

Update on N.J. and Pa. Restrictions on Construction Activities — Utility and Other Projects

New Jersey

We earlier reported that while New Jersey's state of emergency order (Executive Order No. 107) did not halt the construction industry's physical operations, considering the construction industry, generally, to be essential, Governor Murphy indicated the state would continue to examine the situation regularly. This Alert addresses a recent development in the state's posture.

On April 8, 2020, Governor Phil Murphy issued Executive Order No. 122 (EO122), which halts all non-essential construction projects and requires additional and specific mitigation measures by essential retail businesses and industries and for essential construction projects in order to limit the spread of COVID-19 in New Jersey.

The executive order requires that all non-essential construction projects shall cease at 8:00 p.m. on Friday, April 10. EO 122 describes "essential construction projects" to include, among other things, utility projects, government contracted or ordered projects, transportation projects, data center and business-critical facilities projects, construction necessary to support law enforcement and first responder agencies in their COVID-19 response, and emergency repairs necessary for health and safety of residents.

Utility projects include "those necessary for energy and electricity production and transmission, and any decommissioning of facilities used for electricity generation." Government projects refer to those "ordered or contracted for by Federal, State, county, or municipal government, or any project that must be completed to meet a deadline established by the Federal government." Transportation projects include "roads, bridges, and mass transit facilities or physical infrastructure, including work done at airports or seaports." Also, included as essential construction are "[p]rojects necessary for the delivery of health care services, including but not limited to hospitals, other health care facilities, and pharmaceutical manufacturing facilities" and certain residential, social service, retail and manufacturing supply, and education-related construction, among others.

Importantly, the state director of emergency management, who is the superintendent of state police, is empowered with the discretion to make additions, amendments, clarifications, exceptions, and exclusions to the terms of the executive order.

The executive order also directs that manufacturing businesses, warehousing businesses, and businesses engaged in essential construction projects must adopt specific safe distancing and COVID-19 mitigation policies and practices that, at least, prohibit non-essential visitors from worksites, limit work groups and participation in worksite meetings and inductions to fewer than 10, and require six feet or more distance between individuals wherever possible. Such policies must also address staggered starting, stopping, lunch and break times, where practicable, and restrict access to common areas to decrease worksite congestion, require cloth face coverings for workers and visitors and gloves for workers, such protective coverings to be provided for employees by and at the expense of businesses. Such minimal requirements also include declining entry to visitors who refuses to wear cloth face coverings (for non-medical reasons) and a number of infection control and sanitizing practices.

In addition, such businesses must also, at minimum, adopt and implement management, supervision, and notice policies that address the immediate separation and sending home of workers presenting with COVID-19-related symptoms and promptly notifying workers of any



Michael D. Klein

Senior Counsel

mklein@cozen.com
Phone: (717) 703-5903
Fax: (202) 640-5521



Michael J. Connolly

Of Counsel

mconnolly@cozen.com
Phone: (973) 200-7412
Fax: (856) 910-5075

Related Practice Areas

- Utility & Energy

known exposure to COVID-19 at the worksite, consistent with Americans with Disabilities Act and any other applicable confidentiality requirements, cleaning and disinfecting the worksite when a worker has been diagnosed with COVID-19 in accordance with CDC guidelines and continuing adherence to New Jersey Department of Health, the CDC and the Occupational Health and Safety Administration, guidelines and directives, as applicable, for maintaining a clean, safe, and healthy work environment.

Moreover, businesses authorized to maintain in-person operations, and the owners of buildings “used for commercial, industrial or other enterprises, including but not limited to facilities for warehousing, manufacturing, commercial offices, airports, grocery stores, universities, colleges, government, hotels, and residential buildings with at least 50 units,” are required to adopt specific minimal cleaning protocols where operations are conducted.

Executive Order 122 also requires essential retail businesses still permitted to operate (under Executive Order No. 107) to adopt specific policies and practices related to, among other things, store occupancy, hours of operation solely for high-risk individuals, physical barriers, signage, infection control practices, employees break time for handwashing, contactless pay options, pickup and/or delivery of goods (consideration for populations without internet service access), face and hand coverings, and rules of entry and service.

Executive Order 122 can be accessed [here](#).

Pennsylvania

We reported earlier that the COVID-19 guidelines in Pennsylvania regarding utility construction projects were not clear with respect to the extent utility construction projects are permitted. The Industry Operation Guidance, issued by Pennsylvania provided that utility construction projects could be performed only to make emergency repairs. Other utility construction projects could proceed, if waivers were sought and obtained from the Pennsylvania Department of Community and Economic Development. After the guidelines had been issued, there were mixed signals as to whether the restrictions even applied to utilities, because the utility industry group consists of life sustaining businesses allowed under current guidelines to conduct business operations in Pennsylvania during the COVID-19 outbreak. Recent clarification has been provided that utility construction that is not for emergency repair purposes is prohibited. The exception is utility construction that has been issued a waiver or exemption for construction not involving emergency repairs. There is still an issue as to what constitutes “emergency repairs..

On April 10, Pennsylvania released “Life-Sustaining Business FAQs.” Included among the questions and answers is the following:

17. I am a contractor engaging in emergency repairs, who received an exemption or was told I do not require an exemption. May I perform non-essential work?

Your exemption, or general authority to conduct emergency repairs, is limited to performing tasks necessary to provide repair services to customers. No new construction or non-emergency rehabilitation or remodeling may be performed.

The exemption application process in Pennsylvania expired at 5:00 p.m. on Friday, April 3, 2020. The exemption application process had been established as a means for non-life sustaining businesses to seek exemptions in order to continue certain operations. This process did not apply to life-sustaining businesses. That being the case, it may be possible for life-sustaining businesses, e.g., utilities, to seek waivers for certain construction projects not involving emergency repairs. Those interested in doing so should check with the Pa Department of Community and Economic Development.

The FAQs can be accessed [here](#).

On the environmental front, the PA Department of Environmental Protection has posted guidance on its website regarding 25 Pa. Code Chapter 102 permits for erosion and sedimentation control.

Permittees who are considered life sustaining businesses as set forth in Governor Wolf's March 19, 2020, Order may continue to conduct permitted earth disturbance activities that are in support of the life sustaining business. All earth disturbance must remain in compliance with all conditions of any applicable permit. Permittees and operators who are not considered life sustaining businesses under the order must cease earth disturbance activities.

Further information on PADEP's policy on Chapter 102 permits can be assessed [here](#).

Issues About Which Utility Management Should Be Thinking

Is your company in compliance with the construction-related restrictions and minimal policy and practice requirements?

Are your third-party vendors in compliance with construction-related restrictions and minimal policy and practice requirements?

Have you adopted policies and practices to assure your employees and vendor employees are following CDC and state health agencies' guidelines for safe working conditions, such as safe distancing of employees and sanitizing of equipment and work areas?

Have you proactively coordinated with the state police and local law enforcement to ensure that they are aware that a particular project is exempt?

Have you sought clarification about, or exceptions to, the executive order from the state director?

When appropriate, have you sought clarification about, or waivers to, the PA Guidelines/Orders from the PA Department of Community and Economic Development?

In the event that you face an enforcement action or audit, have you identified and properly documented your projects to qualify as utility or other essential construction projects?

Have you provided your field operations personnel with written proof that the project on which they are working is exempt from the restrictions?

Is your accounting department fully and accurately tracking COVID-19 related expenses for possible future rate recovery?
