

Most Commercial Construction Is No Longer “Essential” And Must Shut Down

Description

On March 31, 2020, Gov. Baker revised the list of “essential” services in Massachusetts. The revised list (“Exhibit A”) can be found at: <https://www.mass.gov/info-details/covid-19-essential-services>. The criteria for establishing “essential” has, indeed, been drastically narrowed from the Exhibit A published on March 23, 2020. Residential construction and certain public works are still, however, considered “essential” if they fit within certain criteria. Exhibit A contains 23 sections. It is imperative that you read Exhibit A in its entirety to determine whether your construction activity fits the criteria for essential under any of the sections of Exhibit A. If they do not, then your businesses must “close their physical workplaces and facilities to workers, customers and the public . . . until May 4.”

The criteria for determining “essential” for most construction activities is found in the section entitled “Construction-Related Activities.” Unless your construction activity either fits into one of the five categories under this section or falls within an exception found in one of the other sections, it is not “essential.” The five criteria for determining what is “essential” under Construction-Related Activities are as follows:

1. Workers such as plumbers, electricians, exterminators, builders, contractors, HVAC Technicians, landscapers, inspectors and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, businesses and buildings such as hospitals, health care facilities, senior living facilities, and any temporary construction required to support COVID-19 response.
2. Workers – including contracted vendors – who support the operation, inspection, maintenance and repair of essential public works facilities and operations, including roads and bridges, water and sewer, laboratories, fleet maintenance personnel, construction of critical or strategic infrastructure, traffic signal maintenance, emergency location services for buried utilities, and maintenance of digital systems infrastructure supporting public works operations. Critical or strategic infrastructure includes public works construction including construction of public schools, colleges and universities and construction of state facilities, including leased space, managed by the Division of Capital Asset Management; airport operations; water and sewer; gas, electrical, nuclear, oil refining and other critical energy services; roads and highways; public transportation; steam; solid waste and recycling collection and removal; and internet and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services).
3. Workers who support infrastructure, such as by road and line clearing and utility relocation, to ensure the availability of and access to needed facilities, transportation, energy and communications.
4. Workers performing housing construction related activities, including construction of mixed-use projects that include housing, to ensure additional units can be made available to combat the Commonwealth’s existing housing supply shortage.
5. Workers supporting the construction of housing, including those supporting government functions related to the building and development process, such as inspections, permitting and plan review services that can be modified to protect the public health, including allowing qualified private third-party inspections accountable to government agencies.

Even if your construction activities do not fall within one of the five categories found in the “Construction-Related Activities” section, they might, nonetheless, be considered “essential” under other sections of Exhibit A. For example, under “Commercial Facilities” section, workers are considered essential if they:

support the supply chain of building materials from production through application/installation, including

cabinetry, fixtures, doors, cement, hardware, plumbing, electrical, heating/cooling, refrigeration, appliances, paint/coating, and employees who provide services that enable repair materials and equipment for essential functions.

This criteria is somewhat unclear. We have sought clarification and will update as appropriate. Under the “Energy” section, construction is considered essential if the services relate to “energy sector fuels”. Construction is also considered “essential” for renewable energy infrastructure under the “Electricity Industry” section. The “Public Works” section adds a limited number of activities to those found under the “Construction-Related Activities” section. In short, you must carefully read each section to ascertain whether your construction activities are “essential.”

The firm’s [Construction Practice](#) is ready to advise and answer any questions you may have. For additional information and resources, visit the firm’s [COVID-19 Advisory Group](#) page.

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