



Governor Abbott's March 31 Order Allows Broad Categories of Construction to Continue

What is the March 31 Order? Executive Order GA-14 ("GA-14" or the "[Order](#)") issued March 31, 2020, by Governor Abbott attempts to provide uniformity to the numerous county and city orders issued in the state over the last two weeks to reduce the transmission of the COVID-19 virus. Not only was tracking the differences of each order challenging, but some orders, particularly those affecting the City of Austin and Travis County, significantly restrained construction activity. GA-14 reverses these highly restrictive orders as regards construction and allows broad categories of construction to proceed as "essential services."

What does GA-14 do? Simply, it attempts to provide a uniform state-wide approach regarding efforts to minimize the spread of COVID-19 such as "social distancing, work from home, school closures and limiting restaurants to delivery and take out service." It also attempts to provide a uniform guide as to what constitutes "essential services" that can continue to operate so long as procedures to minimize the spread of COVID-19 are followed. There are many categories of construction included in the listing of "essential services".

What are "essential services" under GA-14? In addition to religious services, the Order provides that essential services are all those listed in the U.S. Department of Homeland Security's Guidance on the Essential Critical Infrastructure Workforce, Version 2.0 ("CISA Guidance Version 2.0") and any additions approved by the Texas Division of Emergency Management (TDEM). CISA Guidance Version 2.0 is a 15-page document covering sixteen expansive categories of activity with long lists of examples of each. Briefly, the categories are: 1) Health care; 2) Law enforcement; 3) Food; 4) Energy; 5) Water; 6) Transportation; 7) Public Works; 8) Communications; 9) Community Essential Functions; 10) Hazardous Materials; 11) Financial; 12) Chemical; 13) Defense; 14) Commercial Facilities; 15) Residential; and 16) Hygiene. CISA Guidance Version 2.0 can be found [here](#).

How does CISA Guidance Version 2.0 treat construction? Although all construction activity is not expressly considered an essential service, "maintenance," "construction" and related construction workers and suppliers are frequently listed as examples of essential services under the various categories. Because CISA Guidance Version 2.0 is advisory rather than a federal directive, it is a lengthy document filled with examples rather than a uniform regulatory scheme.

- Under the "Residential" category essential services include "workers performing housing construction related activities to ensure additional units can be made available to combat the nation's existing housing supply shortage."
- Under the "Public Works" category "workers who support the operation, inspection, and maintenance of essential public works facilities and operations, including . . . construction of critical or strategic infrastructure . . ." are considered "essential services."
- Under the "Commercial Facilities" category Version 2.0 describes "essential services" as follows:
 - Workers who 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/coatings, and employees who provide services that enable repair materials and equipment for essential functions; and
 - Workers distributing, servicing, repairing, installing residential and commercial HVAC systems, boilers, furnaces and other heating, cooling, refrigeration, and ventilation equipment.

It appears clear that numerous types of commercial construction activity are considered to be "essential services," but there are noticeable omissions from the list of trades expressly treated as exempt; however, that does not equate to meaning they are not permitted. Examples of trades not expressly listed are site preparation, roofing, and drywall. Examples of project types not expressly listed include office buildings, garages and strip centers.

If further guidance regarding essential services is required, what is available under GA-14? A contractor can apply to the Texas Division of Emergency Management to be declared an essential service. An application can be found at: <http://tdem.texas.gov/essentialservices/> Click on the certification checkbox and it will go to an application to TDEM. The application only lists the type of business of the applicant as opposed to the type of construction project where a contractor works; however, there is room to set forth your justification for the request.

What impact does GA-14 have on local orders providing detailed health and hygiene practices on every construction project? Local orders, such as one issued by Dallas County, have imposed certain safety requirements on construction sites such as mandatory temperature checks, shift work to reduce the number of workers on a project, restrictions limiting interaction of different subcontractors, prohibitions against gathering at meals or breaks, social distancing, prohibitions on common water coolers, handwashing and sanitizer requirements, minimum toilet requirements, and safety monitors. GA-14 expressly states that: "In providing or obtaining essential services, people and businesses should ... [practice] good hygiene, environmental cleanliness, and sanitation, [and] implementing social distancing ..." Based on this directive, local orders such as that described above should be enforceable. Further, contractors practically should strictly observe and even exceed such requirements for the protection of their workers, to avoid costly quarantines, and to maintain the significant advantages construction currently has compared with other hard-hit industries.