

Construction Law Alert: Update on Workplace Reduction and Essential Businesses

On Friday, March 27, 2020, the Empire State Development Corporation (“ESD”) issued guidance regarding the classification of Essential Projects under Executive Order 202.6 as modified by Executive Order 202.8. This can be found at <https://esd.ny.gov/guidance-executive-order-2026>. We discussed this Order in an earlier alert, <https://www.hancocklaw.com/publications/construction-law-alert-impact-of-covid-19-and-new-rules-for-the-construction-industry/>

On Monday, March 30, 2020, Governor Cuomo issued Executive Order 202.13, which extended the authority of the ESD to make direct determinations as to what qualifies as an essential construction project rather than merely offering guidance regarding the interpretation of prior Executive Orders. We discussed this Order in another alert, <https://www.hancocklaw.com/publications/construction-law-alert-impact-of-covid-19-for-construction-project-owner/>

The Governor’s successive Executive Orders regarding workplace reduction for all but essential businesses as a result of the coronavirus pandemic can be found here: <https://www.governor.ny.gov/executiveorders>

On April 9, 2020, the ESD updated its guidance regarding the classification of Essential Projects under Executive Order 202.6 as modified by subsequent Executive Orders. The updated guidance can be found at <https://esd.ny.gov/guidance-executive-order-2026>.

Section 9 of the newest guidance reads as follows:

9. Construction

All non-essential construction must safely 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, but only to the point that it is safe to suspend work).

Essential construction may proceed, to the extent that:

- *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.*

At every site, it is required that the personnel working on the site maintain an appropriate social distance, including for purposes of elevators/meals/entry and exits. Sites that cannot maintain appropriate social distancing, as well as cleaning/disinfecting protocols must close. Enforcement will be conducted by state and local governments, including fines up to \$10,000 per violation.

Construction may continue solely with respect to those employees that must be present at the business location/construction site in support of essential business activities. No other employees/personnel shall be permitted to work in-person at the business location/construction site. Any other business activities being completed that are not essential are still subject to the restrictions provided by Executive Order 202.

As noted above, local governments, including municipalities and school districts, are allowed to continue construction projects at this time as government entities are exempt from these essential business restrictions. However, to the greatest extent possible, local governments should postpone any non-essential projects and only proceed with essential projects when they can implement appropriate social distancing and cleaning/disinfecting protocols. Essential projects should be considered those that have a nexus to health and safety of the building occupants or to support the broader essential services that are required to fulfill the critical operations of government or the emergency response to the COVID-19 public health crisis.

The guidance is subject to further change in response to the developing nature of the pandemic crisis.

Sign up for coronavirus updates from the Governor's Office here: <https://now.ny.gov/page/s/coronavirus-updates>

Check <https://esd.ny.gov/> for updates to ESDC guidance.

Check here for ESD responses to frequently asked questions:
https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_033120.pdf

Our Firm's **construction** attorneys are available to assist you in addressing your specific needs and questions.

