

April 21, 2020 | Number 2636

## “New York State on PAUSE” Update: What Businesses Need to Know

***New York State has issued guidance regarding businesses exempt from the order, but has yet to clarify its regulations’ interplay with local orders and federal guidance.***

As part of the State of New York’s continued response to the outbreak of COVID-19, on March 20, 2020, Governor Andrew Cuomo expanded upon Executive Order 202.6 and issued [Executive Order 202.8](#), known as the “New York State on PAUSE” Order (the Order), pursuant to which all nonessential businesses in the State of New York are ordered to reduce their in-person workforce by 100%, excluding industries and personnel previously identified as “Essential Business” in 12 categories (though such exempt entities are required to facilitate six feet of distance between employees and provide face masks to any employee who interacts with the public). The Order took effect March 22, 2020, at 8:00 p.m. ET. Through multiple subsequent executive orders, the Order has been extended through May 15, 2020, and the Guidance (as defined below) has been amended.

Latham & Watkins understands that the Order will have significant implications for businesses located across the United States and within the State of New York in particular, and is hopeful that the information contained in this *Client Alert* will provide some guidance to businesses and entities affected by the Order. Importantly, the situation remains fluid, and government agencies have not yet provided substantive guidance as to the specific contours of the Order. Accordingly, while Latham believes that the information provided below may be useful to obtain a general understanding of the Order, the firm recommends that businesses discuss their particular circumstances with legal counsel in order to determine the best path forward. Latham continues to monitor the rapidly developing situation.

The Order requires all businesses and nonprofit entities in the state to reduce their in-person workforce and to use any telecommuting or work-from-home procedures to the maximum extent possible, unless such businesses and entities are deemed essential (see below). Guidance on the New York Coronavirus website states that all nonessential gatherings of individuals of any size for any reason are banned, and that individuals may only leave their residences for good reason (such as groceries, medicine, and exercise), and mandates that all individuals maintain at least six feet of distance from other individuals when outside their residences, with stricter restrictions placed on individuals over the age of 70 and those with underlying illnesses (exercise is limited to solitary activity, and there are requirements to wear masks when in the company of others, as well as to pre-screen all visitors by taking their temperature). For more information, see the [New York Coronavirus website](#).

## New York State Essential Businesses or Entities

Following Governor Cuomo's issuance of [Executive Order 202.6](#) on March 18, 2020, the state issued Guidance on Executive Order 202.6 (the Guidance) identifying 12 categories of "Essential Business" that are exempt from the business restrictions placed by the state in the most recent Order. This Guidance has been amended through several subsequent executive orders, and such amendments are reflected in the below list. The exempt businesses include:

- **Essential health care operations:** including research and laboratory services; hospitals; walk-in-care health facilities; emergency veterinary and livestock medical services; senior and elder care; medical wholesale and distribution; home healthcare workers or aides for the elderly; doctor and emergency dentist offices; nursing homes, residential healthcare facilities or congregate care facilities; medical supplies and equipment providers; licensed mental health providers; licensed substance abuse treatment providers; medical billing support personnel; emergency chiropractic services; physical therapy, prescribed by a medical professional; and occupational therapy, prescribed by a medical professional
- **Essential infrastructure:** including public and private utilities (power generation, fuel supply, and transmission); public water and wastewater; telecommunications and data centers; airports/airlines; commercial shipping vessels, ports and seaports; transportation infrastructure such as bus, rail, for-hire vehicles, and garages; and hotels and other places of accommodation
- **Essential manufacturing:** including food processing and manufacturing, including all foods and beverages; chemicals; medical equipment/instruments; pharmaceuticals; sanitary products; telecommunications; microelectronics/semi-conductor; food-producing agriculture/farms; household paper products; defense industry and transportation infrastructure; automobiles; and any parts or components necessary for essential products that are referenced within the Guidance
- **Essential retail:** including grocery stores and all food and beverage stores; pharmacies; convenience stores; farmers' markets; gas stations; restaurants/bars (but only for take-out/delivery); hardware, appliance, and building material stores; pet food; telecommunications to service existing customers and accounts; and delivery for orders placed remotely via phone or online at non-essential retail establishments (provided, however, that only one employee is physically present at the business location to fulfill orders)
- **Essential services:** including trash and recycling collection, processing, and disposal; mail and shipping services; laundromats and other clothing/fabric cleaning services; building cleaning and maintenance; child care services; bicycle repair; auto repair; automotive sales conducted remotely or electronically, with in-person vehicle return and delivery by appointment only; warehouse/distribution and fulfillment; funeral homes, crematoriums and cemeteries; storage for essential businesses and maintenance for the infrastructure of such storage facilities or to maintain or safeguard materials or product therein; animal shelters or animal care including dog walking and animal boarding; landscaping, but only for maintenance or pest control and not cosmetic purposes; designing, printing, publishing, and signage companies to the extent that they support essential businesses or services; and remote instruction or streaming of classes from public or private schools or health/fitness centers (provided, however, that no in-person congregate classes are permitted)

- **News media**
- **Financial Institutions:** including banks and lending institutions; insurance; payroll; accounting; and services related to financial markets
- **Providers of basic necessities to economically disadvantaged populations:** including homeless shelters and congregate care facilities; food banks; and 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
- **Essential construction:** including construction of, and business supporting the construction of, roads, bridges, transit facilities, utilities, hospitals or healthcare facilities, homeless shelters, or public or private schools; affordable housing, as defined as construction work where either (i) a minimum of 20% of the residential units are or will be deemed affordable and are or will be subject to a regulatory agreement and/or a declaration from a local, state, or federal government agency or (ii) where the project is being undertaken by, or on behalf of, a public housing authority; construction necessary to protect the health and safety of its occupants or to continue a project if allowing the project to remain undone would be unsafe (provided that the construction must be shut down when it is safe to do so); projects in the energy industry; existing (*i.e.*, currently underway) projects of an essential business; and work that is being completed by a single worker who is the sole employee/worker on the job site
- **Defense:** including defense and national security-related operations supporting the US government or a contractor to the US government
- **Essential services necessary to maintain safety, sanitation, and essential operations of residence or other essential businesses:** including law enforcement, including corrections and community supervision; fire prevention and response; building code enforcement; security; emergency management and response, EMS and 911 dispatch; building cleaners or janitors; general maintenance whether employed by the entity directly or a vendor; automotive repair; disinfection; and residential moving services
- **Vendors that provide essential services or products, including logistics and technology support and childcare services:** including logistics; technology support for online services; childcare programs and services; government owned or leased buildings; essential government services; and any personnel necessary for online or distance learning or classes delivered via remote means
- **Recreation:** including parks and other open public spaces, except playgrounds and other areas of congregation where social distancing cannot be abided; essential services, such as grounds keeping to avoid hazardous conditions and security, provided by employees, contractors, or vendors for private recreation facilities otherwise closed by the Order; and marinas, boatyards, and recreational marine manufacturers, for ongoing marina operations and boat repair/maintenance, where such facilities adhere to strict social distancing and sanitization protocols (use of such sites for the purposes of personal use or operation of boats or other watercraft is permissible, provided that no establishment offers chartered watercraft services or rentals)

- **Professional services with extensive restrictions:** including lawyers (who may continue to perform all work necessary for any service so long as it is performed remotely and any in-person work presence shall be limited to work only in support of essential businesses or services); and real estate services (which shall be conducted remotely for all transactions, including but not limited to title searches, appraisals, permitting, inspections, and the recordation, legal, financial, and other services necessary to complete a transfer of real property; provided, however, that any services and parts therein may be conducted in person only to the extent legally necessary and in accordance with appropriate social distancing and cleaning/disinfecting protocols)

The Guidance provides for any business not identified in the above categories to request a designation as essential [here](#). Any business ordered to close pursuant to the restrictions placed on large gatherings or event venues; dine-in or on-premise restaurant or bar services; facilities authorized to conduct video lottery gaming or casino gaming; any gyms, fitness centers, or exercise classes (except remote or streaming services); movie theaters; indoor common portions of retail shopping malls; places of public amusement; and barbershops, hair salons; tattoo or piercing parlors, and related personal care services are not eligible for designation as an essential business.

## 16 Federal Infrastructure Sectors

The Order does not reference the critical infrastructure sectors identified in the March 19, 2020, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (the Memo) issued by the US Department of Homeland Security's Cybersecurity & Infrastructure Security Agency (CISA). While it is not fully clear how the Order and the Memo are consistent or inconsistent with one another, if New York State is silent on interaction with federal guidance, Latham would assume that any client that qualifies as federal critical infrastructure pursuant to the Memo could continue to operate even if it would be unclear under the Order.

Currently, the 16 critical sectors identified by CISA include:

Chemical	Dams	Financial Services	Information Technology
Commercial Facilities	Defense Industrial Base	Food and Agriculture	Nuclear Reactors, Materials, and Waste
Communications	Emergency Services	Government Facilities	Transportation Systems
Critical Manufacturing	Energy	Healthcare and Public Health	Water and Wastewater Systems

Source: <https://www.cisa.gov/critical-infrastructure-sectors>

The Memo provides a list of sectors and identifies groups of essential critical infrastructure workers, which "are intended to be overly inclusive" and include, amongst others, the following:

- **Critical Manufacturing:** including workers necessary for the manufacturing of materials and products needed for supply chains, transportation, energy, communications, food and agriculture, and chemical manufacturing
- **Healthcare/Public Health:** including manufacturers, technicians, logistics, and warehouse operators; and distributors of medical equipment pharmaceuticals, blood and blood products, vaccines, testing materials, and laboratory supplies

- **Chemical:** including workers supporting the chemical and industrial gas supply chains, workers at chemical manufacturing plants, workers in laboratories, workers at distribution facilities, and workers who transport basic raw chemical materials to the producers of industrial and consumer goods
- **Energy:** including workers who maintain, ensure, or restore the generation, transmission, and distribution of electric power, including call centers, utility workers, reliability engineers, and fleet maintenance technicians
- **Communications:** including manufacturers and distributors of communication equipment, in addition to call centers, wireline and wireless providers, cable service providers, satellite operations, undersea cable landing stations, and Internet Exchange Points
- **Information Technology:** including workers supporting the provision of essential global, national, and local infrastructure for computing services, including cloud computing services, business infrastructure, web-based services, and critical manufacturing, and manufacturers and supply chain vendors that provide hardware and software as well as information technology equipment (to include microelectronics and semiconductors) for critical infrastructure
- **Financial Services:** including workers who are needed to process and maintain systems for processing financial transactions and workers who are needed to provide consumer access to banking and lending services and to move currency and payments

## Impact on Local County and Municipal Orders

It is not clear whether the Order is meant to replace similar orders recently issued by local county and municipal health departments. However, pursuant to the New York Executive Law, the governor has the authority to suspend or modify any statute, local law, ordinance, order, rule or regulation, or parts thereof, of any agency during a state disaster emergency, which was declared by the governor on March 7, 2020, and remains in effect. The governor has exercised this authority in previous executive orders issued in response to COVID-19. At this time, Latham recommends, to the extent possible, that businesses and entities comply with the terms of both the statewide Order and any local order that may apply to them. To the extent the terms of the statewide Order and any local order conflict, Latham recommends businesses and entities comply with the terms of the more restrictive order that applies to them.

## Enforcement

Any business violating the Order will be subject to enforcement as if it were in violation of Section 12 of the New York Public Health Law, and will be subject to mandatory closure and a civil fine of up to US\$2,000 (or up to US\$5,000 for subsequent violations and up to US\$10,000 for violations that result in serious physical harm).

## Additional Information

See the following links for additional information:

- <https://coronavirus.health.ny.gov/home>
- [Guidance for Determining Whether a Business Enterprise is “Essential” under the “New York State on PAUSE” Executive Order](#)
- [Request for Designation as an Essential Business](#)

- [The Full Executive Order 202.8 is available here \(pdf\)](#)
- [The Full Executive Order 202.6 is available here \(pdf\)](#)
- <https://www.cisa.gov/critical-infrastructure-sectors>
- <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>
- <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>

---

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**[Kevin M. McDonough](#)**

kevin.mcdonough@lw.com  
+1.212.906.1246  
New York

**[Gwyn Williams](#)**

gwyn.williams@lw.com  
+1.617.880.4512  
Boston

**[Jeffrey J. Bashara](#)**

jeffrey.bashara@lw.com  
+1.617.880.4633  
Boston

**[MacLane Winsor Taggart](#)**

maclane.taggart@lw.com  
+1.212.906.1884  
New York

**You Might Also Be Interested In**

[California's Stay-at-Home Order: What Businesses Need to Know](#)

[US Emergency Paid Leave Act: New Relief to Mitigate COVID-19's Economic Impact](#)

---

*Client Alert* is published by Latham & Watkins as a news reporting service to clients and other friends.

The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at [www.lw.com](http://www.lw.com). If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <https://www.sites.lwcommunicate.com/5/178/forms-english/subscribe.asp> to subscribe to the firm's global client mailings program.