

New York State Mandates That Nonessential Workers Work From Home, and All to Maintain Social Distance

Coronavirus Legal Advisory

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Governor Andrew M. Cuomo has issued a series of Executive Orders for New York state impacting businesses operating in the state. This alert analyzes two of these orders, Executive Order 202.8 (“202.8 Order”) and Executive Order 202.6 (“202.6 Order”), the latter of which describes what qualifies as an essential business.

Specifically, the 202.8 Order requires that all nonessential business employers “reduce the in-person workforce at any work locations by 100%.” To accomplish this, the 202.8 Order directs employees of these businesses to telecommute or work from home. Any business that violates the 202.8 Order may be subject to civil fines and/or civil enforcement proceedings by the attorney general under Section 12 of the Public Health Law. The 202.8 Order became effective on March 22, 2020, at 8:00 PM and is currently set to expire on April 19, 2020 (unless otherwise extended). Below is an outline of the provisions of the 202.8 Order.

For Nonessential Businesses

- All nonessential businesses and not-for-profit entities in the state shall implement, to the maximum extent possible, telecommuting or work-from-home procedures.
- All such employers must reduce their in-person workforce at any work locations by 100%.
- Violations can subject a business to penalties of between \$2,000 and \$10,000. The sliding scale of fines above \$2,000 is set to expire on April 1, 2020, and after April 1, 2020, the penalty will be \$2,000 for each violation.

For Essential Businesses

- Any essential business or entity providing essential services or functions shall not be subject to the in-person work restrictions on nonessential businesses.
- Any entity providing essential functions or services to an essential business or nonessential business is not subject to the in-person work restriction.

What Qualifies as an Essential Business?

The 202.6 Order directed the Empire State Development Corporation (ESDC) to issue regulatory guidance concerning essential businesses and empowered the ESDC to determine

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whether businesses are essential if requested to do so by application. The ESDC has published the required guidance (“Guidance”), which, “while not legally binding,” provides further information to assist businesses in complying with the 202.6 Order. The Guidance can be found [here](#).

The Guidance describes essential businesses and services, such as the following:

- Essential healthcare operations, including research and laboratory services.
- Essential infrastructure, including utilities and telecommunications, airports, and transportation infrastructure.
- Essential manufacturing, such as food processing and pharmaceuticals.
- Essential retail, such as grocery stores and pharmacies.
- Essential services, including trash collection, mail, shipping services, and news media.
- Banks, insurance companies and services related to the financial markets.
- Providers of basic necessities to economically disadvantaged populations; construction services; and vendors of essential services necessary to maintain the safety, sanitation, and essential operations of residences or essential businesses.
- Defense and national security-related operations supporting the US government.
- Vendors providing essential services or products, including logistics and technology support, child care, and services needed to ensure the continuing operation of government agencies and to provide for the health, safety, and welfare of the public.

The Guidance also states that for businesses or entities operating or providing essential and nonessential services, supplies, or support, the exemption from the workforce reduction restrictions applies only to those businesses’ lines or operations necessary to provide the essential services, supplies, or support.

Businesses Seeking Designation as an Essential Function/Business

If a business feels it is providing essential services, but it is **not** specifically listed as such in either the Orders or the Guidance, it can then, by application, request to be deemed an essential business by submitting the request found [here](#). The ESDC has further advised that:

- Any business that has only a single occupant/employee (e.g., a gas station) is exempt and does not need to submit a request to be designated as an essential business.
- Businesses, including but not limited to bars, restaurants, gyms, movie theaters, casinos, auditoriums, concert venues, conference centers, houses of worship, sporting event venues, and physical fitness centers must remain closed and are **not** eligible for designation as an essential business for purposes of the Guidance.

The ESDC has published a helpful Frequently Asked Questions guide, which is available [here](#).

Additional Regulations Businesses Should Be Aware Of

In addition to the Orders and Guidance discussed above, New York state has issued requirements that can be found in the various Executive Orders specifically issued in response to the COVID-19 pandemic (which are available [here](#)). Some of the most relevant regulations are described below:

- The regulatory requirement that shareholder meetings be held in a physical location is suspended. (See Executive Order 202.8)
- Enforcement of evictions and foreclosures for residential and commercial properties is prohibited for a period of 90 days. (See Executive Order 202.8)
- The tax commissioner’s authority to abate late filing and payment penalties has been expanded to allow abatement of interest for a period of 60 days for taxpayers who are

required to file returns and remit sales and use taxes by March 20, 2020, and for the sales tax quarterly period that ended February 29, 2020. (See Executive Order 202.8)

- It is deemed an unsafe and unsound business practice for any bank subject to the jurisdiction of the Department of Financial Services not to grant a forbearance to any person or business that has a financial hardship as a result of the COVID-19 pandemic. (See Executive Order 202.9, which is discussed in greater detail on the McCarter & English Coronavirus Resource Center [here](#).)
- Under reasonable and prudent circumstances, any licensed or regulated entity must provide any New York state consumer facing a financial hardship due to the COVID-19 pandemic an opportunity for a forbearance of payments for a mortgage, and such application shall be granted in all reasonable and prudent circumstances for the period of the emergency. (See Executive Order 202.9, which is discussed in greater detail on the McCarter & English Coronavirus Resource Center [here](#).)
- All statutes of limitations and statutory and court filing deadlines have been tolled through April 19, 2020. (See Executive Order 202.8, which is discussed in greater detail on the McCarter & English Coronavirus Resource Center [here](#).)

The McCarter COVID-19 Task Force is diligently monitoring the evolving requirements being implemented by various levels of government in response to the pandemic. The integrated team of lawyers are covering every subject matter relevant to businesses, including employment, government contracting, real estate, insurance recovery, litigation, supply chain and logistics, trade, and immigration. Navigating compliance with the new COVID-19 regulations can be daunting, be it determining whether your business qualifies as an essential business, whether an exemption request is warranted, or what instructions should be given to employees. Please feel free to email our [Task Force](#) with any questions.