

In Delaware – Is Your Business “Essential” or Not? A Deep Dive With Our Guidance

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By Charles "Max" A. McCauley, III

This blog post may contain information that was accurate at the time of publication but could become outdated over time. We strive to provide relevant and timely content, but circumstances, facts, and data can change. Users are encouraged to verify the current status of any information presented and seek updated guidance where necessary.

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Practice Group: Business Law & Transactions

In response to the Coronavirus pandemic, most of us know that governments have ordered certain businesses to close. Delaware Governor John C. Carney declared a State of Emergency starting on March 13, 2020 and has since updated it multiple times, most recently on March 22. On March 22, the Governor ordered Non-Essential Businesses to close at 8:00 a.m. on Tuesday, March 24. The March 22 Order also requires that employers operating “Essential Businesses” maximize telecommuting. Moreover, the Order is a “stay at home” order that requires everyone to stay home, except essential personnel. The Order also puts in place a travel ban except for certain circumstances. The purpose of the Order is to control and direct within the State of Delaware the operation of certain businesses, organizations, and enterprises necessary to maintain life, health, property, or public peace during the State of Emergency. Above all else, we as a firm want everyone to remain healthy and make it through this emergency unscathed.

This article provides a general overview. As always, please contact us for specific guidance for your business as the March 22 Order creates a few murky areas for the unwary business. For example, while the Order allows individuals to leave their house to perform “Essential Activities,” which seems to allow for work in the office, the section on “Essential Travel” does not seem to authorize leaving the house to go to the office. Another example is that the Order appears to require employers to exclude workers over 60 years old from the worksite. However, this provision may run afoul of the Americans with Disabilities Act. Another issue presented is what to do about situations in which employees cannot be kept six feet apart, as will happen in many situations. We are here to help.

THE MARCH 22 ORDER.

In essence, the March 22 Order states that all physical locations of Non-Essential Businesses within the State of Delaware are closed until after May 15, 2020, or after the public health threat of COVID-19 has been eliminated, except that Non-Essential Businesses may continue to offer goods and services over the internet. Here is a link to the 18-page March 22 Order relating to Essential and Non-Essential Businesses. <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Fourth-Modification-to-State-of-Emergency-03222020.pdf>

WHO CAN WORK?

Essential Businesses are certain businesses that employ or utilize the following workers: (a) healthcare and public health; (b) law enforcement, public safety and first responders; (c) food and agriculture; (d) certain energy-related industries (electricity, petroleum, natural and propane gas); (e) water and wastewater; (f) transportation and logistics; (g) public works; (h) certain communications and information technology businesses; (i) certain community-based government operations and essential function; (j) manufacturing; (k) hazardous materials; (l) financial services and insurance; (m) chemical; (n) defense industrial base; (o) construction; (p) necessary products retailers; (q) necessary retail and service establishments; and (r) open air recreational facilities.

Non-Essential Businesses are certain businesses that employ or utilize the following workers: (a) hospitality and recreational facilities; (b) concert halls and venues; (c) theaters and performing arts venues; (d) sporting event facilities and venues; (e) golf courses and shooting ranges; (f) realtors; (g) business support services, including customer service call centers and telemarketing operations; (h) shopping malls; and (i) retail stores.

It is important to note that the above list of Essential Business and Non-Essential Businesses contains many exceptions and clarifications. The list found at the link above also contains the relevant 4-digit North American Industry Classification System (NAICS) code. All businesses should have a NAICS code or codes on their unemployment insurance forms or on their most recent tax return to aid in determining whether a business is Essential or Non-Essential. If you are unsure as to whether your business is Essential or Non-Essential, you can email covid19faq@delaware.gov or call 302-577-8477 between the hours of 9:00 am and 4:00 pm with any additional questions. Again, Offit Kurman is also here to help you navigate your business through these troubled waters.

CAN YOU APPEAL YOUR BUSINESS CLASSIFICATION AS NON-ESSENTIAL?

Yes, but there is not a guarantee that a petition will be successful. A petition must be requested in writing via electronic mail to covid19faq@delaware.gov for consideration. We understand that you can expect to receive a decision within one week of your submission. If you have questions or need assistance with the preparation of your petition, please contact us at the phone number or e-mail address listed below.

ENFORCEMENT.

The March 22 Order has the force and effect of law. Any failure to comply with the provisions contained in a Declaration of a State of Emergency or any modification to a Declaration of the State of Emergency constitutes a criminal offense. State and local law enforcement agencies are authorized to enforce the provisions of any Declaration of a State of Emergency.

OTHER RESOURCES.

Delawareans with questions about COVID-19 or their exposure risk can call the Division of Public Health's Coronavirus Call Center at 1-866-408-1899, or 711 for people who are hearing impaired, from 8:30 a.m. to 8:00 p.m. Monday through Friday, and 10 a.m. to 4 p.m. Saturday and Sunday, or email DPHCall@delaware.gov

For more information go to <https://dhss.delaware.gov/dhss/dph/epi/2019novelcoronavirus.html>

The Delaware Department of Health & Social Services website offers a response to COVID-19, including information on testing, community resources and what you can do to avoid spreading COVID-19. For more information go to <https://coronavirus.delaware.gov/>

FURTHER GUIDANCE AND CLARIFICATION.

As noted above, Governor Carney has modified the Declaration of a State of Emergency on six occasions and we anticipate that such modifications will continue, seemingly on a daily basis. For example, on March 24, the Governor issued an order, effective March 25 at 8:00 a.m. that delayed elections, evictions, foreclosures, termination of utility service, and termination of insurance coverage. Here is a link to the March 24 order as to these

issues. <https://media1.dsba.org/public/pdfs/GOVR%20Sixth-Modification-to-State-of-Emergency-03242020.pdf>

Please contact us if you have any questions regarding the Declaration of a State of Emergency generally, the classification, or appeal of a classification, as an Essential or Non-Essential Business, insurance coverage questions, employment law questions, or the most recent order concerning delayed elections, evictions, foreclosures, termination of utility service, and termination of insurance coverage.

Stay tuned for more.

Charles "Max" McCauley III contributed to this Article.