

Construction is Deemed “Essential Infrastructure” Under Ohio’s Stay At Home Order

On Sunday afternoon, Governor DeWine announced a “Stay at Home Order” (the “Order”) which will go into effect on Monday, March 23 at 11:59 p.m. The Order requires all individuals currently living within the State of Ohio to stay at home or at their place of residence unless they must leave to engage in “Essential Activities,” “Essential Governmental Functions,” or participate in “Essential Businesses and Operations.”

How this Order will impact the construction industry is an evolving question. Certain types of construction activity are included in the list of “Essential Businesses and Operations.” According to the Order, “**Critical Trades**” are **exempt** from the Order to stay home and include:

Building and Construction Tradesmen and Tradeswomen, and other trades including but not limited to plumbers, electricians, . . . operating engineers, HVAC, painting, . . . and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses and Operations. (Emphasis added).

This would seem to include a broad swath of residential and commercial construction work. In particular, the term “Essential Activities,” includes certain types of work, including work providing essential products and services related to healthcare operations, government functions and certain work on “Essential Infrastructure” related to:

construction (including, but not limited to, construction required in response to this public health emergency, hospital construction, construction of long-term care facilities, public works construction, school construction, essential business construction, and housing construction); **building management and maintenance**; airport operations; operation and maintenance of utilities, including water, sewer, and gas; electrical (including power generation, distribution, and production of raw materials); distribution centers; oil and biofuel refining; **roads, highways, railroads, and public transportation**; ports; cybersecurity operations; flood control; solid waste and recycling collection and removal; and internet, video, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services). (Emphasis Added).

The Order notes that the term “Essential Infrastructure” shall be construed liberally to avoid any “impacts to essential infrastructure as broadly defined.”

Finally, the language highlighted above concerning “essential business construction” appears to open the door for many activities being performed for any of the businesses listed in Paragraph 12 of the Order, which would include work on: (1) grocery stores and pharmacies; (2) charitable organizations; (3) financial institutions; (4) gas stations and transportation companies; (5) religious institutions; (6) educational institutions; (7) residential facilities; (8) manufacturing companies; and (9) hotels and motels. The relevant question is whether the work or service to be performed is necessary to maintain the safety, sanitation, or essential operation of the business. If it is, then the work is exempt from the Order’s prohibition on non-essential business operations and may continue.

At this point, we are recommending that construction companies look carefully at the various jobsites upon which they are performing work to determine whether any of the exemptions listed above would apply.

It would seem to us that most construction activity of which we are aware would arguably fall under one the areas discussed above. However, certain services or activities may not be permitted under the Order. If unsure about whether a particular project falls within an exemption, companies should consult with their counsel and/or OVABC to determine whether the work is permissible under the Order.

The Order is to be enforced by State and local law enforcement officers. Where questions arise as to whether a particular jobsite is exempt or not, law enforcement officers can request a written opinion from the local public health department in the jurisdiction where the jobsite is located. Governor DeWine indicated that violations of the Order will be considered as a 2nd degree misdemeanor which is punishable by 90 days in jail, a fine of up to \$750 or both.

The Order is set to expire on April 6, 2020 at 11:59 p.m.

Taft’s Labor and Employment Group and OVABC are closely monitoring developments related to COVID-19 and its impact on employers. For more specific information about the above Order, or any other employment questions related to the Coronavirus pandemic, please contact us.