

COVID-19 Construction Update: DE, NJ, NY, and PA Close Businesses

Within the past week, state governments have been attempting to mitigate the novel coronavirus (COVID-19) pandemic. In the mid-Atlantic region, the governors of New Jersey, New York, Delaware, and Pennsylvania issued executive orders that close non-essential businesses and order residents to stay home. In New Jersey, the order focuses mainly on the closure of non-essential retail businesses and restricts some of the construction industry's physical operations. In New York, updated guidance on March 27, 2020, has ordered the shutdown of all construction that is not "emergency" or "essential." In Pennsylvania, with few narrow exceptions, the executive order bars the construction industry from continuing physical operations. The specifics are discussed more fully below.

NEW JERSEY

On March 21, 2020, Governor Phil Murphy issued Executive Order No. 107, which mandated the closure of all non-essential retail businesses. Specifically, Governor Murphy ordered the closure of all retail businesses not listed in the order and put some restrictions on other businesses. Violation of the order or aiding and abetting such a violation is punishable by up to six months in prison and/or a fine not to exceed \$1,000. The order took effect on March 21, 2020, at 9:00 p.m. and shall last until revoked or modified by Governor Murphy.

New Jersey's order does not halt the construction industry's physical operations. However, the order does direct businesses that cannot perform their function via telework to "reduce staff on site to the minimal number necessary to ensure that essential operations can continue."

The executive order specifically lists "construction workers" within this group. Construction projects that comply with this directive to reduce staff where possible are able to continue their operations. Further, "hardware and home improvement stores" are permitted to remain open. Construction suppliers are likely unaffected by this since the order focuses on retail stores in an attempt to increase social distancing. Most construction suppliers should either be unaffected or qualify as a hardware or home improvement store and be allowed to continue operations.

New Jersey took an additional step to ensure consistent rules across the state. On March 21, 2020, Governor Murphy issued Executive Order No. 108. This order supersedes all orders from municipalities and cities within New Jersey that differ from Order No. 107. The various municipalities and cities in New Jersey are also prohibited from instituting additional orders that either tighten or loosen the restrictions in Order No. 107. As a result, New Jersey businesses should not have to confer multiple locations to see whether they can continue operations. Instead, businesses can look to the State of New Jersey for this direction.

NEW YORK

On March 18, 2020, Governor Andrew Cuomo issued Executive Order 202.6, which mandates that non-essential businesses reduce their in-person work forces by 50 percent and utilize work from home procedures to the extent practical. Governor Cuomo followed this on March 20, 2020, by issuing Executive Order 202.8, which requires non-essential businesses to reduce their in-person work forces by 100 percent no later than March 22, 2020, at 8 p.m. However, essential businesses are not subject to these restrictions. Violations of these orders shall be punishable by a fine up to \$2,000 per violation. At this time, the requirements in the orders are set to expire after April 19, 2020.

Executive Order 202.6 includes in its list of essential businesses, which identified construction as



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essential. However, New York subsequently issued guidance, which was updated on March 27, 2020, at 11:00 a.m. and significantly limited what construction operations may continue and increased the penalties for non-compliance.

Under the updated guidance, “[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 continue a project if it would be unsafe to allow to remain undone until it is safe to shut the site).” In addition to emergency construction, “essential construction” may continue operations. This includes “roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters.” For both emergency and essential construction, these projects may only continue to operate if they can be done while “maintaining distance and safety best practices,” which includes “maintaining social distance, including for purposes of elevators/meals/entry and exit.” If the project cannot be operated in compliance with these rules, they must close or be subject to fines up to \$10,000 per violation.

The new guidance from New York drastically reduces the construction operations that may continue. Based on this guidance, non-essential and non-emergency construction must shut down as quickly as is possible while ensuring the safety of construction personnel and the project site. As noted in the guidance, construction operations may continue long enough to ensure the sites are made safe before shutting down. Additionally, maintaining social distance is no longer “strongly urged” — it is a requirement.

Businesses in New York that are not currently considered emergency or essential may apply to be designated as an essential business [here](#).

PENNSYLVANIA

On March 19, 2020, Governor Tom Wolf issued an unnumbered executive order that closed all businesses that are not “life sustaining.” Additionally, on March 23, 2020, Governor Wolf issued a Stay at Home order for individuals in various counties in the commonwealth. Even under the Stay at Home order, individuals may leave their homes if they need to do so for businesses that are allowed to continue physical operation. The order does not specify a penalty or punishment for violation of the order. However, businesses should be aware that Pennsylvania has warned that it will take enforcement actions against noncompliant businesses. The order was effective immediately on March 19, 2020, and will last until further notice. However, due to the high number of requests for waivers (as discussed below), Pennsylvania delayed beginning enforcement of the order until March 23, 2020, at 8:00 a.m.

Pennsylvania takes the most restrictive approach of the three states, closing all businesses that are not “life sustaining” with much fewer exceptions than other jurisdictions. Pennsylvania published and updated a list of businesses by industry and sector identifying which businesses may or may not continue physical operations. The list follows the CISA guidance, as interpreted by the commonwealth. With the exception of “emergency repairs” and the “construction of health care facilities,” the construction industry may not continue physical operations. The list specifically excludes:

residential building construction; nonresidential building construction; utility subsystem construction; land subdivision; highway, street, and bridge construction; other heavy and civil engineering construction; foundation, structure, and building exterior contractors; building equipment contractors; building finishing contractors; and other specialty trade contractors.

However, some businesses related to the construction industry are allowed to continue operations at this time. Specifically, many manufacturing businesses and wholesalers can continue operations. Additionally, “Services to Building and Dwelling” may continue, including “janitorial, pest control, and landscaping services.”

Businesses that are identified as not being able to operate may request a waiver by submitting a request to the Pennsylvania Department of Community & Economic Development. Pennsylvania has been inundated with such waivers, which resulted in delayed enforcement of the closures. Businesses should consider whether such a waiver is appropriate and consult with legal counsel about their best options in the face of closure.

DELAWARE

On March 22, 2020, Governor John Carney issued the [Fourth Modification](#) and the [Fifth Modification](#) to Delaware's Declaration of a State of Emergency. These modifications closed non-essential businesses and ordered individuals living in Delaware to stay at home. Violations of these orders shall be punishable by a fine between \$50 to \$500 or imprisonment up to six months for each violation. Both orders went into effect on March 24, 2020, at 8:00 a.m. and will last until further notice.

In these modifications, Delaware stated that essential businesses are allowed to continue operations and individuals may leave their home as necessary for essential businesses. The Fourth Modification defined essential businesses to include construction as follows:

1. Workers who are engaged in the construction of residential, nonresidential structures, or infrastructure, and any workers who provide critical maintenance to residential or non-residential structures.
2. Businesses that supply materials and hardware to those engaged in the construction of residential or non-residential structures.
3. Workers involved in activities related to the design and apportionment of residential and non-residential structures.

The modification also includes hardware stores and manufacturing of materials, goods, products, or similar distribution as essential. Like Pennsylvania, Delaware issued a [NAICS-sorted list](#) of businesses that may or may not stay open. Most aspects of the construction industry are allowed to operate at this time.

BEST PRACTICES

The federal and local governmental response to the COVID-19 outbreak will likely change from the date of this publication. The best practices for construction companies that are still permitted to operate are to implement and maintain social distancing to the extent possible without sacrificing safety or quality. Sanitation and deep-cleaning procedures should be implemented and maintained as well. Teleworking should be utilized to the extent possible, and in-person meetings should be eliminated and/or reduced while maintaining necessary safety and supervision. To the extent any contractors or suppliers are impacted by executive orders and related business closures, it is critical that they promptly notify both upstream and downstream contracting partners. In particular, contractors should reach out to their supply chain and confirm whether they anticipate any changes in delivery times or methods for materials and equipment.

For strategies on responding to and documenting impacts from these government actions and COVID-19 in general, please refer to our previous client alert, [COVID-19 Strategies for the Construction Industry](#). Additionally, visit [Cozen O'Connor's COVID-19 website](#) for new updates. For additional guidance on whether your company may continue to operate as a result of governmental action, and/or for advice on preparing for and responding to pandemic-related construction cost and schedule impacts, please contact any one of [Cozen O'Connor's Construction Group attorneys](#) who can help guide you through the legal challenges.