

COVID-19: ARE CONSTRUCTION PROJECTS "ESSENTIAL WORKPLACES" IN ONTARIO?

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09 April 2020

As of April 24, 2020

On April 3, 2020, the Province of Ontario announced further restrictions on what businesses can continue to operate and what businesses need to shut down immediately in order to combat and stop the spread of COVID-19.

As of 11:59 p.m. Saturday, April 4, 2020, businesses, including certain construction sites, not identified in this revised list of essential workplaces, were obliged to close their physical locations until May 6, 2020 (unless the Province of Ontario further extends the order).

UPDATE - On April 22, 2020, the Province of Ontario extended until May 6, 2020 various emergency orders under the *Emergency Management and Civil Protection Act*, including the ones governing the closure of non-essential workplaces.

UPDATE - On April 11, 2020, the Province of Ontario extended until April 23, 2020 various emergency orders under the *Emergency Management and Civil Protection Act*, including the ones governing the closure of non-essential workplaces.

UPDATE - On April 9, 2020, the Province of Ontario added to the list of essential workplaces construction projects that are due to be completed before October 4, 2020 and that would provide additional capacity in the production, processing, manufacturing or distribution of food, beverages or agricultural products.

UPDATE - On April 7, 2020, the Province of Ontario issued orders temporarily waiving noise by-laws as part of an announcement to extend construction hours for essential construction projects, such as critical projects in the health care sector, to 24 hours a day.

This has a significant impact on construction projects in Ontario. And the potential penalties under the Emergency Management and Civil Protection Act could be severe.

Gowling WLG's Infrastructure & Construction Sector Group has been publishing a series of articles and hosting webinars to help the construction sector through these very trying times.

This Building Brief bulletin is focused on some of the what construction work may continue and what must be stopped, and the possible consequences of not complying with the Province's shut down Order.

List of essential workplaces (Ontario)

All workplaces need to shut down unless they are permitted to continue based on the Province's essential workplaces list. In high level summary, to carry on any kind of construction work in Ontario, you need to be:

1. designated an essential workplace that requires construction to continue;
2. providing ancillary or support type services necessary for the operations of a business that is designated as essential;
3. providing services that fit within the specific and narrow exceptions for continuing construction or construction related activities (such as certain residential construction that has already started, activities necessary for temporarily shutting down a construction site, and certain repair and maintenance services);
4. operating or delivering services of any publicly funded agency or organization that delivers or supports government operations and services; or
5. providing off-site services (i.e., working remotely).

The full revised list of essential workplaces in response to COVID-19 (2019 novel coronavirus) is here: <https://www.ontario.ca/page/list-essential-workplaces>.

Some of the specific categories that could apply to construction work and projects, property managers and building supply chain are set out below. (The number corresponds to the numbering in the Province's list of essential workplaces.)

Supply chains

1. Businesses that supply other essential businesses or essential services within Ontario, or that supply businesses or services that have been declared essential in a jurisdiction outside of Ontario, with the support, products, supplies, systems, or services, including processing, packaging, warehousing, distribution, delivery, and maintenance necessary to operate.

Maintenance

20. Maintenance, repair and property management services strictly necessary to manage and maintain the safety, security, sanitation and essential operation of institutional, commercial, industrial and residential properties and buildings.

Transportation services

21. Businesses and facilities that provide transportation services, including,
 - i. transportation services provided by air, water, road, and rail, including taxis and other private transportation providers, and
 - ii. support services for transportation services, including,
 - A. logistical support, distribution services, warehousing and storage, truck stops and tow operators,
 - B. services that support the operations and safety of transportation systems including maintenance and repairs, and
 - C. marinas, but only to the extent that the marina is necessary to enable individuals to access their primary place of residence.

Manufacturing

23. Businesses that extract, manufacture, process and distribute goods, products, equipment and materials, including businesses that manufacture inputs to other manufacturers, (e.g. primary metal/ steel, blow molding, component manufacturers, chemicals, etc. that feed the end-product manufacturer), regardless of whether those other manufacturers are inside or outside of Ontario, together with businesses that support and facilitate the movement of goods within integrated North American and global supply chains.

Construction

27. Construction projects and services associated with the healthcare sector, including new facilities, expansions, renovations and conversion of spaces that could be repurposed for health care space.
28. Construction projects and services required to ensure safe and reliable operations of, or to provide new capacity in, critical provincial infrastructure, including transit, transportation, energy and justice sectors beyond the day-to-day maintenance.
29. Critical industrial construction activities required for,
 - i. the maintenance and operations of petrochemical plants and refineries,
 - ii. significant industrial petrochemical projects where preliminary work has already commenced,
 - iii. industrial construction and modifications to existing industrial structures limited solely to work necessary for the production, maintenance, and/or enhancement of Personal Protective Equipment, medical devices (such as ventilators), and other identified products directly related to combatting the COVID-19 pandemic.

29.1 Construction projects that are due to be completed before October 4, 2020 and that would provide additional capacity in the production, processing, manufacturing or distribution of food, beverages or agricultural products. (Added April 9, 2020)

30. Residential construction projects where,
 - i. a footing permit has been granted for single family, semi-detached and townhomes
 - ii. an above grade structural permit has been granted for condominiums, mixed use and other buildings, or
 - iii. the project involves renovations to residential properties and construction work was started before April 4, 2020.
31. Construction and maintenance activities necessary to temporarily close construction sites that have paused or are not active and to ensure ongoing public safety.

Resources and energy

32. Businesses that provide and ensure the domestic and global continuity of supply of resources, including mining, forestry, aggregates, petroleum, petroleum by-products and chemicals.
33. Electricity generation, transmission, distribution and storage and natural gas distribution, transmission and storage.

Community services

34. Businesses that deliver or support the delivery of services including:
- i. Sewage treatment and disposal.
 - ii. Collecting, transporting, storing, processing, disposing or recycling of any type of waste.
 - iii. Potable drinking water.
 - iv. Critical infrastructure repair and maintenance including roads, dams, bridges etc.
 - v. Environmental rehabilitation, management and monitoring, and spill clean up and response.
 - vi. Administrative authorities that regulate and inspect businesses.
 - vii. Professional and social services that support the legal and justice system.
 - viii. Government services including but not limited to policing and law enforcement, fire and emergency services, paramedics, coroner and pathology services, corrections and court services, licences and permits.

This is not an exhaustive list. All businesses should consider the list very carefully to verify if they can continue operations at their physical workplaces.

The Province has set up a help line if you have questions about what will be open or impacts to your business or employment at its “Stop the Spread Business Information Line” at 1-888-444-3659.

Also permitted

The shut down of all non-essential business and workplaces does not preclude the provision of work and services either online, by telephone or by mail/delivery. It also does not preclude any governments from operating or the operation or delivery of services of any publicly funded agency or organization that delivers or supports government operations and services, including operations and services of the health care sector. Teleworking and online commerce are permitted at all times for all businesses.

Penalties

All businesses and organizations should consider the list carefully to make sure they clearly fit in one of the categories. To the extent any business or organization continues to work or provide services, you will also want to make sure you are strictly following all applicable law, which includes the Province of Ontario's other the advice and recommendations of public health officials and other applicable orders under the

Emergency Management and Civil Protection Act. Note that federal and municipal governments are also sources of rapidly-evolving orders and by-laws related to curbing the spread of COVID-19, so they are additional areas of applicable requirements to watch.

The Province has already shut down at least 5 construction sites for health and safety violations related to COVID-19. It is not clear if these projects included fines/penalties, but the Emergency Management and Civil Protection Act under which these emergency Orders have been issued, and the Provincial Offences Act, permit the Province and its delegated enforcement officers to assess very strong penalties, including:

- for failure to comply with an order, a fine of \$750 (plus victim fine surcharges)
- for obstructing the enforcement or performance of an order, a fine of \$1,000 (plus victim fine surcharges)
- for individuals, up to \$100,000 fine and 1 year jail time for each day the violation is continuing
- for an individual who is a director or officer of a corporation, up to \$500,000 fine and 1 year jail time for each day the violation is continuing
- for corporations, up to \$10,000,000 for each day the violation is continuing
- depending on the severity of the violation, a court can also order a higher fine

It is not clear that the Province will immediately assess such harsh penalties without any kind of warning (although they could). However, the Province did announce the hiring of 60 additional inspectors specifically for construction sites, and has been training police officers and other local enforcement agencies on the requirements of the Provincial Orders. In other words, the Province is taking their stop work Order very seriously and does not seem afraid to strictly enforce it.

These are very challenging times and even more so for construction projects. The health and safety of construction personnel is always paramount in construction, now more than ever.

Please check back to Gowling WLG's website as we update the sector on new developments, new announcements and best practices. Our Infrastructure & Construction Sector Group will continue publishing articles and hosting webinars to help the construction sector.

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