

Stradley Ronon Stevens & Young, LLP  
2005 Market Street  
Suite 2600  
Philadelphia, PA 19103-7018  
215.564.8000 Telephone  
215.564.8120 Facsimile  
www.stradley.com

With other offices in:  
Washington, D.C.  
New York  
New Jersey  
Illinois  
Delaware



www.meritas.org

*Our firm is a member of Meritas.  
With 189 top-ranking law firms  
spanning 97 countries, Meritas  
delivers exceptional legal knowledge,  
personal attention and proven  
value to clients worldwide.*

Information contained in this publication should not be construed as legal advice or opinion or as a substitute for the advice of counsel. The enclosed materials may have been abridged from other sources. They are provided for educational and informational purposes for the use of clients and others who may be interested in the subject matter.

Copyright © 2020  
Stradley Ronon Stevens & Young, LLP  
All rights reserved.

Please click [here](#) to visit our **COVID-19 RESOURCE CENTER**

## Construction in the Age of Coronavirus

Though the COVID-19 pandemic is still in its early stages, it is already having an effect on construction projects. Some jobs have already been put on hold. Others are at risk for the same fate, as owners and the government seek ways to slow the progression of the disease. As this pandemic continues spreading across the nation, more severe consequences may be anticipated.

In Pennsylvania, Governor Wolf has indicated that construction activities may continue (at least for now). Nevertheless, projects may face labor shortages as workers stay home due to illness or to avoid exposure in the first place. Vendors may have a difficult time meeting orders. Nervous owners may allow projects to continue but impose workforce restrictions such as manpower reductions to impose distancing or temperature monitoring for access to projects that involve occupied spaces. The full effects of this devastating virus will not be known for some time.

Contractors, owners and performing sureties would be wise to get on the front end of these issues. Consider whether your contract documents contain any of the following provisions and, if so, what notice, pre-conditions and documentation requirements are imposed:

- Force majeure
- Suspension for convenience
- Delay damages
- Acceleration
- Impossibility/frustration of purpose

Many standard form construction contracts contain provisions that are not labeled as “force majeure” provisions but which nevertheless excuse non-performance for act “beyond the contractor’s control.” And even if the contract documents do not address this situation created by the coronavirus, the common law has doctrines that might apply. For example, the law in most states will recognize impracticability as a defense in certain circumstances. Most standard form construction contracts have provisions addressing the ability of the owner to suspend work and what recourse the contractor may have in that option were to be invoked. For example, most AIA forms address when a contractor may terminate in the face of a government-imposed shutdown.

Review your contract documents now to identify every provision that might be invoked by you or against you. Take special note of the notice requirements. If you haven’t done so yet, begin a dialogue with the other project participants: the owner, the general contractor, the subs and the suppliers. It would be good if a plan could be developed cooperatively. And if that won’t happen, it would be good to know that too. Keep detailed records regarding any delays and costs you may be experiencing. Whether these are recoverable is a different issue, but such documentation may be crucial to advance or defend a claim. If you are about to enter a new contract, consider whether its provisions need to be modified to reflect the new reality the virus has created.

*(continued)*

March 20, 2020

## Update 1

Last evening Pennsylvania's Governor [ordered](#) all non-life sustaining "places of business" to close. Construction activities are now included on the list of activities that may not "continue physical operations." Enforcement begins just past midnight on Friday.

There is a process for seeking clarifications (e-mail [RA-dcedcs@pa.gov](mailto:RA-dcedcs@pa.gov)) and waivers and exemptions (e-mail [RA-dcexemption@pa.gov](mailto:RA-dcexemption@pa.gov)).

March 21, 2020

## Update 2

Late on Friday, the Pennsylvania Gov. Tom Wolf slightly revised the list of what is and what is not life-sustaining. The list is linked [here](#). The list indicates that construction activities are excepted if they involve emergency repairs or construction on health care facilities. Enforcement has now been pushed back until Monday morning at 8:00 a.m. A [waiver](#) form has now been provided on the website. The [FAQ](#) section offers the following guidance relating to construction:

- 13. Construction was classified as non-life-sustaining. Should all construction companies suspend in-person physical operations? Can a construction company continue projects related to road repair, road completion, flood mitigation, etc.?**

Construction activities not clearly authorized under the OHS Guidance should suspend general operations, but may maintain specific limited operations necessary to ensure compliance with federal, state, or local regulatory requirements.

March 22, 2020

## Update 3

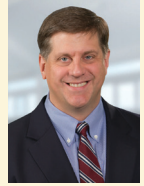
Today, Mayor Kenney signed an emergency order prohibiting non-essential business operations within the City of Philadelphia. You can read the full order [here](#).

**Essential activities are described as including construction for:**

- i. All medical, pharmaceutical, and healthcare facilities (including non-emergency construction)
- ii. All emergency projects or other projects deemed essential by the City of Philadelphia, while

## ABOUT THE AUTHOR

Patrick Kingsley is Chair of the Construction Practice Group and has tried more than 40 cases involving diverse legal claims and fact patterns in several different forums across the country. As a trial lawyer, he has tried both jury and non-jury cases and has represented clients in arbitrations, mediations and hearings before administrative law judges and referees. Patrick is a fellow of the American College of Civil Trial Mediators. He has also served as an adjunct professor at Rutgers University School of Law, instructing students on trial advocacy skills.



Patrick R. Kingsley  
215.564.8029  
[pkingsley@stradley.com](mailto:pkingsley@stradley.com)

appropriately balancing public safety, to ensure the continued delivery of critical infrastructure services and functions by the City ("City Essential Infrastructure Projects")

- iii. Emergency repairs for "Residential Building Construction," "Nonresidential Building Construction," "Utility Subsystem Construction" (related buildings and structures for utilities, i.e., water, sewer, petroleum, gas, power, and communication, and all structures that are integral parts of utility systems); "Highway, Street, and Bridge Construction," "Other Heavy and Civil Engineering Construction," "Other Heavy and Civil Engineering Construction," "Foundation, Structure, and Building Exterior Contractors," "Building Equipment Contractors," "Building Finishing Contractors," and "Other Specialty Trade Contractors"

**As it relates to non-essential construction, the order provides:**

Operators of non-life sustaining, non-emergency construction in Philadelphia shall have until 5:00 p.m. on March 27, 2020, to make construction sites safe and secure. Contractors are directed to take proper measures to protect adjacent properties, remove or fasten items that are or could become loose, secure sites against trespass, and complete work necessary to protect and ensure the structural integrity of buildings under construction. Occupied residential properties must be left in safe and habitable condition.

*(continued)*

March 24, 2020

## Update 4

Today, Pennsylvania Gov. Tom Wolf updated the list of business types that may continue physical operations, in relation to the Governor's Executive Order mandating closures for COVID-19 mitigation. You can access the full list [here](#).

---

---

March 30, 2020

## Update 5

On Friday, March 27, 2020, Pennsylvania issued some new guidance regarding construction activities in Pennsylvania.

The Governor amended the frequently asked questions ([FAQ](#)) regarding which businesses may continue physical operations. In relation to residential construction, the new guidance offers the following:

### **May I complete my customer's residential construction project?**

Residential construction projects that are substantially complete may continue to completion. For all other residential construction projects limited activities may continue to the extent necessary to stabilize the site, temporarily prevent weather damage, or make emergency repairs only. Projects that are "substantially completed" are those projects that have been issued a final occupancy permit. No new residential construction projects may be started.

The Pennsylvania Department of Education announced new guidance relating to school construction. The [DOE website](#) now offers the following guidance:

### **Must school districts seek a formal exemption through the Pennsylvania Department of Community and Economic Development (DCED) to continue construction projects?**

School districts should use best judgment in exercising their authority to continue critical construction projects and should not seek a formal exemption through DCED. All school district construction decisions should appropriately balance public health and safety while ensuring the continued safety of critical infrastructure. School districts and the contractors must ensure continuance of and compliance with the social distancing and other mitigation measures to protect employees and the public, including virtual and telework operations (e.g. work from home) as the primary option when available, as have been or will be established by the Department of Health and the Centers for Disease Control and Prevention. In-person work is only to be performed on the most limited basis possible.

April 2, 2020

## Update 6

Yesterday, April 1, 2020, Pennsylvania Gov. Tom Wolf updated the [list](#) of business types that may continue physical operations and amended the frequently asked questions ([FAQ](#)).

The new guidance includes a deadline for exemption applications for businesses that are not life-sustaining but want permission to keep operating. The process for such applications will close this Friday, April 3, 2020.

Please do not hesitate to call on the Stradley Ronon Construction Group for assistance regarding these issues.

---

---

April 9, 2020

## Update 7

New Jersey Gov. Phil Murphy recently signed an [executive order](#) announcing that the physical operations of construction projects must cease by Friday, April 10, 2020, at 8 pm with the exception of the following "essential" construction activities:

- Construction related to health care facilities and pharmaceutical manufacturing facilities,
- Transportation infrastructure including airports and seaports,
- Public utility work,
- Affordable housing construction,
- Schools,
- Completion of residential construction involving homes or occupied apartments (construction crew sizes must be five or fewer),
- Completion of unoccupied residential units under contract,
- Manufacturing and distribution facilities providing goods or products to online or essential retail businesses,
- Projects involving "data centers" or "facilities that are critical to a businesses' ability to function,"
- Construction of homeless shelters and other essential social services,
- Construction activities supporting first responders and law enforcement,
- Government projects,
- Work necessary to safely secure the site of any non-essential project, and
- Emergency repairs to residential dwellings.

Essential construction projects that are allowed to continue must follow stringent safety requirements including:

- Prohibit non-essential visitors,
- Work site meetings must be fewer than ten individuals,
- Six feet of physical separation wherever possible,
- Staggering start and stop times,
- Staggering breaks,

- Restrict concurrent access to common areas,
- Face coverings,
- Specified infection control practices,
- Restricted sharing of tools,
- Making sanitizers available, and
- Sanitizing high-touch areas.

---

---

April 21, 2020

## Update 8

Yesterday, Pennsylvania Gov. Tom Wolf updated his executive order on life-sustaining businesses. Limited construction activities may resume on May 8, 2020, and other changes have been made.

The updates regarding the [orders by the governor](#), the [associated order by the Health Secretary](#), the [new chart](#) of life-sustaining businesses and business FAQ are linked [here](#).

### **The Governor's Order says:**

Limited construction activity is authorized to commence in-person operations statewide beginning on May 8, 2020

### **The new chart provides the following guidance regarding construction:**

Emergency repairs permitted. Beginning May 8, 2020, construction permitted as authorized by the Governor's and Secretary of Health's April 20, 2020 amendments to their business closure orders and in strict compliance with the Administration's guidance.

For information regarding the Pennsylvania Department of Health safety order, click [here](#). To view the frequently asked questions (FAQ) of the Pennsylvania Department of Health safety order, click [here](#).

---

---

April 24, 2020

## Update 9

Yesterday, Pennsylvania Gov. Tom Wolf accelerated the date of reopening limited construction projects in the state amid the coronavirus pandemic. The new guidance, linked [here](#), allows previously non-essential construction activities to begin on May 1, 2020:

Beginning May 1, 2020, all businesses in the construction industry in the Commonwealth, including those in the new construction, renovation, and repair, as well as land subdivision and design-related field activities, are permitted to maintain

in-person operations pursuant to the Governor's and Secretary of Health's April 20, 2020, amendments to the Business Closure Orders so long as their activities strictly adhere to this guidance. Construction projects previously granted an exemption to continue in-person operations may continue operations but must adhere to this guidance.

Prior to May 1, all businesses in the construction industry should continue to follow existing Administration orders and guidance and may continue to maintain in-person operations to the extent authorized by any existing exemptions.

**Please do not hesitate to call on the [Stradley Ronon Construction Group](#) for assistance regarding these issues.**