

PUBLICATION

The Department of Homeland Security Issues Additional Guidance on Who is an 'Essential' Construction Worker

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April 7, 2020

On March 28, the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) issued new guidance that identifies specific areas where construction workers will typically be considered "essential" and therefore, can work during the COVID-19 pandemic. CISA initially released guidelines on March 19 in response to shelter-in-place orders issued by the governors of California, New York, and Illinois. The most recent guidance was issued in response to shelter-in-place orders issued in all but a handful of states.

The orders issued by states and localities vary locale to locale. While most states find construction to be an essential service, some do not, and other states allow only certain types of construction activities. Even states without an express statewide ban on construction may have a shelter-in-place order that is unclear or provides additional restrictions at the city or county level. As a result, whether your particular construction services are deemed essential or exempt needs a careful review. An updated list of states with shelter-in-place orders that may impact construction can be found [here](#).

Though not binding on states, CISA's updated guidelines are intended to help state and local officials protect their communities while also ensuring continuity of functions critical to public health and safety, as well as economic and national security. CISA collaborated with other federal agencies, state and local governments, and the private sector when drafting the guidelines, so the guidelines could be persuasive evidence in evaluating whether work is considered "essential" under a particular state's shelter-in-place order. The guidelines may also provide grounds for seeking an exemption from a shelter-in-place order that would otherwise prohibit construction.

Under CISA's original guidelines, construction was only specifically mentioned with respect to public works and communications projects. The updated guidelines, however, add new permissible activities or clarify activities that are exempt. Under these new guidelines, the following is a non-exhaustive list of sectors where construction workers will "typically" provide services essential to continued critical infrastructure viability:

1. **Public Works and Infrastructure Support.** Construction of critical and strategic infrastructure and workers such as plumbers, electricians, exterminators, builders, contractors, HVAC technicians, landscapers, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, businesses, and buildings such as hospitals, senior living facilities, or any temporary construction required to support COVID-19 response.
2. **Commercial Facilities.** Workers who support the supply chain of building materials from production through application/installation, including cabinetry, fixtures, doors, cement, hardware, plumbing, electrical, heating/cooling, refrigeration, appliances, paint/coatings, and employees who provide services that enable repair materials and equipment for essential functions.
3. **Residential Facilities.** Workers performing housing construction-related activities to ensure additional units can be made available to combat the nation's existing housing supply shortage. This

applies to workers supporting the construction of housing, including supporting government functions related to the building and development process, such as inspections, permitting, and plan review services.

4. **Energy.** Workers supporting the construction and maintenance of renewable energy infrastructure (including, but not limited to wind, solar, biomass, hydrogen, ocean, geothermal, and/or hydroelectric) and fuels (including, but not limited to petroleum (crude oil), natural gas, propane, natural gas liquids, other liquid fuels, nuclear, and coal). This applies to new and existing construction.
5. **Communications.** Engineers, technicians, and associated personnel responsible for infrastructure construction and restoration, including contractors for construction and engineering of fiber optic cables, buried conduit, small cells, other wireless facilities, and other communications sector-related infrastructure. This includes construction of new facilities and deployment of new technology as these are required to address congestion or customer usage due to unprecedented use of remote services.
6. **Water and Wastewater.** Repairs to water and wastewater conveyances and equipment suppliers to water and wastewater systems and personnel protection.
7. **Supply Chain and COVID-19 Relief Efforts.** Workers supporting construction for essential products, services, and supply chain and COVID-19 relief efforts.

State and local orders follow CISA's updated guidelines with varying interpretations. Moreover, since the COVID-19 pandemic continues to be a fluid situation, guidelines and orders are subject to change at any moment. Thus, be sure to check the laws and guidance applicable to your particular project site and scope of work. If the rules are unclear or you have any questions, contact any member of Baker Donelson's [Construction Group](#) and visit the [Coronavirus \(COVID-19\): What You Need to Know information page](#) on our website.