

Empire State Development Updates Guidance on Essential Construction Projects During COVID-19

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Client Advisory

April 10, 2020 by Michael H. Bauscher, Christopher Rizzo and Karen E. Meara

On April 9, 2020, Empire State Development ("ESD") updated its interpretive guidance on Executive Order 202.6 related to mandated workforce reductions. As we explained in a previous advisory (available [here](#)), non-essential construction projects are not permitted to continue during the current COVID-19 crisis, except for emergency construction, which ESD defines as "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."

In its April 9 guidance, ESD confirmed that essential construction may continue, "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."

Additionally, ESD confirmed that all personnel working at any permissible site must maintain appropriate social distancing measures and that "sites that cannot maintain appropriate social distancing, as well as cleaning/disinfecting protocols must close." State and local governments will continue to enforce these requirements and violators will be subject to fines up to \$10,000 per violation.

With respect to essential and emergency projects, “[c]onstruction 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.”

ESD also confirmed that “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.” That said, ESD advised that “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.” According to ESD, “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.”

This firm continues to recommend that clients consider suspending construction unless (1) it clearly falls into one of the exceptions above or (2) work is in progress that must be completed to keep the site safe. For example, projects in the middle of demolition may need to complete that work to maintain safe conditions.

The rules governing business operations during the COVID-19 crisis continue changing on a daily basis. The Carter Ledyard COVID-19 Response Group is monitoring developments in this area and will continue providing updates as the situation evolves.

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*Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of **Jeffery S. Boxer** (212-238-8626, boxer@clm.com), **Judith A. Lockhart** (212-238-8603, lockhart@clm.com), **Bryan J. Hall** (212-238-8894, hall@clm.com), **Alexander G. Malyshev** (212-238-8618, malyshev@clm.com), **Melissa J. Erwin** (212-238-8622, erwin@clm.com), and **Leonardo Trivigno** (212-238-8724, trivigno@clm.com). Clients should contact the attorneys listed above or their regular CLM attorney for any questions concerning legal obligations arising from the COVID-19 pandemic.*

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