

Essential Business Update: Construction

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There has been a significant change regarding what construction is considered “essential” and may continue. Based on new language that we now have, companies that previously received specific approval of a construction project must reevaluate that approval in light of the Empire State Development Corporation’s (ESDC) March 27th guidance regarding essential construction projects. If the previously approved construction project does not meet the guidance, the project must come to an end unless an application is made to, and approved by, ESDC to continue the project. Construction regarding governmental projects may be evaluated differently. We expect a different statement from ESDC regarding those projects.

For background, Gov. Cuomo issued Executive Orders 202.6, 202.7 and 202.8, which delineated essential industries. As a result, ESDC issued guidance specifying the essential functions and services of businesses. Construction was broadly defined, which led many in the industry to believe that all construction was considered essential.

That all changed on Friday, March 27. ESDC redefined essential construction, significantly narrowing the scope of essential construction. On Sunday, March 29, Gov. Cuomo issued Executive Order 202.13, which provided that “only certain construction is considered exempt from the in-person restrictions.” Additionally, the order restated ESDC authorization to “determine which construction projects shall be essential.”

Executive Order 202.13 and ESDC guidance created more questions than answers. In response to an application for a construction project designation as essential, ESDC has answered many of the questions.

First, ESDC clarified that any ESDC designation or determination made prior to March 27 that is inconsistent with ESDC’s revised guidance is no longer valid. This means that each approval granted to construction businesses before March 27 must be reevaluated to determine if it fits with ESDC’s latest guidance.

Second, ESDC provided further detail on how it determines whether a construction project is essential, and how construction may proceed even at essential projects. We quote the ESDC language below. The underlined text is not language included in the ESDC March 27th guidance.

For purposes of Executive Order 202.6, “Essential Business,” means businesses operating in or as:

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).

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- 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.
- Governmental construction projects: restriction does not apply to government projects; however, governments are expected to use discretion and postpone non-essential work.
- All services necessary for essential construction (environmental monitoring, surveyors, architects) are essential
- Emergency repairs such as roof repair, or other construction work necessary to protect health and safety is essential.
- Construction of any essential business is essential as long as they can maintain social distancing (6ft between people) and do all appropriate cleaning & disinfecting.

Additionally, construction is considered essential so long as it is “necessary to maintain the safety, sanitation and essential operations of residences or other businesses” which includes:

- law enforcement, including corrections and community supervision;
- fire prevention and response;
- building code enforcement;
- security;
- emergency management and response, EMS and 911 dispatch;
- building cleaners or janitors;
- general maintenance whether employed by the entity directly or a vendor;
- automotive repair;
- disinfection; and
- residential moving services.

It is important that all continuing construction projects utilize best practices to avoid transmission of COVID-19.