



March 27, 2020

GOVERNOR CLARIFIES DISTINCTION OVER NON-ESSENTIAL CONSTRUCTION PROJECTS

Albany, NY—As of 11:00am on Friday, March 27, 2020, Governor Andrew Cuomo put out the latest “Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction under Recent Executive Orders.” You can see the complete Guidance at <https://esd.ny.gov/guidance-executive-order-2026>.

For our clients interested in the clarifications for construction projects, the Empire State Development Office indicates that non-essential construction projects must shut down. Even “essential” construction must shut down if sites “cannot maintain distance and safety best practices.”

We point to this information found in the Guidance under #9 Construction:

All non-essential construction must shut down except emergency construction, (e.g. a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone until it is safe to shut the site).

Essential construction may continue and includes roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters. At every site, if essential or emergency non-essential construction, this includes maintaining social distance, including for purposes of elevators/meals/entry and exit. Sites that cannot maintain distance and safety best practices must close and enforcement will be provided by the state in coordination with the city/local governments. This will include fines of up to \$10,000 per violation.

For purposes of this section construction work does not include a single worker, who is the sole employee/worker on a job site.

There's no more detailed government guidance available, but here is an interpretation from partner from our Construction Practice Group:

Work on roads, bridges, etc. as listed above may and should continue. Note, too, the exception for "emergency construction," that is in a condition or state that would be unsafe to leave "as-is". This should include the safety of the structure itself; for example, assuring that the envelope is weathertight, footings are properly back-filled and walls are tied in.

Importantly, this new "guidance" doesn't over-rule Executive Order 202.6 itself. So, we believe that it remains permissible to work on projects for other "essential services," like hospitals and food processing. Also, work necessary to maintain the "safety, sanitation and essential operations of residences or other businesses" remains "essential." The same goes for work necessary "to ensure the continuing operation of government agencies."

No effective date is given, but we recommend that you act now to identify your non-essential sites and plan to have them secured and shut down by Monday. Now's also the time to send out "notice" letters for time extensions and additional costs on your non-essential projects, because this now qualifies unequivocally as a "force majeure," since it's a government shut-down order.

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