Available at http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-4.pdf.

power and maintenance of the power distribution system; and k. Activities necessary to maintain protection of research property."[9]

C. Other State Law

A number of other states appear to take an approach that is consistent with the federal approach. For example, Pennsylvania allows agencies to decide their essential functions and which employees must remain at work. In a guidance document, the state's office of administration states that "[t]he designation of essential depends on an employee's duties as well as the circumstances for the closing."[10]

In Minnesota, a state budget impasse led to litigation and the court in that case generally followed the guidance provided by the federal government. Specifically, in *In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, the state's attorney general filed suit to seek a court order that would direct core functions to continue operation on a temporary basis despite the absence of a state budget. No. 62-CV-11-5203 (Minn. Dist. Ct. June 29, 2011).[11] The court followed the guidance in the 1981 OMB memorandum discussed above. The court stated that an analysis to determine what is a critical or essential activity must be a fact-based study, and that offering good services or the prospect of closing down without funding were both, by themselves, insufficient causes to deem a function necessary to protect life or property. *Id.* at 11.

[9] *Id.*
[10] Available at https://www.portal.state.pa.us/portal/server.pt/document/127332/guidance_defining_essential_employees_pdf.
[11] Available at http://www.mncourts.gov/Documents/2/Public/Civil/Proposed_Findings_of_Fact_by_Peititoner.pdf.