Update On ESD Guidance On Essential Businesses
(The following is a Question & Answer between President Wills and Mark Glaser from Greenberg Traurig)

President Wills: In light of the most recent updates to NYS Guidance of essential businesses, I wanted to clear a few things up for the membership.

Mark Glaser: On March 27, 2020 the Governor clarified his Executive Order (EO), but it still does not address some of your concerns. Here is the revised language:

Executive Order 202.6 is hereby modified to clarify that construction which was an essential service not subject to the in-person work restrictions is modified to provide only certain construction is considered exempt from the in-person restrictions as of March 28, 2020. Further, on and after March 27, 2020, Empire State Development Corporation is hereby authorized to determine which construction projects shall be essential and thereby exempt from the in-person workforce prohibition, contained in EO 202.6 and subsequent Executive Orders, which further reduced the workforce requirements. All continuing construction projects shall utilize best practices to avoid transmission of COVID-19.

So what does this mean to you? Going back to the EO that limited construction work, ESD’s interpretation is that the following are “emergencies”:

- emergency construction, (e.g. a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone until it is safe to shut the site);
- roads, bridges
- transit facilities
- utilities
- hospitals or health care facilities
- affordable housing and,
- homeless shelters

But, in addition to qualifying as construction work, some of your work is “essential infrastructure” work, which includes:

- public and private utilities including but not limited to power generation, fuel supply and transmission
- public water and wastewater

So, based on this, and recognizing that there will be gray areas, see my comments in blue below.

President Wills: We understand that non-essential construction has been shut down. At this point we are led to believe that non-essential would be anything that does not directly relate to health or safety of a homeowner or the driller. For instance, if a homeowner is out of water, a low flow condition, or a contaminated well, we have the ability to provide drilling services for them (provided we take precautions) correct?

Mark Glaser: Correct, but with respect to a “low flow condition” if it means that the home (or essential business) does not have a reliable supply of potable water, then yes. I can’t say where the line is, but if a customer calls and says that they don’t have water, or enough water to meet their household needs, you should be OK.

March 30, 2020
President Wills: If a homeowner is experiencing a pump problem, or a suspected well contamination issue, are we still allowed to provide service as required?

Mark Glaser: This is the same analysis: if the customer does not have a reliable source of potable water, it should be allowed.

President Wills: Many homeowners do not know the system details of their well, therefore two people are often required if the well depth is unknown. Certain conditions can pose a safety hazard without a second person. We have no way to predetermine these conditions. Are we allowed to send two employees as needed?

Mark Glaser: Yes, assuming that the work is otherwise permitted to be performed (e.g., an emergency) as long as the workers maintain appropriate safeguards and social distancing.

President Wills: No-Water calls are non-scheduled events, and we have no way to predict the scheduling. We cannot lay-off employees and then be expected to try and re-hire them every time the phone rings. Some days we have no calls, other days we have many. Are companies liable to have persons working for them in anticipation?

Mark Glaser: You are not required to lay off employees. You are certainly allowed to have employees in stand-by mode. You just can’t have them at the office. It is understood that you may end up paying people to just sit around. The federal acts provide some relief, including SBA loans that may be helpful (see below).

President Wills: If we have work to be performed at a public utility, but it is not an emergency, (regular maintenance or upgrades) are we allowed to perform the work or is that also emergency basis only?

Mark Glaser: If the public utility requires you to perform work, because public utility work is essential, this should be allowed. Please see the following excerpt from ESD’s FAQs.

- Question: What if my business is NOT an “Essential Business” listed on ESD’s guidance but provides services, materials, supplies or other support to an Essential Business?
- Answer: If your firm is a vendor, supplier or provides other support to an Essential Business that is required for the Essential Business’s operation, then your business is exempt from the employment reduction provisions contained in Executive Orders 202.8. However, only those employees necessary to support the Essential Business are exempt from the employment reduction requirements of Executive Orders 202.8 and your business is still required to utilize telecommuting or work from home procedures to the maximum extent possible.

President Wills: Many contractors are concerned about the longevity of the shutdown and the potential effect that it will have on their businesses. There are many rumors of programs available for payroll, low interest loans, etc. Do you have any insight on this?


March 30, 2020