

CONSTRUCTION BUSINESSES CAN CONTINUE TO OPERATE UNDER OHIO'S STAY AT HOME ORDER

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Ohio construction businesses can continue to operate under Ohio's Stay at Home Order issued Sunday, March 21, 2020 (the "Order").

Generally, the Order provides that all individuals living in Ohio must stay at home except as allowed in the Order, and that all businesses and operations in the State – except "Essential Businesses and Operations" as defined in the Order – are required to cease all activities within the State. Only "Minimum Basic Operations," as defined in the Order, are permitted for businesses that are not defined as Essential Businesses and Operations.

Here is the reasoning that supports the opinion that construction businesses can continue to operate – and are not limited to just "Minimum Basic Operations" – under the Order.

- The Order provides that individuals may leave home to provide any services or perform any work necessary for "Essential Infrastructure," which under the Order 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)." The Order says that Essential Infrastructure must be broadly interpreted.
- The Order defines Essential Businesses and Operations to include Essential Infrastructure. That means that construction is included among the Essential Businesses and Operations that are permitted to continue operating under the Order.
- Additionally, the Order lists many specific types of construction-related businesses that also are considered Essential Businesses and Operations. Those include the following:
 - "Critical trades," which are broadly defined and include, but are not limited to, "Building and Construction Tradesmen and Tradeswomen" and service providers who provide services necessary to maintaining the safety, sanitation, and essential operation of Essential Businesses and Operations, among other things.
 - "Supplies for Essential Businesses and Operations," meaning businesses that sell, manufacture, or supply other Essential Businesses and Operations – i.e., construction – with the support or materials necessary to operate, including many categories of construction materials (electrical, plumbing, and heating material, hardware, paint, etc.).
 - "Manufacture, distribution, and supply chain for critical products and industries," which includes manufacturing companies, distributors, and supply chain companies producing

and supplying essential products and services in and for industries, including construction and several others.

- The Order also incorporates and defines as Essential Businesses and Operations all the categories of workers identified by the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency in its “Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response,” issued March 19, 2020. That Memorandum is attached to the Order and may provide even more rationale for certain construction businesses to continue to operate.

“Critical labor union functions” are also included as specifically listed Essential Businesses and Operations.

In the unlikely event that an Ohio construction-related business truly does not fall within one of the categories mentioned above, that business would be limited to only Minimum Basic Operations. According to the Order, those include minimum necessary activities to maintain the value of the business’s inventory, preserve the condition of the business’s physical plant and equipment, ensure security, process payroll and employee benefits, or related functions, and minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.

Although construction businesses can remain open, they will need to comply with restrictions that are included in the Order. And there are many.

For example, in Section 18 of the Order, several of the social distancing recommendations that have become all-to-familiar to us have now become requirements under the Order. It also includes a call for even Essential Businesses and Operations to take measures such as allowing as many employees as possible to work from home dealing with sick employees in specific ways as they look to return to work, and several others. These and several other measures listed in the Order sound aspirational in nature – such as ensuring that “sick leave policies are up to date, flexible, and non-punitive to allow sick employees to stay home” to care for themselves and their family members – but arguably operate as requirements, if the Order is strictly interpreted. (It is logical to ask whether the Director of the Ohio Department of Health can regulate employers’ sick leave policies and other such matters.) There are many questions surrounding interpretation and enforcement of these measures, and those questions remain to be answered. For now, businesses should take reasonable efforts to comply with Section 18 to the extent feasible, especially any items that read more like a requirement (i.e., “must”) than a recommendation (i.e., “should”).

As to travel, “Essential Travel” under the Order includes within its definition any travel related to the provision of or access to Essential Businesses and Operations. Under the same analysis outlined above regarding construction being part of Essential Infrastructure and, therefore, Essential Businesses and Operations, the employees of construction businesses should be permitted to travel for their work. Employers will want to consider providing employees with notes to carry with them in case they are questioned for being on the road going to/from work or during the workday. It would be better to do that in advance instead of risking an interruption in operations due to employees not having a note or other verification with them if stopped. Additionally, employees should be cautioned that travel outside of the scope of their work could and probably will be considered prohibited travel under the Order.

The full Order can be found [HERE](#). This is certainly not an all-inclusive analysis of all the issues raised by the 12-page order. Instead, it is intended to address the issue of whether construction businesses can continue to operate under the Order, and, if so, what their operations will need to look like under the Order. Please use your association's legal services plan, if applicable, or contact legal counsel for questions related to your business and compliance with the Order.