

## Ohio's "Stay at Home" Order regarding construction- issues and interpretations may cause confusion



Peter D. Welin, John Gambill | Tuesday, March 24, 2020

On March 22, 2020, the Ohio Department of Health issued its Director's "Stay at Home" Order which requires all Ohioans to stay in their homes to prevent further spread of COVID-19. The Order went into effect at 11:59 p.m. on March 23, 2020. However, the Order provides for certain exemptions to the general rule, including individuals that need to leave their residence to provide any services or perform any work related to "Essential Infrastructure."

For now, Construction is generally exempted as a part of "Essential Infrastructure" under the new order and contractors can, and in a lot of cases must, continue to perform their work on projects in the State of Ohio. However, there are interpretations of the Order surfacing as the industry adjusts to our new reality. Three of these interpretations include:

1. **The Social Distancing Requirements are not mandatory.** There have been certain interpretations of the Order circulating around the industry that argue that subcontractors and other workers are not permitted to work on job sites where they cannot adhere to the Social Distancing Requirements set forth in the Order (*i.e.*, they cannot maintain six feet of separation between workers). While contractors should "at all times and as much as reasonably possible comply with Social Distancing Requirements," the requirements are not mandatory—they are guidelines that should be followed "as much as reasonably possible."

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- All construction projects are exempt.** Some industry participants have suggested that only those projects that are “necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses and Operations” may continue to move forward. This interpretation of the Order contradicts the exemption of “construction” in general. Moreover, the particular qualifying language that some people are attempting to use to limit construction’s general exemption only applies to the last portion of ¶12(k) of the order—the “other service providers” not specifically listed in that section concerning “Critical trades.” As it stands today, all construction is exempt from the Order.
- The current COVID-19 epidemic may not automatically qualify as a force majeure event.** In reality, Ohio’s “stay at home” order actually makes it more difficult to argue that the circumstances surrounding the current coronavirus pandemic trigger force majeure clauses UNLESS the specific force majeure clause contains specific language referencing “epidemics” as a triggering event. By broadly exempting all construction, the Order eliminates another potential triggering event commonly listed in force majeure provisions—government action. Some of the industry-standard contracts specifically list “epidemics” as a triggering event, but others, including the AIA A201-2017 only states that delays outside the control of the Contractor qualifies as a force majeure event. Ultimately, whether the COVID-19 epidemic qualifies as a “force majeure event” depends on the language of your contract.

Although presently exempted, contractors must take reasonable efforts as much as reasonably possible to adhere to the social distancing guidelines provided by the State of Ohio in its order. These include: designating 6-foot distances; providing hand sanitizer and sanitizing products; providing separate hours for vulnerable populations (not likely to impact contractors); and providing online and remote access for those employees that can work remotely.

Despite the construction industry’s being exempted under Ohio’s “Stay at Home” order, the government’s reaction to the Coronavirus epidemic evolves daily and the current order could later be changed to require contractors to shut down job sites. Similarly, construction projects can move forward in Illinois, Indiana, and Kentucky under the current executive orders in those states. But, these “stay at home” or “shelter in place” orders vary from state to state. For example, Pennsylvania and Michigan have issued orders halting all non-emergency construction. Contractors need to be aware of the current status of government action in all of the states where they have projects to make sure they are complying with the varying orders from each of those states.

Our experienced construction attorneys have been working around the clock to assist our clients on Coronavirus related issues. Please contact one of the individuals listed below if your construction company is experiencing delays and/or impact on your projects and we will gladly assist you with the problems you face. Our goal is to help our clients navigate these unprecedented times in a manner that helps reduce the overall impact to their projects and the company as a whole.

A full copy of the Director’s Stay at Home Order is available [here](#).



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