

NEW YORK STATE UPDATE: ESD Narrows Construction Exemption from Workforce Reduction Order

As most are aware construction was deemed an essential service exempt from the NYS Workplace Restriction Order. Today, the exemption concerning construction has changed. The NYS Empire State Development (ESD) updated the State's Guidance on the Order and provided a new ruling on what is exempt construction that may continue. Under the circumstances, it is imperative that contractors obtain a clear directive as to how and whether they are expected to proceed. If you are expecting contract impact or delay based on the updated Guidance or the COVID-19 situation overall, you should review your contract and provide prompt and proper notice of the delay/impact. A proper notice will be crucial toward obtaining an extension of time and preserving contract rights.

Contractors must also stay aware of important recent COVID-19 related changes to employer obligations stated in rules/laws such as the Federal Family And Medical Leave Act, New York State Emergency Paid Leave and in Guidance from the EEOC and DOL. Be alert to updates from our Employment Group on key evolving changes to employer obligations.

The updated ESD description of exempt construction as an essential business (including a new fine for violation) is as follows:

9. Construction

- All 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).
- 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.

See the below link to the changed rules concerning construction as an essential business.
<https://esd.ny.gov/guidance-executive-order-2026>

The attorneys in KD's Construction Law Practice Group continue to closely monitor developments on the law and update employers as the legal landscape continues to evolve. If you have questions about these developments, complying with the above regulations or are in need assistance in implementing the new policies, please contact one of the experienced Construction Law attorneys below or call Kaufman Dolowich & Voluck at (516) 681-1100.