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New York State on “PAUSE”: Governor Orders All Non-Essential Entities to Reduce In-Person Workforces by 100%

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On March 20, 2020, New York State Governor Andrew Cuomo implemented his “New York State on PAUSE (Policies Assure Uniform Safety for Everyone)” initiative by signing Executive Order 202.8 (the “PAUSE Order”). The PAUSE Order includes a number of restrictions upon the daily lives of New Yorkers statewide, including strict limitations on outdoor activities and the use of public transportation, and implements numerous temporary modifications of New York laws and regulations. However, the most significant aspect of the PAUSE Order is the mandate that all non-essential businesses and not-for-profit entities close or reduce their in-person workforces by 100% by 8:00 p.m. on March 22, 2020.

The PAUSE Order further amends Executive Order 202.6, dated March 18, 2020, which, as we discussed in a prior alert [<https://www.nixonpeabody.com/en/ideas/articles/2020/03/19/nys-in-person-workforce-reduction>], ordered all businesses and not-for-profit entities to reduce their in-person workforces by 50%, and then 75%, and to utilize telecommuting and work-from-home arrangements “to the maximum extent possible.” As with Executive Order 202.6, the PAUSE Order provides that “[a]ny essential business or entity providing essential services or functions whether to an essential business or a non-essential business” is not subject to the in-person workforce restriction, but rather “may operate at the level necessary to provide such service or function.” Similarly, under the PAUSE Order, non-essential businesses and not-for-profit entities may continue to operate via telecommuting and other work-from-home arrangements.

In connection with Executive Order 202.6, Governor Cuomo and the New York State Department of Economic Development d/b/a Empire State Development (“ESD”) published guidance identifying essential businesses which are not subject to the in-person workforce restrictions, which is available at <https://esd.ny.gov/guidance-executive-order-2026>. This guidance has not been modified by the PAUSE Order. The guidance identifies the following types of businesses and industries as “essential”:

- 1. Essential health care operations including**
 - research and laboratory services

- hospitals
- walk-in-care health facilities
- emergency veterinary and livestock services
- elder care
- medical wholesale and distribution
- home health care workers or aides for the elderly
- doctor and emergency dental
- nursing homes, or residential health care facilities or congregate care facilities
- medical supplies and equipment manufacturers and providers

2. Essential infrastructure including

- utilities including power generation, fuel supply and transmission
- public water and wastewater
- telecommunications and data centers
- airports/airlines
- transportation infrastructure such as bus, rail, or for-hire vehicles, garages
- hotels, and places of accommodation

3. Essential manufacturing including

- food processing, manufacturing agents, including all foods and beverages
- chemicals
- medical equipment/instruments
- pharmaceuticals
- sanitary products
- telecommunications
- microelectronics/semi-conductor
- agriculture/farms
- household paper products

4. Essential retail including

- grocery stores including all food and beverage stores
- pharmacies
- convenience stores
- farmer's markets
- gas stations
- restaurants/bars (but only for take-out/delivery)
- hardware and building material stores

5. Essential services including

- trash and recycling collection, processing and disposal
- mail and shipping services

- laundromats
- building cleaning and maintenance
- child care services
- auto repair
- warehouse/distribution and fulfillment
- funeral homes, crematoriums and cemeteries
- storage for essential businesses
- animal shelters

6. News media

7. Financial Institutions including

- banks
- insurance
- payroll
- accounting
- services related to financial markets

8. Providers of basic necessities to economically disadvantaged populations including

- homeless shelters and congregate care facilities
- food banks
- human services providers whose function includes the direct care of patients in state-licensed or funded voluntary programs; the care, protection, custody and oversight of individuals both in the community and in state-licensed residential facilities; those operating community shelters and other critical human services agencies providing direct care or support

9. Construction including

- skilled trades such as electricians, plumbers
- other related construction firms and professionals for essential infrastructure or for emergency repair and safety purposes

10. Defense

- defense and national security-related operations supporting the U.S. Government or a contractor to the U.S. Government

11. Essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses including

- law enforcement
- fire prevention and response
- building code enforcement
- security
- emergency management and response
- building cleaners or janitors

- general maintenance whether employed by the entity directly or a vendor
- automotive repair
- disinfection

12. Vendors that provide essential services or products, including logistics and technology support, child care and services:

- logistics
- technology support for online services
- child care programs and services
- government owned or leased buildings
- essential government services

A business which is not within the above categories but which believes that it is essential or that it is an entity providing essential services or functions, may request designation as an essential business from ESD. However, the guidance notes that “[a]ny business that only has a single occupant/employee (i.e. gas station) has been deemed exempt and need not submit a request to be designated as an essential business.” Further, those businesses which were previously ordered to close on March 15, 2020 pursuant to the restrictions on any gathering with 50 or more participants (such as gyms, movie theaters and casinos) “remain closed and are not eligible for designation as an essential business for purposes of this guidance.”

The PAUSE Order is the first in this series of Executive Orders to specify a penalty for noncompliance, stating it will be punishable as a violation of an order pursuant to section 12 of the Public Health Law, which provides for civil monetary penalties, including escalating penalties for repeat violations.

Nixon Peabody will continue monitoring Governor Cuomo’s actions and orders in response to COVID-19, in addition to monitoring developments on a nationwide basis.

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