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"Non-Essential" Construction Activities To Be Shut Down In New York Effective March 27, 2020
Updated as of 8:00 a.m. - April 9, 2020

By: Henry L. Goldberg & Robert J. Fryman

On Friday, March 27, 2020, New York State issued a directive shutting down virtually all non-emergency construction work on projects **not** involving infrastructure, healthcare or other facilities contributing to public safety or welfare. This was essentially a complete reversal of the State's prior guidance on and application of the New York construction work PAUSE Order.

Background on New York State's restriction on construction during the Covid-19 Pandemic:

Under Executive Order 202.6, issued on March 18, 2020 (the "Order"), New York State Governor Andrew Cuomo ordered that all non-essential businesses "reduce the in-person workforce at any work locations by 50% no later than March 20 at 8 p.m." The Governor's order was modified shortly thereafter to cover 100% of non-essential businesses workforce (the so-called "New York on PAUSE Order"). All construction was originally deemed "essential" and exempt from the PAUSE Order.

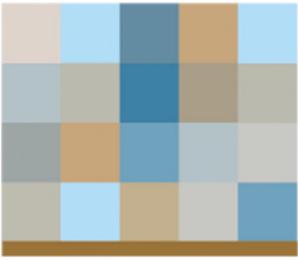
However, while the Governor's Order originally deemed construction as "essential" and thereby exempt, the Empire State Development Corp. ("ESD"), the agency designated by the Governor to resolve any question as to what was deemed an essential service exempt from the Order, took the position, at first, that essential construction included only "skilled trades such as electricians, plumbers, other related construction firms and professionals for essential infrastructure or for emergency repair and safety purposes."

Miscommunication and confusion as to the Covid-19 emergency orders regarding construction:

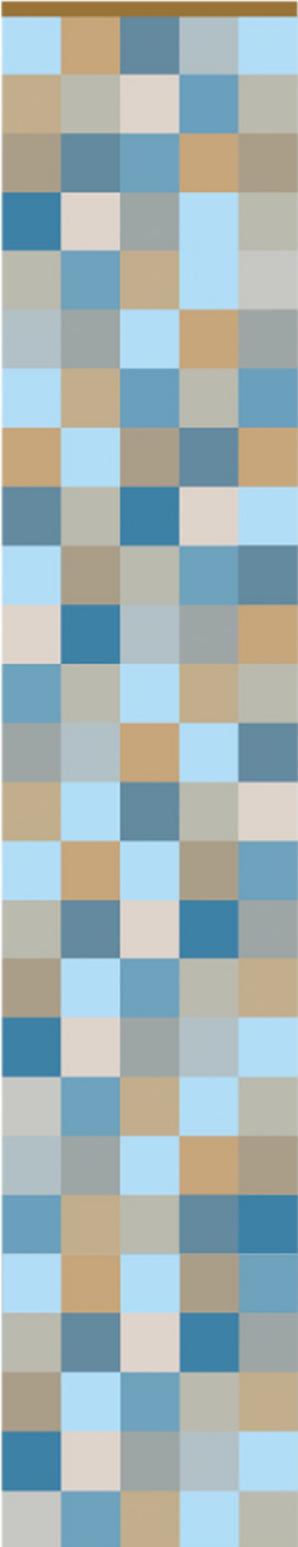
ESD's guidance on what types of construction projects were deemed essential created further confusion and ambiguity regarding which construction projects were exempt from the PAUSE Order. By March 21, 2020, ESD advised that all construction activities were exempt from the Order.

However, on Friday, March 27, 2020 ESD issued an updated guidance on essential construction under the Governor's PAUSE Order directing:

"[a]ll non-essential construction must shut down except emergency construction, (e.g. a project necessary to protect health and safety of the occupants, or to



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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.” The ESD’s Guidance document is available here: <https://esd.ny.gov/guidance-executive-order-2020>

Guidelines still lack clarity and are evolving:

While the industry continues to seek clarification from ESD on the implementation of these new guidelines for construction work in New York, as of now our best guidance is:

The order is intended to be effective immediately. On project sites that require some work to be performed in order to be shut down, time will be allowed to perform work necessary to secure the site for safety and security.

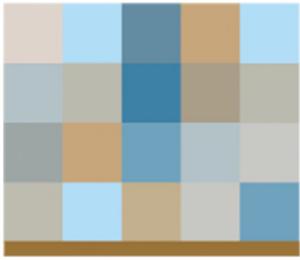
Moreover, even where work is considered to be “essential construction,” it may only be performed while practicing safe social distancing and other guidelines such as with respect to use of elevators/hoists by limited amounts of workers, and no congregating during meal, entry and exit from the project site.

Violations of this order may result in fines of \$10,000 per occurrence.

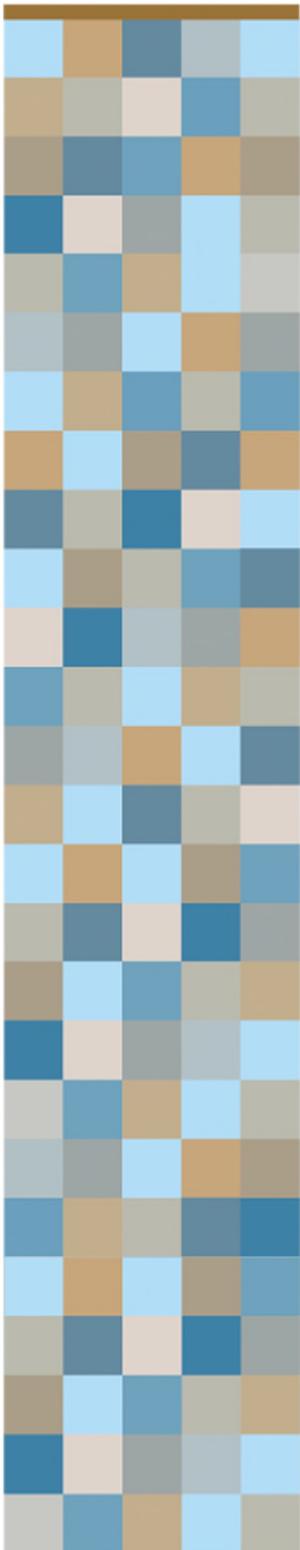
Vendors, manufacturers and suppliers supporting essential construction are still deemed essential.

As this is an evolving issue, we expect further clarifications and modifications to the Order, including from individual state and local governmental agencies, to affect the construction industry. For example, the New York City School Construction Authority has already indicated that, notwithstanding the State’s new guidance, its school construction projects are essential and will not be shut down. We urge all contractors to check with the project owner, owner’s representative, construction manager or general contractor for project-specific information on shutdowns before taking any action. Please check our website or reach out directly to us for further developments or updates.

UPDATE - On April 9, 2020 at 8:00 a.m., Empire State Development Corp. issued the following updated and clarified guidance on limitations of the exemption of “essential”



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construction and the shutdown of “non-essential” construction under New York State Executive Order 202.6:

“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).

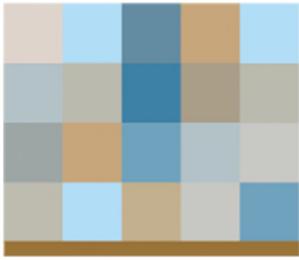
Essential construction may proceed, to the extent that:

- 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: [NYS Essential Employer FAQ](#)
- 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.

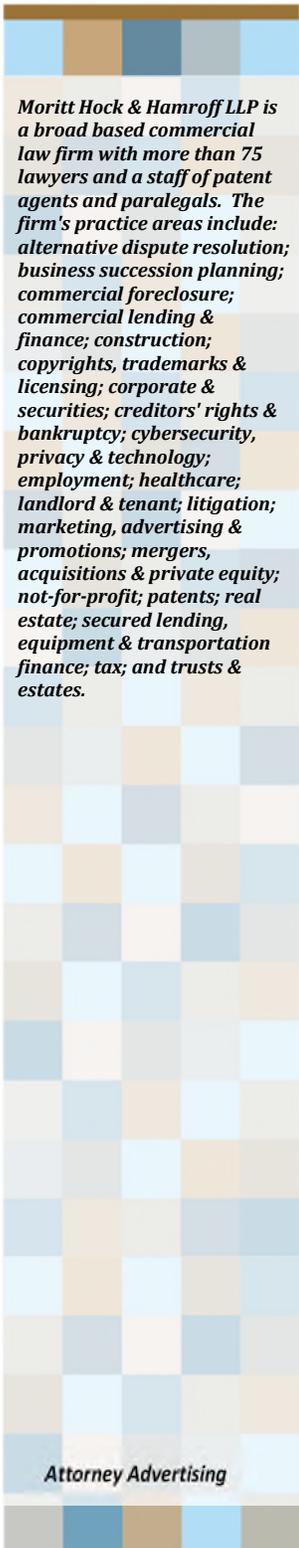
Construction may continue solely with respect to those employees that must be present at the business location/construction site in support of essential business activities. No other employees/personnel shall be permitted to work in-person at the business location/construction site. Any other business 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



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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.”

ESD’s updated guidance document to New York State Executive Order 202.6 is available here: [NY State Executive Order 202.6](#)

We also strongly advise all contractors, whether directly or indirectly affected by the new modification of the PAUSE Order and shut down of “non-essential” construction work to review the delay, force majeure and notice provisions of their contracts and to consult with experienced construction counsel to best preserve your rights and remedies. For an informative article on force majeure provisions and similar contract defenses, see the article by MHH’s Stephen J. Ginsberg & Tina M. Kassangana at [MHH Alert: Force Majeure](#).

MHH’s Construction Law Practice Group is available to answer any questions you may have regarding your contract and your project and to assist you in navigating these uncharted and troubling times.

Henry L. Goldberg, a partner of the firm, chairs the firm's Construction Practice Group where he handles all facets of complex construction law related matters.

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