

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

Client Alert | April 10, 2020

On April 9, 2020, the New York Empire State Development Corporation (“ESD”) [further updated its guidance](#) for determining whether businesses are “essential” and therefore exempt from the in-person workforce restrictions established in Governor Cuomo’s March 20, 2020 “New York State on PAUSE” Executive Order (EO 202.8). That March 20 order required all non-essential businesses keep 100 percent of their workforce at home. These updates, which we review in this alert, demonstrate that ESD is continuing to evolve the breadth and depth of its guidance on what constitutes an essential business. It is therefore critical that businesses continue to stay apprised of the latest developments.

The ESD’s April 9 version of the guidance contains four primary updates to its previous guidance, which was last updated on April 8.^[1]

- *First*, the new guidance adds two new essential business categories—“Recreation” and “Professional services with extensive restrictions”—which together set forth social distancing and workplace restrictions regarding parks and open public spaces, legal and real estate services, and houses of worship.
- *Second*, the updated guidance provides further detail on what constitutes essential construction in the context of affordable housing and the energy industry, and clarifies that essential construction also includes construction necessary to protect the health and safety of occupants of a structure as well as construction for existing projects of an essential business.
- *Third*, the updated guidance incorporates new examples of essential businesses in the preexisting healthcare, manufacturing, retail, and essential services industry categories.
- *Fourth*, the updated guidance broadens the list of businesses deemed non-essential and therefore prohibited from requesting a designation as an essential business under the guidance.

These four primary updates to the guidance are reviewed below in further detail.

I. The Updated Guidance

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Incorporates Two New Essential Business Categories

The updated guidance now includes two additional essential business categories: “Recreation” and “Professional services with extensive restrictions.” According to the guidance, recreation includes parks and other open public spaces—except for golf courses, the use of boat launches and marinas for recreational vessels, and “playgrounds and other areas of congregation where social distancing cannot be abided.”

The new professional services category is largely directed to legal and real estate services, as well as houses of worship. With respect to legal services, the guidance clarifies that lawyers may provide in-person services, but *only* in support of essential businesses. Even so, the guidance recommends that such work be conducted “as remotely as possible,” while mandating that the remainder of all legal work shall be performed remotely. With respect to real estate services, the guidance permits services necessary to complete a transfer of real property to occur in person “only to the extent legally necessary and in accordance with appropriate social distancing and cleaning/disinfecting protocols.” Otherwise, all real estate transactions should be conducted remotely. Finally, with respect to houses of worship, the revised guidance allows individuals to enter them only where six feet of distance can be maintained between persons. That permission notwithstanding, the guidance cautions that individuals should not be gathering in houses of worship until the end of the COVID-19 public health emergency, and encourages religious leaders to hold virtual religious services.

II. The Updated Guidance Provides Further Detail Concerning What Constitutes Essential Construction

The ESD’s prior guidance on construction, which Gibson Dunn reviewed in a [prior alert](#), provided that all non-essential construction must cease, except for emergency construction such as projects “necessary to protect health and safety of the occupants” or projects for which it would be unsafe to allow them to remain incomplete. The prior guidance also noted that essential construction included that of roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters. And it provided that essential and non-essential emergency construction must adhere to social distancing and safety best practices, to be enforced by state and local authorities, with up to \$10,000 fines for a violation. All that remains in effect in the updated

guidance.

The updated guidance, however, affords new detail on what constitutes “essential” construction with respect to affordable housing and the energy industry. Construction of affordable housing is now defined as construction work where: “either (i) a minimum 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.” And certain construction in the energy industry is now expressly included as “essential” construction which may continue, as set forth in greater detail in the response to Question 14 of the [ESD's FAQs](#).^[2] The updated guidance also categorizes as essential construction that which is “necessary to protect the health and safety of occupants of a structure” and construction for “existing (i.e. currently underway) projects of an essential business.”

III. The Updated Guidance Incorporates New Examples into Several Other Essential Business Categories

The revised guidance sets forth additional examples of essential businesses among several of the original 12 categories of businesses provided in the prior guidance and narrows the scope of one example in the financial institutions category. These essential business categories and their new examples are set forth below.

- **Essential Health Care Operations:** Emergency chiropractic services; physical therapy, prescribed by a medical professional; occupational therapy, prescribed by a medical professional.
- **Essential Manufacturing:** Any parts or components necessary for essential products that are referenced within the guidance, such as sanitary and personal care products regulated by the Food and Drug Administration.
- **Essential Retail:** Telecommunications to service existing customers and accounts; and delivery for orders placed remotely via phone or online at non-essential retail establishments—provided that only one employee is physically present at the business location to fulfill orders.
- **Essential Services:** Marine vessel repair and marinas, but only to support government or essential commercial operations, and not for recreational purposes; landscaping, but only for maintenance or pest control and not cosmetic purposes; designing, printing, publishing and signage companies to the extent that they support essential businesses or services; remote instruction or streaming of classes from public or private schools or health/fitness centers—provided that no in-person congregate classes are permitted.
- **Financial Institutions:** The prior example of “services related to financial markets” has been narrowed to exclude debt collection services.

IV. The Updated Guidance

Provides Further Examples of Businesses Deemed Non-Essential

The ESD's updated guidance broadens the types of businesses deemed non-essential and therefore ineligible to request a designation as an essential business. The prior guidance provided that non-essential businesses included those that were previously ordered to close due to prior restrictions on gatherings with 50 or more participants, such as bars, restaurants, gyms, movie theatres, casinos, auditoriums, concerts, conferences, worship services, sporting events, and any physical fitness centers.^[3]

The revised guidance now also specifically enumerates certain additional businesses as "non-essential." These include "[a]ny indoor common portions of retail shopping malls with 100,000 or more square feet of retail space available for lease," "[a]ll places of public amusement, whether indoors or outdoors," such as amusement rides, aquariums, bowling alleys, and children's play centers, among others; and barbershops, hair salons, tattoo or piercing parlors, and related personal care services like nail technicians, and laser hair removal services. The new restrictions further note that restaurant take-out or delivery for off-premise consumption do not fall within the scope of restaurants deemed non-essential, which are now more clearly specified as those offering dine-in restaurant or bar services.

* * *

In sum, as ESD continues to help businesses navigate the effects of Governor Cuomo's "New York State on PAUSE" Executive Order, its guidance on what constitutes essential businesses continues evolving as to the breadth and depth of the types of business and activities covered. Gibson Dunn will continue to track these updates and will report on important developments.

Prior client alerts providing an overview of the Governor Cuomo's "New York State on PAUSE" executive order's in-person workforce restrictions and ESD's guidance on essential businesses exempt from the order may be accessed [here](#), [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.

^[1] The April 8 guidance removed the following sentence that was present in earlier versions: "Houses of worship are not ordered closed however it is strongly recommended not to hold congregational services. If held, social distance must be maintained and compliance with DOH guidance, which can be found at <https://coronavirus.health.ny.gov/information-providers>."

^[2] The answer to [Question 14 in the ESD's FAQs](#) explains (among other things) that utility operations and maintenance for existing power generation, fuel supply, and "[t]ransmission and distribution infrastructure," are examples of essential construction "necessary to respond to the COVID-19 state emergency or to provide basic human services" like food, shelter, and safety.

^[3] See Governor Andrew M. Cuomo, [E.O. 202.3](#) (March 16, 2020).

Gibson Dunn's lawyers are available to assist with any questions you may have regarding

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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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