

Summary of Construction Activities that Qualify as “Essential Business Services” Under Washington’s Stay Home-Stay Safe Order

I. Introduction

Last night, Governor Inslee issued Proclamation 20-25, the Stay Home-Stay Healthy emergency order (“Stay Home Order”) for the state of Washington, which goes into effect at Midnight on Wednesday, March 25, 2020 for companies doing business in Washington.

Pursuant to the Stay Home Order, “all people in Washington State are immediately prohibited from leaving their home or place of residence except to conduct or participate in (1) essential activities, and/or (2) employment in providing essential business services[.]” The Stay Home Order further provides that “employment in essential business services means an **essential employee performing work for an essential business as identified in the ‘Essential Critical Infrastructure Workers’ list, OR carrying out minimum basic operations** (as defined in Section 3(d) of this Order) for a non-essential business.” For construction industry companies, this raises three critical questions: (1) who is an essential employee; (2) what is an essential business; and (3) what are minimum basic operations? According to the Seattle Times, the Governor’s office has indicated “a range of activities will be shut down, such as construction on buildings not considered essential. That includes Key Arena, which is undergoing a renovation for professional hockey, and commercial office towers going up around Amazon’s campus in South Lake Union.”¹ This should be kept in mind when reviewing this analysis.

II. What Construction Activities Constitute “Essential Business Services”?

In conjunction with the Stay Home Order, Governor Inslee issued a lengthy list of “Essential Critical Infrastructure Workers”, identifying thirteen (13) different industry sectors and numerous sub-categories within those sectors. Construction is expressly referenced as a sub-category in the “Other Community-Based Government Operations and Essential Functions” industry sector:

- Construction workers who support the construction, operation, inspection, and maintenance of construction sites and construction projects (including housing construction) *for all essential facilities, services and projects included in this document*, and for residential construction related to emergency repairs and projects that ensure structural integrity.
- Workers such as plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintain the safety, sanitation, and essential operation of construction sites and construction projects (including those that support such projects to ensure the availability of needed facilities, transportation, energy and

¹<https://www.seattletimes.com/seattle-news/inslee-to-hold-televised-address-monday-evening-to-announce-enhanced-strategies-on-covid-19/> (Updated as of 1:34 a.m. on March 24, 2020).

communications, and support to ensure the effective removal, storage and disposal of solid waste and hazardous waste).

Thus, any construction project will generally fall into one of the following four categories: (1) construction activities that involve other essential facilities, services, and projects identified in the Governor's list of "Essential Critical Infrastructure Workers" (2) residential emergency repairs, (3) construction to ensure structural integrity, and (4) everything else. There is also a potential separate category for housing construction, which the Governor will need to clarify prior to midnight on Wednesday, March 25.

A. Construction Involving Facilities, Services and Projects Identified in the Essential Critical Infrastructure Workers List

As mentioned above there are thirteen (13) industry sectors: and hundreds of sub-categories of essential workers and businesses. The complete list can be viewed through the following link. <https://assets.documentcloud.org/documents/6817901/FINAL-WA-Essential-Critical-Infrastructure.pdf>. The enumerated industry sectors, are as follows, along with a few examples of projects that fall within these categories:

1. Healthcare/Public Health⁷
 - a. Healthcare facilities (hospitals, care clinics, and other direct health services), research facilities, medical manufacturing and suppliers.
2. Emergency Services (and Public Works)
 - a. Fire stations, police stations, private emergency response providers.
 - b. Maintenance of bridges, water and sewer systems, construction of "strategic" infrastructure.
 - c. Plumbing, electrical, safety and sanitation services for residences.
3. Food and Agriculture
 - a. Grocery stores, convenience stores, food processing facilities, food and beverage distribution facilities,
 - b. Timber and paper manufacturing and distribution facilities.
 - c. Chemical, vaccine, medicine producers.
4. Energy
 - a. Facilities and infrastructure involved in the generation, transmission and distribution of electric power, petroleum, natural gas, and propane.
 - b. Wastewater and water treatment facilities and conveyance systems.
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6. Transportation and Logistics
 - a. Airports, roadways, bridges, tunnels, ferry terminals, ports.
 - b. Railroad, light rail, and other public transit facilities and infrastructure.
7. Communications and Information Technology
 - a. Radio, television, newspapers and media facilities, including printing and distribution facilities.
 - b. Construction of telecommunication, cable, and internet infrastructure.
8. Other Community-Based Government Operations and Essential Functions
 - a. Commercial Retail Stores, that supply essential sectors, including convenience stores, auto repair, hardware and home improvement, and home appliance retailers.
 - b. Legal, accounting and tax preparation firms that assist in compliance with legally mandated activities and critical sector services.
 - c. Laundromats and laundry services
9. Critical Manufacturing
 - a. Manufacturers of materials and products needed for medical supplies, transportation equipment, food and agriculture, and emergency services.
10. Hazardous Materials
 - a. Nuclear facilities, medical waste treatment facilities, testing laboratories,
11. Financial Services
 - a. Banks, credit unions, insurance services.
12. Chemical
 - a. Chemical manufacturing plants, distribution facilities, testing laboratories.
 - b. Producers of cleaning, medical, PPE and protective packaging equipment and materials.
13. Defense Industrial Base
 - a. Companies in the following fields that support the US Military
 - i. Aerospace, mechanical and software engineering, manufacturing/production, IT support, security, intelligence support, aircraft and weapon system maintenance.
 - b. Contractors, subcontractors, and suppliers of the Department of Defense.

These are just a few examples of the many categories enumerated in the list of Essential Critical Infrastructure Workers. If you are performing construction work on a public project that may fall within one of the thirteen (13) industry sectors, you should submit an RFI to the Owner seeking clarification as to whether the Owner believes the project qualifies as an essential business activity under the Stay Home Order. Additionally, if there is any doubt as to whether your project is an “essential business activity”, **you should seek clarification, certification of your status, or petition to be added to the list**, by visiting the Washington State Business Re-Entry Registration website at: <https://mil.wa.gov/business-re-entry-registration>.

In addition, for Public Works projects, the Public Owner should be able to answer a simple RFI confirming the Essential Critical Infrastructure nature of the project and be able to provide substantive assurance of the same. To the extent that the Public Owner is unable to identify the project as Essential Critical Infrastructure, you and the Public Owner may seek clarification and/or certification of the project status through the Washington State Business Re-Entry Registration website at <https://mil.wa.gov/business-re-entry-registration>.

B. Structurally Unsound Projects

If your project is currently under construction and cannot be made structurally sound or safe from a life safety standpoint by Wednesday, March 25 at midnight, you should contact the structural engineer and develop a plan for the tasks to be completed to make the project safe and structurally sound. The plan should be in writing and out of an abundance of caution you should also consider submitting a request for certification of your status through the Washington State Business Re-Entry Registration at: <https://mil.wa.gov/business-re-entry-registration>.

C. Housing Construction

While at first glance, the list Essential Critical Infrastructure Workers appears to expressly include “housing construction,” as written, and upon further evaluation, it actually seems to be limited to “housing construction for all essential facilities, services and projects included in this document.” However, this appears to be a drafting error, as the qualifying language makes little sense when read in conjunction with the list of Essential Critical Infrastructure Workers. While we anticipate that the Governor will clarify this issue prior to midnight on March 25, companies involved with housing construction projects should similarly seek clarification and certification of their status via the Washington State Business Re-Entry Registration website at: <https://mil.wa.gov/business-re-entry-registration>.

What does seem clear is that emergency repair work that keeps existing residential housing habitable can continue.

D. Projects Involving Non-Essential Business Activities: Minimum Basic Operations

For all other projects that do not fit into the above two categories (along with residential emergency repairs), we recommend that you seek clarification (or petition the state to be added to the list) through the Washington State Business Re-Entry Registration website at: <https://mil.wa.gov/business-re-entry-registration>.

The purpose of clarification is two-fold: First, as portions of the order are unclear, clarification will help you to confirm whether closure of the project is required and allow you to speak with authority to both lower tier and higher tier entities. Second, confirmation that the project is not essential and must be closed will allow you to properly invoke relief or assert claims under the delay, force majeure or emergency provisions of your contracts.

Per the Stay Home Order, non-essential businesses may only perform “minimum basic operations” which are defined as the minimum activities necessary to maintain the value of the business’ inventory, preserve the condition of the business’ physical plant and equipment, ensure security, process payroll and employee benefits, facilitate employees of the business being able to continue to work remotely from their residences, and related functions.” Thus, permitted activities for non-essential construction will be limited to securing the project site. You should continue to maintain site security through the duration of the Stay Home Order.

III. Implementation of a Social Distancing and Sanitation Plan

Importantly, compliance with the Stay Home Order requires more than just falling within the definition of an “essential business.” The Stay Home Order also requires essential businesses to implement social distancing and sanitation measures established by the United States Department of Labor’s guidance on COVID-19 **AND** Washington State Department of Health’s (WSDOH) workplace recommendations:

b. **Essential businesses** are prohibited from operating under this Proclamation unless they establish and implement social distancing and sanitation measures established by the United States Department of Labor’s Guidance on Preparing Workplaces for COVID-19 at <https://www.osha.gov/Publications/OSHA3990.pdf> and the Washington State Department of Health Workplace and Employer Resources & Recommendations at:

<https://www.doh.wa.gov/Coronavirus/workplace>.

This is no simple task, as the referenced OSHA document is quite lengthy and contains three different job risk classifications with differing recommendations. Likewise, the WSDOH workplace recommendation includes maintaining six (6) feet of distance between employees. This may render performance of certain construction activities impossible or impractical, but **be aware that proceeding without a social distancing and sanitation plan after March 25, 2020 is a gross misdemeanor, punishable by up to 364 days in jail and/or a fine of up to \$5,000.**² Therefore, companies performing projects that qualify as essential business services should provide notice to the owner of potential delays and impacts associated with the implementation of a social distancing and safety plan and ensure that such a plan is in place (and followed) before proceeding with construction.

If you have any questions regarding the effect of the Stay Home Order on your business, please feel free to contact Elliot Copenhaver at copenhaver@carneylaw.com or 206-353-5801.

² RCW § 9A.20.021(2).