

Advocate's View: The coronavirus and essential services

By: Special to The Daily Record Daniel Adams April 15, 2020 0



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The events of the last few weeks bring to mind the curse, “May you live in interesting times.” The outbreak of COVID-19, and the resulting government action — shuttering large segments of our economy — has resulted in every business having to immediately rethink how to conduct its operations, sometimes with a business’ survival in the balance. This article discusses what constitutes *essential service*, for the purpose of avoiding the government-mandated 100% reduction of in-person workforce. The distinction is significant because an entity providing *essential services* is not subject to the in-person workforce reduction. There’s been some confusion, however, concerning what constitutes *essential services*.

Governor Cuomo instituted measures designed to lessen the spread of COVID-19 in Executive Order 202.1, which has since increased in number to 202.15 as of close of business Friday, April 10, 2020. The order with the most serious direct impact on private business is Executive Order 202.6 which requires all businesses and nonprofit entities performing *nonessential services* to reduce their in-person work force by 50%. The order includes a laundry list of *essential services* that are exempt from the workforce reduction requirement, including:

health care operations including essential research and laboratory services; essential infrastructure including utilities, telecommunication, airports and transportation infrastructure; essential manufacturing, including food processing and pharmaceuticals; essential retail including grocery stores and pharmacies; essential services including trash

collection, mail, and shipping services; news media; banks and related financial institutions; providers of basic necessities to economically disadvantaged populations; construction; vendors of essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses; vendors that provide essential services or products, including logistics and technology support, child care and services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public.

That Order was amended by the Governor's issuance of Executive Order 202.8, directing all *nonessential* businesses to reduce their *entire* in-person workforce beginning at 8 p.m. on March 22, 2020 through April 19, 2020. The Order provided additional information on the definition of *essential services*:

Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. An entity providing essential services or functions whether to an essential business or a non-essential business shall not be subjected to the in-person work restriction, but may operate at the level necessary to provide such service or function.

So, a business is not subject to the workforce reduction so long as it is supporting an essential business, or providing an essential service or function.

202.8 also directed the Empire State Development Corporation (ESDC) to provide guidance as to which businesses are essential, in addition to ruling on applications seeking a determination as to whether the applicant provides an essential service, and therefore is exempt from the in-person workforce reduction.

The ESDC issued a *Guidance* on April 9, 2020 which is "intended to assist businesses in determining whether they are an essential business."

Initially, the Guidance makes clear that state and local governments, including municipalities, authorities, and school districts are exempt from the essential business reductions. This has proven to be an important development in the construction industry, as many public owners have taken the position that their construction projects are necessary for them to provide *essential services* to the students in their districts. For instance, in directing that school construction projects continue many school districts note they are required to maintain food service, operational capability, and red cross readiness, in addition to offering online instruction and meals to students. The schools need their facilities to be safe and secure for their essential employees, and operational again as quickly as possible when resuming regular classroom instruction.



The Guidance draws a distinction where a business provides both *essential* and *non-essential services*. In that instance only those business operations that are necessary to support *essential services* are exempt from the workforce reduction restrictions.

The Guidance goes on to provide fairly detailed bullet point descriptions of what constitutes *essential services* within each of the 14 larger headings of essential industries, including health care, infrastructure, manufacturing, retail, financial, news media, recreation, services to the disadvantaged, defense, professional services, and construction. The Guidance is an immediate must-read for every business. You can find the Guidance on the ESDC website at <https://esd.ny.gov/guidance-executive-order-2026>.

For the construction industry, the headings "Infrastructure" and "Construction" provide some needed clarity, but still leave questions for owners and contractors trying to determine whether a given project is permitted to proceed. There is a very real penalty of up to \$10,000 in fines for guessing wrong. What's more, enforcement is not likely to be consistent, given that it is left to local building departments and police. Local governments are at risk for civil rights claims however, in the event of arbitrary or capricious rulings that result in damages to owners or contractors.

Under the Guidance, essential infrastructure includes:

- public and private utilities including but not limited to power generation, fuel supply, and transmission
- public water and wastewater
- telecommunications and data centers
- airlines/airports
- commercial shipping vessels/ports and seaports
- transportation infrastructure such as bus, rail, for-hire vehicles, garages
- hotels, and other places of accommodation.

In a separate heading for Construction, the following activities are deemed essential:

- the construction is for, or your business supports, roads, bridges, transit facilities, utilities, hospitals or healthcare facilities, homeless shelters, or public or private schools;
- the construction is for affordable housing, as defined as construction work where either (i) a minimum of 20% of the residential units are or will be deemed affordable and are or will be subject to a regulatory agreement and/or a declaration from a local, state, or federal government agency or (ii) where the project is being undertaken by, or on behalf of, a public housing authority;



- the construction is necessary to protect the health and safety of occupants of a structure;
- the construction is necessary to continue a project if allowing the project to remain undone would be unsafe, provided that the construction must be shut down when it is safe to do so;
- the construction is for projects in the energy industry in accordance with Question No. 14 in the FAQ at: https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_033120.pdf
- the construction is for existing (i.e. currently underway) projects of an essential business; or
- the construction work is being completed by a single worker who is the sole employee/worker on the job site.

In addition, construction that is “necessary to protect the health and safety of the occupants, or to continue a project if it would be unsafe to allow it to remain undone, but only to the point that it is safe to suspend work” is essential. Interpreting this provision is not always clear. However, continuing construction to proceed to the point where it is *weathertight*, so as to protect completed elements from suffering weather-related deterioration has been met with approval by the ESDC, and should not run afoul of the local building department. There is also some ambiguity as to what constitutes construction for “existing i.e. currently underway projects of an essential business.” Does this mean only projects that have actually broken ground, or does it include those projects that have proceeded to the point where they have, or would be entitled to, a building permit being issued? How about projects whose purpose is to expand or enhance an existing essential business’ ability to provide essential services? The answer seems to be “Yes” for projects that can begin delivery of an enhanced capability on or before September 1, 2020.

Remember, only those employees who must be present at the business location or construction site in support of essential business activities are allowed, and no other personnel. Even where in-person work activities are permitted, the participants must still maintain appropriate social distancing. Sites that cannot maintain appropriate social distancing, as well as cleaning and disinfecting protocols, must close.

There is further clarification provided in the ESDC’s FAQ at https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_033120.pdf.

May all your business be essential.

Adams Leclair LLP is a litigation law firm based in Rochester, New York focused on commercial and construction advocacy. The team of attorneys can provide specialized counsel in contract issues and state regulations. Contact Adams Leclair LLP at 585.327.4100 or Daniel Adams at dadams@adamsleclair.law.



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