

Governor Murphy Issues Executive Order 122 Shutting Down Non-Essential Construction Projects in New Jersey

Client Alert

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In an intensifying effort to combat the impacts of COVID-19 as it spreads in New Jersey, Governor Phil Murphy issued Executive Order 122 on April 8, 2020, shutting down the "physical operations" of all "non-essential" construction in the state as of Friday, April 10, 2020 at 8:00pm.

According to Executive Order 122, exceptions or "essential" construction include:

1. Projects necessary for the delivery of health care services, including but not limited to hospitals, other health care facilities and pharmaceutical manufacturing facilities;
2. Transportation projects, including roads, bridges and mass transit facilities or physical infrastructure, including work done at airports and seaports;
3. Utility projects, including those necessary for energy and electricity production and transmission, and any decommissioning of facilities used for electricity generation;
4. Residential projects that are exclusively designated as affordable housing;
5. Projects involving pre-K-12 schools, including but not limited to projects in Schools Development Authority districts, and projects involving higher education facilities;
6. Projects already underway involving individual single-family homes, or an individual apartment unit where an individual already resides, with a construction crew of 5 or fewer individuals. This includes additions to single-family homes such as solar panels;
7. Projects already underway involving a residential unit for which a tenant or buyer has already entered into a legally binding agreement to occupy the unit by a certain date, and construction is necessary to ensure the unit's availability by that date;
8. Projects involving facilities at which any one or more of the following takes place: the manufacture, distribution, storage, or servicing of goods or products that are sold by online retail businesses or

essential retail businesses, as defined by Executive Order No. 107 (2020) and subsequent Administrative Orders adopted pursuant to that Order;

9. Projects involving data centers or facilities that are critical to a business's ability to function;
10. Projects necessary for the delivery of essential social services, including homeless shelters;
11. Any project necessary to support law enforcement agencies or first responder units in their response to the COVID-19 emergency;
12. Any project that is ordered or contracted for by Federal, State, county, or municipal government, or any project that must be completed to meet a deadline established by the Federal government;
13. Any work on a non-essential construction project that is required to physically secure the site of the project, ensure the structural integrity of any buildings on the site, abate any hazards that would exist on the site if the construction were to remain in its current condition, remediate a site, or otherwise ensure that the site and any buildings therein are appropriately protected and safe during the suspension of the project; and
14. Any emergency repairs necessary to ensure the health and safety of residents.

Executive Order 122 notes that "construction sites are inherently difficult environments for social distancing to occur, as they frequently require large numbers of individuals to touch the same surfaces, gather closely together in area such as service elevators, and use common facilities such as portable restrooms" Yet, it acknowledges that "some construction is needed to expand our health care system's capacity, address immediate infrastructure deficiencies, and prevent future disruptions in various areas such as education, housing, and transportation, which are themselves tied to the public health and safety"

The Executive Order attempts to balance the competing interests of worker health and safety with the need for "essential" construction by requiring essential construction projects to comply with certain minimum requirements:

- Prohibit non-essential visitors from entering the worksite;
- Limit worksite meetings to groups of fewer than ten individuals;
- Require individuals to maintain six feet or more distance between them wherever possible;
- Stagger work start and stop times to limit the number of persons at the worksite;
- Stagger lunch breaks;
- Restrict the number of individuals who can access restrooms and breakrooms concurrently;
- Require workers and visitors to wear cloth face coverings with limited exceptions;
- Require infection control practices, including proper hand washing and coughing and sneezing etiquette;
- Limit sharing of tools, equipment, and machinery;
- Provide hand sanitizer and sanitizing wipes; and
- Require frequent sanitization of high-touch areas like restrooms, breakrooms, equipment, and machinery.

Executive Order 122 attempts to meet the practical reality of construction in New Jersey as many projects struggle in the face of COVID-19. While construction workers have continued to show up for work on New

Jersey projects before this latest Executive Order, sailing has been anything but smooth, Projects throughout New Jersey have been facing labor shortages as a result of skittish workers concerned that they cannot effectively maintain the requisite social distancing as they carry out their work. Laborers are worried about their personal health, as well as the health of their family members. As a result, some workers have simply stopped showing up to jobsites. Other construction workers have shown up but have been quietly disgruntled, demoralized or just plain fearful as they attempt to comply with social distancing requirements at a cramped construction site.

While Executive Order 122 does not change the reality for "essential" construction workers, it does offer several prophylactic measures beyond merely complying with the requisite social distancing and CDC guidelines.

With Executive Order 122, New Jersey now joins New York, which late last month narrowed the definition of "essential" construction projects. New York Governor Andrew Cuomo shuttered most New York projects following concerns about the spread of COVID-19 throughout in that state. The Empire State Development Corporation (ESD) issued guidelines following Governor Cuomo's issuance of revised Executive Order 202.6. The ESD noted that all non-essential construction must shut down except emergency construction, which can continue. According to the ESD, "essential" construction in New York includes roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters.

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