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# LEGALLY SPEAKING

by Bob Dunlevey and Nadia A. Lampton  
Taft/Law



## OHIO'S STAY AT HOME ORDER: CONSTRUCTION DEEMED "ESSENTIAL INFRASTRUCTURE"

On Sunday, March 22, 2020, Governor Mike DeWine announced that Ohio would follow in the footsteps of several other states by issuing a statewide "stay at home" mandate (the "Order"), effective as of 11:59 p.m. on Monday, March 23, 2020. The Order requires that all Ohio residents stay at home or at their place of residence unless they must leave to engage in "Essential Activities," "Essential Governmental Functions," or to participate in "Essential Businesses and Operations." The Order also mandates that all non-essential business immediately cease operations.

For construction contractors, the question of the day has become, "What constitutes an essential business?" According to the Order, essential businesses are, among others, those engaged in healthcare, public health operations, essential governmental functions, essential infrastructure, and critical trades. These critical trades that are exempt from the Order to stay home include:

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**Building and Construction Tradesmen and Tradeswomen, and other trades** including but not limited to plumbers, electricians, exterminators, cleaning and janitorial staff for commercial and governmental properties, security staff, **operating engineers**, HVAC, painting, moving and relocation services, 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).

In addition to the types of work implicated under “critical trades,” the Order also provides for an exemption for businesses that provide essential products and services related to essential infrastructure, which includes:

**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** . . . (Emphasis added).

Essential infrastructure seems to include a broad swath of residential and commercial construction work, especially considering that the Order permits a very broad interpretation in order to avoid negative impact to essential businesses. Moreover, the language highlighted above concerning “essential infrastructure” and “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.

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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 recommend that construction companies look carefully at their various jobsites to determine whether any of the exemptions listed above apply. If a company performs work for a resident or an essential business, the company must consider whether the work is necessary to maintain the safety, sanitation, or essential operation of the business or residence. For example, if a residential customer wants to install a new air conditioner because the current unit is declining and will not be adequate to survive the upcoming summer, this service is not necessary for the safety, sanitation, or essential operation of the residence, and therefore, would not be permitted. However, if the same HVAC company received a residential request to service a troubled furnace in mid-March (when the temperatures remain in the thirties), this request would be necessary for safety and the essential operation of the residence and would be permitted.

In sum, it seems to us that most construction activity of which we are aware would arguably fall under one of the areas discussed above. However, certain services may not be permitted under the Order. If unsure about whether a particular project falls within an exemption, companies should consult labor counsel to determine whether the work is permissible under the Order.

While the above guidance will assist employers in dealing with these complicated issues, please be reminded that this is an overview of developing legal issues and is not intended to be and should not be construed as legal advice. We will remain open and available during the shutdown in order to provide legal services.

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For more specific information, contact Bob Dunlevey, Board Certified Specialist in Labor and Employment Law, at (937) 641-1743 or Nadia A. Lampton at (937) 641-2055.