

Updated Resources for the Construction Industry In the age of COVID-19

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By
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This is an update to the March 25th version of this article. Some portions are the same and others have been updated as a result of the new stay-at-home orders.

The world is facing a unique and profound crisis as a result of the COVID-19 pandemic. The safety and wellbeing of all people is incredibly important at this time. Additionally, limiting the financial impact of this virus is important as well, but this is becoming more of a challenge as stay-at-home orders are being extended and becoming stricter. This brief article will summarize some of the challenges facing the construction industry, its customers, employees, and the general public, and provide links to resources that may be helpful at this time. The guidance, regulations, and best practices relating to the pandemic will continue to evolve and change, so please keep in mind that this information could be out of date soon.

Who can work?

Obviously, if a person is able to perform their job duties or continue their business from home, they are allowed to continue such work whether or not they are in an essential business or part of a Critical Infrastructure Sector (CIS). However, all work that can be performed from home should be performed at home for the safety of the individual and the public. For example, there will be certain employees (office employees, administrators, etc.) within essential businesses/CIS who can perform most, if not all, of their job functions from home, and they should do so.

The governor of California has issued [Executive Order N-33-20](#) to try to limit inconsistencies between localities in California. It is essentially a “stay-at-home” order for the entire State, with certain exceptions. It identifies the businesses that can continue to operate outside of residences as the [Critical Infrastructure Sector \(CIS\)](#) jobs identified by the federal government. California issued additional guidance on CIS work and workers, which can be found [here](#). Additional California Executive Orders are likely to be issued as this situation develops and most likely can be found [here](#).

Many local jurisdictions have issued their own orders, which you can see by clicking on the county name link. These include [San Francisco County](#), [Alameda County](#), and [Contra Costa County](#). The San Francisco Bay Area Counties issued updated orders on March 31, 2020. The individual county orders are essentially the same in the Bay Area. They all allow for specific Minimum Basic Operations of a business, even those that are non-essential, to continue if social distancing is followed. However, the updated orders of March 31, 2020, have further specified and limited activities exempt from the stay-at-home provision. Most construction activities are now subject to the stay-at-home order and cannot proceed if they cannot be performed from home.

These three local orders still approve of “plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the habitability, sanitation, and operation of residences and Essential Businesses, *but not for cosmetic or other purposes.*” [[Alameda County Public Health Order](#); Emphasis Added.] There is also an entire subsection on what construction activities may continue outside of the home, and they mostly relate to construction of new housing that includes low income units, construction of hospitals or other health care operations, projects necessary for essential infrastructure, securing other incomplete non-essential construction sites, and “construction or repair necessary to ensure that residences and buildings containing Essential Businesses are safe, sanitary, or habitable to the extent such construction or repair cannot reasonably be delayed.” [[Alameda County Public Health Order](#).] This is no longer vague for most construction businesses and restricts most construction activities.

The description of construction that falls under Essential Businesses is as follows (from the Alameda County Order March 31, 2020):

Construction, but only of the types listed in this subparagraph below:

1. Projects immediately necessary to the maintenance, operation, or repair of Essential Infrastructure;
2. Projects associated with Healthcare Operations, including creating or expanding Healthcare Operations, provided that such construction is directly related to the COVID-19 response;
3. Affordable housing that is or will be income-restricted, including multi-unit or mixed-use developments containing at least 10% income-restricted units;
4. Public works projects if specifically designated as an Essential Governmental Function by the lead governmental agency;
5. Shelters and temporary housing, but not including hotels or motels;
6. Projects immediately necessary to provide critical non-commercial services to individuals experiencing homelessness, elderly persons, persons who are economically disadvantaged, and persons with special needs;
7. Construction necessary to ensure that existing construction sites that must be shut down under this Order are left in a safe and secure manner, but only to the extent necessary to do so; and
8. Construction or repair necessary to ensure that residences and buildings containing Essential Businesses are safe, sanitary, or habitable to the extent such construction or repair cannot reasonably be delayed;

It is still a little unclear whether the State Executive Order is meant to preempt the local orders or complement them. Further guidance on this issue may develop. However, the cautious approach is to abide by the strictest orders. It is also possible that the CIS guidance from the federal government may change. I recommend continuing to monitor these issues if they are

applicable to your business. It would be a good idea to consult an attorney to discuss specific scenarios.

Safety Policies for Continuing Operations.

Under the new March 31, 2020, Bay Area Counties' Orders, most construction operations are now restricted. If an Essential Business is going to continue any operations that are not performed at home, they **must** post a "Social Distancing Protocol" at any facility frequented by the public or employees. This must be posted by end of day April 2, 2020. The form for the required "Social Distancing Protocol" is part of the county health orders (see links above to three of the counties). Clear personalized safety policies for all employees still working outside of the home in these Essential Businesses is a good idea. General advice on preventative measures is available at the [Center for Disease Control website](#). A notice to customers of an Essential Business about the protective measures the business is taking and to inform customers of any procedures they need to follow to ensure their own, and the employees' safety, is also a good idea. Customers will likely appreciate that the business is taking this public health risk seriously and is addressing it in a proactive and professional manner.

The National Association of the Remodeling Industry, Diablo Valley Chapter, in coordination with others, put together some forms with policies and procedures that could be used by businesses in the construction industry (a link will be added as soon as it becomes available). However, many construction businesses are restricted by the updated orders.

Again, you may want to consult an attorney about specific questions relating to policies and procedures for employees and customers.

Employment Matters.

Many businesses have been temporarily closed or are at least operating at much lower volume. Layoffs, reduced hours, and reduced compensation are all real concerns for employees and employers. I recommend consulting an attorney before making these types of changes. There is available public guidance on wage and hour issues relating to furloughs and hour reduction issues at the [U.S. Department of Labor website](#). There is also updated guidance on the Family Medical Leave Act (FMLA) [here](#). Lastly, the California Labor and Workforce Development Agency has California specific information and resources for employers and employees related to COVID-19 on its website [here](#). Employers should be aware that employees working remotely may incur reimbursable reasonable business expenses that they would not typically incur.

Miscellaneous Information.

Other issues that businesses may face include project/work stoppages, contract modifications, loans or deferments, or even cancellations or breaches of contract. The good news is that there is a lot of talk about coming together to help each other out in this unprecedented time. However, it is a good idea to try to get ahead of any problems by

addressing issues and modifications as early as possible and in writing. Again, it is a good idea to consult with a lawyer before making any major decisions that affect existing contracts.

The new aid package has been approved. Information on small business assistance can be found at the [U.S. Small Business Administration Coronavirus page](#), amongst many other places.

Essential Business Notice for Employees.

Again, construction operations are now severely limited under the updated orders. However, if there is an exemption that applies, employees that will continue to travel and work outside of their home could be stopped by authorities. It is not a bad idea to prepare them for this possibility. You could create your own form with your business logo that would provide a statement to authorities about the nature of the work and who they could contact to verify such information. With the updated orders, you should include a description of the project that shows the work is exempt from the stay-at-home order. Here is an example:

I [insert name of employee] am employed by [insert name of employer], and am engaged in a construction project [insert description of project and specifically why it is exempt] located in [insert City or area where the project is located], California. This work is exempt from shelter-in-place under the [insert applicable county] public health order and State Executive Order N-33-20.

You may contact [insert name of contact person] at [insert name of business] if you have any questions.

This article is meant to provide general information and links to resources. I hope it is informative, but it is not legal advice as each scenario is different and the information and regulations are changing constantly. This article will not be updated over time. Please consult with a lawyer if you have legal questions.

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