

New York State Empire State Development Corporation Revises Guidance on Construction Businesses Deemed Essential Under New York Governor Andrew Cuomo’s “New York State on PAUSE” Executive Order

Client Alert | March 27, 2020

On March 27, 2020, the New York State Empire State Development Corporation (“ESD”) revised its guidance for determining whether businesses are “essential” and therefore exempt from the in-person workforce restrictions under Governor Cuomo’s March 20, 2020 “New York State on PAUSE” Executive Order (EO 202.8), which requires that all non-essential businesses keep 100 percent of their workforce at home. The revised guidance provides that all “non-essential” construction “must shut down,” with the exception of “emergency construction,” and limits the businesses in the construction industry that are deemed essential. It also notes that fines of up to \$10,000 per violation may be issued for sites that cannot maintain social distancing and safety best practices.

Prior to March 27, ESD did not make clear whether all construction was deemed essential. Pursuant to the revised guidance, however, it is clear that “[a]ll non-essential construction must shut down except emergency construction,” which is defined to include projects “necessary to protect health and safety of the occupants,” as well as projects for which it would be “unsafe to allow to remain undone until it is safe to shut the site.”

The revised guidance also provides more detail on the types of construction deemed essential, which now includes construction of “roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters.” Sites providing essential, or emergency non-essential construction, must maintain social distance and follow “safety best practices.” According to ESD, the state will be enforcing these restrictions in coordination with local authorities.

Finally, the revised guidance clarifies that construction work “does not include a single worker, who is the sole employee/worker on a job site.”

The [New York Daily News](#) has reported that Governor Cuomo “told the city that construction work must stop immediately, like other industries that are closing down to combat the spread of the deadly pandemic.”

Businesses whose functions are not covered in ESD’s guidance but believe that they should be considered an “essential business,” may still request designation as an essential business via ESD’s [website](#).

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Prior client alerts providing an overview of the executive order's in-person workforce restrictions and ESD's guidance on essential businesses exempt from the order may be accessed [here](#) and [here](#). As noted in Gibson Dunn's March 24, 2020 alert, New York Attorney General Letitia James has urged employees who believe their employers to be acting in violation of Governor Cuomo's executive order to file a complaint with the New York State Office of the Attorney General's Labor Bureau.

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*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.*

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