

LEGAL UPDATE

NEW CISA GUIDANCE AFFIRMS IMPORTANCE OF CONSTRUCTION BUT MAY NOT CHANGE AUSTIN AND TRAVIS COUNTY STAY HOME ORDERS

By [Travis Brown, Allensworth & Porter](#)
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BACKGROUND

As of Monday, March 30, 2020, Austin and Travis County's Stay Home Orders have not been amended to allow more construction projects to continue, consistent with other major Texas cities. We have sent numerous updates and guidance on how to interpret these Orders. The COA Order identified categories of "Essential Businesses." It also incorporated by reference certain sectors of critical infrastructure construction projects in Austin that are exempt from the Order, citing a March 19, 2020 Advisory Memorandum from the Department of Homeland Security's National Cybersecurity and Infrastructure Agency ("CISA"). The March 19th Advisory Memorandum arguably did not include residential construction as a critical infrastructure sector. The Travis County Order does not reference the CISA Advisory Memorandum at all.

NEW CISA GUIDANCE

On March 28, 2020, CISA delivered version [2.0 of the Advisory Memorandum](#). The intent behind the revised Advisory Memorandum is to clarify construction's critical role in supporting essential infrastructure. However, the first page of the enclosure letter to the Advisory Memorandum includes the following Disclaimer:

This list is advisory in nature. It is not, nor should it be considered, a federal directive or standard. Additionally, this advisory list is not intended to be the exclusive list of critical infrastructure sectors, workers, and functions that should continue during the COVID-19 response across all jurisdictions. Individual jurisdictions should add or subtract essential workforce categories based on their own requirements and discretion.

Notably, "residential construction" is now clearly identified as Critical Infrastructure by CISA. Specifically, the following bullet points were included in the revised Advisory Memorandum as examples of "Residential/Shelter Facilities and Services:"

- Workers performing housing construction related activities to ensure additional units can be made available to combat the nation's existing housing supply shortage.
- Workers supporting the construction of housing, including those supporting government functions related to the building and development process, such as inspections, permitting, and plan review services that can be modified to protect the public health, but fundamentally should continue and serve the construction of housing (e.g., allow qualified private third-party inspectors in case of government shutdown).

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DEVELOPMENTS IN DALLAS

On Friday, March 27th, rumors were circulating that the County of Dallas would issue a revised Order halting construction. That did not happen. Instead, Dallas County Judge Clay Jenkins downplayed the rumors and issued "[Rules for the Construction Industry](#)," which references fourteen (14) health and safety rules for employers in the construction industry.

IMPACT FOR AUSTIN AND TRAVIS COUNTY

The AGC and other trade organizations successfully lobbied DHS to revise the March 19th Advisory Memorandum to clarify that construction activities, generally, and residential construction, specifically, are part of critical infrastructure. Although CISA's guidance is a win for the industry broadly, it likely does not modify the City of Austin or Travis County Orders.

The City of Austin Order does not reference this memo, but instead references an earlier memo. And the Travis County Order does not reference the Department of Homeland Security critical infrastructure categories at all.

Bottom line: the new CISA guidance does not appear to change anything for construction in Austin and Travis County in the short term, but may serve as guidance should the City or County decide to amend their Orders.

ABOUT

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Allensworth & Porter focuses exclusively on the practice of construction law. For 25 years, the firm has handled complex construction matters from preconstruction to closeout, from the first claim to the last appeal, and all manners of disputes in between for clients in virtually every sector of the commercial construction industry. For more information, visit aaplawn.com.

*Note: This article was written on Monday, March 30, 2020, based on the most up-to-date information available at the time. During this unprecedented situation, policies and circumstances evolve rapidly. For our most recent analysis of COVID-19 and the construction industry, please visit aaplawn.com/news. **This is not legal advice**; all decisions should be based on an analysis that is specific to the contracts and facts of any given project.*