

“Essential” Versus “Non-Essential” Under New York, New Jersey, and Federal Law

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Over the past few days, the federal government and the governors of hard-hit states such as New York and New Jersey have issued guidance and executive orders listing the industries and business functions that are “essential” for purposes of remaining open and operational during the COVID-19 emergency.

Is your New York or New Jersey business “essential”? Can you remain open at this time?

The following provides a breakdown of the rules that New York and New Jersey have put in place and are now in effect, as well as an overview of the federal guidance.

NEW YORK

On March 22, 2020, the Governor of New York issued Executive Order 202.8, amending his earlier Executive Order 202.6 and directing that:

- All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work-from-home procedures that they can safely utilize.
- Each employer shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m.
- Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions.
- An entity providing essential services or functions whether to an essential business or a non-essential business shall not be subjected to the in-person work restriction, but may operate at the level necessary to provide such service or function..

In conjunction, the Empire State Development Corporation issued guidance on businesses considered “essential,” which is largely consistent with federal guidance (discussed below). For purposes of the Executive Order, “essential business” means:

Health care operations

- Research and laboratory services
- Hospitals
- Walk-in-care health facilities
- Emergency veterinary and livestock services
- Elder care
- Medical wholesale and distribution
- Home health care workers or aides for the elderly
- Doctor and emergency dental
- Nursing homes, residential health care facilities, or congregate care facilities
- Medical suppliers and equipment manufacturers and providers

Infrastructure

- Utilities including power generation, fuel supply, and transmission
- Public water and wastewater
- Telecommunications and data centers
- Airports/airlines
- Transportation infrastructure such as bus, rail, or for-hire vehicles and garages
- Hotels and other places of accommodation

Manufacturing

- Food processing and manufacturing agents, including all foods and beverages
- Chemicals
- Medical equipment/instruments
- Pharmaceuticals
- Sanitary products
- Telecommunications

- Microelectronics/semiconductors
- Agriculture/farms
- Household paper products

Retail

- Grocery stores, including all food and beverage stores
- Pharmacies
- Convenience stores
- Farmers markets
- Gas stations
- Restaurants/bars (but only for takeout/delivery)
- Hardware and building material stores

Services

- Trash and recycling collection, processing, and disposal
- Mail and shipping services
- Laundromats
- Building cleaning and maintenance
- Child care services
- Auto repair
- Warehouse/distribution and fulfillment
- Funeral homes, crematoriums, and cemeteries
- Storage for essential businesses
- Animal shelters

News media

Financial Institutions

- Banks
- Insurance
- Payroll
- Accounting
- Services related to financial markets

Providers of basic necessities to economically disadvantaged populations

- Homeless shelters and congregate care facilities
- Food banks
- Human services providers whose function includes the direct care of patients in state-licensed or funded voluntary programs; the care, protection, custody, and oversight of individuals both in the community and in state-licensed residential facilities; those operating community shelters and other critical human services agencies providing direct care or support

Construction

- Skilled trade workers such as electricians and plumbers
- Other related construction firms and professionals for essential infrastructure or emergency repair and safety purposes

Defense

- Defense and national security-related operations supporting the U.S. government or a contractor to the U.S. government

Services necessary to maintain the safety, sanitation, and essential operations of residences or other essential businesses

- Law enforcement
- Fire prevention and response
- Building code enforcement
- Security
- Emergency management and response
- Building cleaners or janitors
- General maintenance whether employed by the entity directly or a vendor
- Automotive repair
- Disinfection

Vendors that provide essential services or products, including logistics and technology support, child care, and other services

- Logistics
- Technology support for online services
- Child care programs and services
- Government-owned or -leased buildings
- Essential government services

For businesses that offer both essential and non-essential services, supplies, or support, only those lines and/or business operations that are necessary to support the essential services, supplies, or support are exempt from the restrictions.

NEW JERSEY

On March 21, 2020, the Governor of New Jersey issued **Executive Order 107**, containing standards for the operation of "essential" businesses. The key points of the order are as follows:

- **Medical facilities** may continue to operate. Medical facilities include any facility where a sick or injured person is given care or treatment, such as:
 - Doctor's offices
 - Hospitals
 - Dentist offices
 - Long-term care facilities
 - Other medical offices
- **Certain retail businesses** are deemed essential and are thereby exempt from the order's mandate that storefront operations are to cease:
 - Grocery stores, farmers markets, and farms that sell directly to customers, and other food stores, including retailers that offer a varied assortment

of foods comparable to what exists at a grocery store

- Pharmacies and medical marijuana dispensaries
- Medical supply stores
- Gas stations
- Convenience stores
- Ancillary stores within health care facilities
- Hardware and home improvement stores
- Vehicle rental locations
- Banks and other financial institutions with retail functions
- Laundromats and dry-cleaning services
- Stores that principally sell supplies for children under 5 years of age
- Pet stores and veterinary service locations
- Car dealerships, but only for auto maintenance and repair, and auto mechanics
- Printing and office supply shops
- Mail and delivery stores
- Liquor stores
- Executive Order 107 further mandates that non-essential retail businesses must close storefront and/or brick-and-mortar premises operations while the order is in effect.
- Where possible and practicable, **all businesses or nonprofits must accommodate their workforce for telework or work-from-home arrangements.** To the extent employees are needed on-site, you should operate with the minimal number of on-site employees possible to ensure critical operations can continue. Examples of such employees are cashiers or store clerks, construction workers, utility workers, repair workers, warehouse workers, lab researchers, IT maintenance workers, janitorial and custodial staff, and certain administrative staff.
- **Manufacturing, industrial, logistics, ports, heavy construction, shipping, food production, food delivery, and other commercial operations may continue operating,** but as explained above, they should limit staff on-site to the minimal number to ensure that essential operations can continue.
- Employees reporting to work are permitted to travel to and from their place of business; however, businesses are encouraged to give such employees a letter indicating that they work in an industry permitted to continue operations.

- Executive Order 107 also mandates that all recreational and entertainment businesses must close to the public, including casinos; racetracks; gyms and fitness centers; entertainment centers such as movie theaters, performing arts centers, concert venues, and nightclubs; indoor portions of retail shopping malls; and places of public amusement.
- Businesses may continue any online operations.
- Personal-care businesses must also close, including barbershops, hair salons, spas, nail and eyelash salons, tattoo parlors, massage parlors, tanning salons, and public and private social clubs.
- Bars and restaurants must be closed for on-premises service and may provide takeout and delivery service only. Drive-throughs, takeout, delivery offered by restaurants, and other delivery services can continue to operate.

The Governor also signed Executive Order No. 108, which invalidates any county or municipal restriction that in any way will or might conflict with any of the provisions of Executive Order 107.

FEDERAL GUIDANCE

Last week, the United States Department of Homeland Security's (DHS's) Cybersecurity and Infrastructure Security Agency (CISA) issued *Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response*. The intent of the guidance is to help the private sector, as well as state and local government partners, identify the industry sectors and related workers necessary to maintain essential services while responding to this health emergency. The DHS/CISA guidance lists various categories of "essential" sectors and workers that should be permitted to remain operational. These include:

- Health care/public health
- Financial services
- Communications and information technology
- Energy
- Law enforcement, public safety, and first responders
- Food and agriculture
- Water and wastewater
- Transportation and logistics
- Manufacturing
- Chemical
- Hazardous materials
- Defense

- Public works
- Certain community-based government operations

Certain key principles underscore DHS/CISA's guidance. Among them is that to the extent possible, workers should be encouraged to work remotely. However, when continuous remote work is not possible, businesses should enlist strategies (e.g., social distancing) to reduce the likelihood of spreading the disease. DHS/CISA notes that this list is advisory in nature.

While DHS/CISA's guidance is not, nor should it be considered, a federal directive or standard in and of itself, New York and New Jersey have issued directives that to varying degrees incorporate this federal guidance.

Seeking Additional Guidance

While federal guidance and related New York and New Jersey directives are informative, and must be considered carefully when making key decisions affecting operations, not every business will have a clear answer to the question of whether or not it is essential. To that end, **New York** and **New Jersey** have offered resources for businesses and their counsel to contact and make the case if they believe a business is "essential," but may not be clearly included in the guidance and rules. Since violators risk criminal penalties, care should be taken to check the rules and seek advance guidance when necessary and appropriate.

To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).

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