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STEVEN N. DAVI

Executive Director

Email: sdavi@alliedbuilding.org

Mobile: 516.361.8211

BULLETIN

To: Membership of Allied Building Metal Industries, Inc.

From: Steven N. Davi

Date: April 16, 2020

Re: COVID-19: Essential Construction Update

As many of you know, on April 9, 2020, the Empire State Development (“ESD”) released [updated guidance](#) for determining whether a business or service is “essential” under recent executive orders issued by New York Governor Andrew Cuomo. These recent executive orders, all of which we have addressed in numerous previous advisories, require that only businesses and not-for-profit entities deemed “essential” (or that provide essential services) utilize an in-person workforce, and only to the extent necessary to support or provide such essential business or service. In addition, and as we have previously advised, these prior executive orders make clear all businesses – including those deemed essential – must utilize teleworking arrangements and maintain social distancing to the greatest extent possible.

The ESD’s updated guidance issued April 9 is notable because it has amended the definition of essential construction in place since March 27.

ESD March 27 Guidance

As you know, ESD guidance, as amended on March 27, significantly modified and [narrowed](#) the scope of construction considered “essential,” by separating construction work into four distinct categories, as follows:

- 1) “Essential construction” may continue to operate. This includes “roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters;” [provided](#), however, that social distancing can be maintained, “including for purposes of elevators/meals/entry and exit.”
- 2) “Emergency non-essential” construction also may continue to operate on an interim basis “until it is safe to shut the site.” This includes “projects necessary to protect health and safety of [building] occupants, or ... [that must be] continue[d] ... if it would be unsafe to allow [the project] to remain undone[,] until it is safe to shut the site;” [provided](#), however, that social distancing can be maintained, “including for purposes of elevators/meals/entry and exit.”
- 3) Construction work involving “a single worker, who is the sole employee/worker on a job site,” also may continue to operate.

- 4) Non-emergency non-essential construction may not continue to operate and must be shut down.

ESD April 9 Updated Guidance

The ESD's updated guidance dated April 9 leaves largely undisturbed the definitions of "non-essential construction" and "emergency non-essential construction" contained in its March 27 guidance.

The ESD April 9 updated guidance is notable, however, for its amendment to the definition of "essential construction." The ESD April 9 updated guidance modifies the definition of "essential construction" as follows:

"Essential construction may proceed, to the extent that:

- the construction is for, or your business supports, roads, bridges, transit facilities, utilities, hospitals or healthcare facilities, homeless shelters, or public or private schools;
- the construction is for affordable housing, as defined as construction work where either (i) a minimum of 20% of the residential units are or will be deemed affordable and are or will be subject to a regulatory agreement and/or a declaration from a local, state, or federal government agency or (ii) where the project is being undertaken by, or on behalf of, a public housing authority;
- the construction is necessary to protect the health and safety of occupants of a structure;
- the construction is necessary to continue a project if allowing the project to remain undone would be unsafe, provided that the construction must be shut down when it is safe to do so;
- the construction is for projects in the energy industry in accordance with Question No. 14 in the ESD updated [Q&As](#);
- the construction is for existing (i.e. currently underway) projects of an essential business; or
- the construction work is being completed by a single worker who is the sole employee/worker on the job site.

"At every site, it is required that the personnel working on the site maintain an appropriate social distance, including for purposes of elevators/meals/entry and exits. Sites that cannot maintain appropriate social distancing, as well as cleaning/disinfecting protocols must close. Enforcement will be conducted by state and local governments, including fines up to \$10,000 per violation.

"Construction may continue solely with respect to those employees that must be present at the business location/construction site in support of essential business activities. No other employees/personnel shall be permitted to work in-person at

the business location/construction site. Any other business activities being completed that are not essential are still subject to the restrictions provided by Executive Order 202.

“As noted above, local governments, including municipalities and school districts, are allowed to continue construction projects at this time as government entities are exempt from these essential business restrictions. However, to the greatest extent possible, local governments should postpone any non-essential projects and only proceed with essential projects when they can implement appropriate social distancing and cleaning/disinfecting protocols. Essential projects should be considered those that have a nexus to health and safety of the building occupants or to support the broader essential services that are required to fulfill the critical operations of government or the emergency response to the COVID-19 public health crisis.”

ESD April 9 Updated Q&As

The ESD also amplified its accompanying [Q&As](#) to add a question and answer no. 14 designed to address how a business that supports construction and other projects within the energy industry may determine which of these projects are considered essential.

Moreover, according to the updated Q&As accompanying the updated guidance, not all employees are permitted to work at an essential business location. Rather, only those that are needed to provide the essential product or service are permitted to be present. On the other hand, non-essential businesses that are a vendor, supplier, or provider of other support to an essential business are permitted to have an in-person workforce to the extent necessary to support the essential business, subject to the usual teleworking and social distancing requirements. The Q&As also clarify that non-essential businesses are able to send a single person into the office to perform certain tasks, such as picking up mail, so long as they will not be in contact with others.

As was the case before, employers, with certain exceptions, may request a designation as an essential business on the state’s website.

DOB April 14 Updated Guidance

On Tuesday, April 14, the New York City Department of Buildings followed suit, issuing its own updated guidance interpreting and incorporating the ESD’s April 7 updated guidance, as well as a related Service Notice and FAQs. See attached. These documents are also available on the [COVID-19 Response Page](#) of the Department’s web site.

Highlights from these documents worth noting include the following:

- Approvals for emergency and essential work will now include a Certificate of Authorization. To limit the possibility of disruption of this work, the Department is asking that these certificates be posted at job sites.
- Essential Construction Requests for the following scopes of work will now be subject to professional-certification and Department audit:
 - Work necessary to protect the safety of occupants

- Work in support of an Essential Business
- Work limited to a single worker
- A maximum of two appeals can be requested on a disapproved Essential Construction Request.
- The Department will be establishing a process for stakeholders to notify the Department electronically when work to make a site safe has concluded.

We will continue to monitor developments with regard to all of the above and provide periodic updates as circumstances warrant. In the meantime, please do not hesitate to contact me directly if you have any questions or wish to discuss.

Thank you.