



Date: March 30, 2020
To: Steve Snezek, Montana Building Industry Association Executive Director
Cc: Government Affairs Committee
From: Abigail J. St. Lawrence
Subject: Guidance on operating under directives and other responses to COVID-19

Implementation and Operation under Montana Stay-at-Home Directive

On March 26, 2020, Gov. Bullock issued a directive to implement Executive Orders 2-2020 and 3-2020, which declared a public health state of emergency in response to COVID-19. The March 26th directive implements stay-at-home or shelter-in-place for all Montanans to the maximum extent possible and is effective starting at 12:01 am on March 28, 2020 through April 10, 2020, but may be extended. The directive also designates essential infrastructure and businesses that may remain in operation.

Home building is expressly designated as essential infrastructure, and building and construction trades are designated as essential businesses, along with hardware and supply stores. Consequently, MBIA members and related businesses should be able to operate with minimal interruption. The bullet points with references to the attached directive are as follows:

- **The order is in effect starting at 12:01 am on March 28, 2020 through April 10, 2020** (p. 9)
- Any business or operation not designated as “Essential Businesses or Operations” shall cease (p. 2)
- Essential Travel only is allowed. (p. 3) Essential travel includes travel for Essential Businesses or Operations (p. 8, Item 14))
- **Housing construction is expressly designated as Essential Infrastructure, which term shall be “construed broadly”** (p. 5, Item 8)
- **Building and construction trades are designated as critical trades, which are Essential Businesses or Operations** (p. 6, Item 11.h)
- Other services home builders may rely on are also designated as Essential Businesses or Operations, including
 - Hardware and supply stores (p. 6, Item 11.g)
 - Shipping, delivery, and logistics services (p. 6, Item 11.i)
 - Public, private, and commercial transportation (p. 7, Item 11.o)
 - Professional services such as legal, accounting, insurance, IT, and real estate (including appraisal and title service) (p. 7, Item 11.r)
 - Supply houses for Essential Businesses and Operations (p. 7, Item 11.n)
 - Manufacture, distribution, and supply chains for Essential Businesses and Operations (p. 8, Item 11.s)

With the directive repeatedly using terminology directing that the language be construed broadly and listing items with the preface that the list “includes but is not limited to” specific businesses listed, the directive is not exclusive and should not be read as such. Finally, the directive specifically states that it intends to encompass all workers identified in the Advisory

Memorandum on Identification of Essential Critical Infrastructure Workers during COVID-19 Response issued by the U.S. Department of Homeland Security. The latest iteration of that memo on March 28, 2020 expressly lists builders and a number of other related trades as service providers necessary to maintaining the safety, sanitation, and essential operation of residences, businesses, and buildings.

As builders continue their operations, please **take particular note of the social distancing requirements that Essential Businesses and Operations must follow**. Those requirements are specified at Item 12 on page 12 of the March 26, 2020 directive and are summarized as follows:

- Visually designate six-foot distances.
- Have hand sanitizer and sanitizing products readily available for employees and customers. This should include both in your places of business and on job sites.
- If appropriate, designate separate operating hours for vulnerable populations for your place of business.
- Post online whether your facility is open and how best to reach your business and continue services remotely (by phone or online).

It would be good practice from both a public health and a liability standpoint that you carefully evaluate the wisdom of providing services at locations housing or primarily serving vulnerable populations such as the elderly or immune-compromised, especially if the work requires direct or enclosed contact with such populations.

The state has established a toll-free number for questions: 800-755-6672. However, please contact MBIA first, as we are in direct communication with administration officials and may have information responsive to your question. Try as they might, the staff answering the toll-free hotline have been providing some contrary information, which is understandable given the speed with which they are trying to respond. Additionally, NAHB has sent out guidance for operation and safety that is helpful.

One final note—the directive is enforceable by the county attorney, the public health authorities, and other local authorities such as law enforcement under the authority of Mont. Code Ann. §50-1-103(2). Law enforcement agencies across the state has indicated their intent on how actively and stringently they will enforce the directive with varying degrees of clarity. While not required by the directive, if you wish to provide your employees with documentation they can provide to law enforcement if questioned while traveling for work, suggested language for such documentation is attached to this memo. Further, local public health authorities may issue more stringent orders if merited by local conditions, so please do stay abreast of any more recent directives or orders issued by the city or county public health officials in the locations where you operate.

Additional Relevant Directives

Gov. Bullock has also issued two other directives that may impact MBIA members.

1. March 24, 2020 directive providing measures for operation of local government
2. March 27, 2020 directive providing relief from certain regulatory requirements

Under the March 24, 2020 directive, local government offices are authorized to modify their operating hours upon approval from their political subdivision. Further, local governments may

hold certain statutory deadlines for land use under Mont. Code Title 76, Chapters 1-8 and wastewater treatment under Admin. R. Mont. 17.36, Chapters 1, 3, 6, 8, and 9. Please note this directive is permissive, not mandatory, so you should inquire with your local city or county governments if they are exercising the options authorized by this directive.

The March 27, 2020 directive waives hours of service requirements for commercial motor vehicle carriers operating in Montana. Specifically, the directive waives the requirements of Mont. Code Ann. § 61-10-154 and Admin. R. Mont. 18.8.1502. The directive further temporarily suspends maximum weight limits for commercial vehicle set by Mont. Code Ann. Title 61, Chapter 1, Part 1 and allows a 10 percent increase in weight limits. This directive is only in place as long as the declared emergency under Executive Orders 2-2020 and 3-2020 are in effect.

State Unemployment Insurance Emergency Rules

Should your business find it necessary to either furlough or lay off employees due to reduced demand for services in response to the COVID-19 pandemic, recent emergency rules adopted by the Montana Department of Labor and Industry apply. *See*, Mont. Admin. Reg. Notice No. 24-11-355. These rules are effective as of March 17, 2020 and remain in effective as long as the declared emergency under Executive Orders 2-2020 and 3-2020 are in effect.

Under New Rule II(2), an employee directed to leave work or no report to work due to the employer's response to COVID-19, including pandemic-induced reduction in demand or availability of material, is deemed to be temporarily laid off. New Rule II(3) deems an employee laid off if the employee is subject to quarantine on advice of a medical doctor or public health authority. New Rule II(4) also deems an employee laid off if they are a caregiver for a family member subject to quarantine.

Pursuant to New Rule II(5)(a), an employee deemed temporarily laid off is considered to be "able, available, and seeking suitable work" as required for unemployment eligibility when the employer intends to recall the employee to work at the end of the temporary layoff and the employee intends to return to work when recalled by their employer and takes reasonable measures to maintain contact with their employer. Finally, New Rule II(7) deems an employee temporarily laid off due to COVID-19 under the conditions specified in New Rule II(2)-(4) as immediately eligible for unemployment benefits.

Federal Changes to Family and Medical Leave

Finally, as small businesses, MBIA members may be affected by recent changes to federal Family and Medical Leave enacted on March 18, 2020 and effective as of April 1, 2020 until December 31, 2020. Employees are eligible for up to 10 days of paid sick leave, regardless of length of employment, if they are unable to work, including remotely, due to the following:

1. The employee is subject to a quarantine or isolation order;
2. A health care provider has advised the employee to self-quarantine;
3. The employee is experiencing COVID-19 symptoms and is seeking medical diagnosis;

4. The employee is caring for an individual subject to a quarantine or isolation order or one who has been advised to self-quarantine by a health care provider;
5. The employee is caring for a child whose school or place of care has been closed or is unavailable due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition as specified by the U.S. Department of Health and Human Services.

If an employee is subject to conditions 1 through 3 above, that employee must be paid at their regular compensation, subject to a cap of \$511 per day and \$5,110 in aggregate per employee. If the employee is subject to conditions 4 through 6 above, sick leave must be paid at two-thirds of the employee's regular compensation, subject to a cap of \$200 per day and \$2,000 in aggregate per employee.

Employers who close or cancel work for business-related reasons such as lack of work are not bound by these requirements. Employers who do have to provide paid leave will be eligible for reimbursement in the form of tax credits on their 2020 taxes. Employers with less than 50 employees may qualify for exemptions from the requirement to provide leave under Condition 5 above if the leave would jeopardize the business's viability as a going concern.

Conclusion

Please be advised that this information is current as of the date of this memorandum. Conditions are constantly and rapidly shifting. I will do my best to provide timely updates where relevant regulations change. However, businesses should also keep abreast of changing regulations, particularly those issued by city or county authorities. Finally, businesses are advised to verify all new information, as there are many rumors and inaccurate information circulating. And as always, use common sense to protect health and safety.

SUGGESTED LANGUAGE FOR ESSENTIAL BUSINESS TRAVEL

Home builders and related supportive businesses have been identified by both federal and Montana directives as essential business that may operate while the March 26, 2020 stay-at-home directive issued by Gov. Steve Bullock is in place. *See* United States Department of Homeland Security Critical Infrastructure Workforce Memorandum on Identification of Essential Critical Infrastructure Workers during COVID-19 Response dated March 28, 2020; *see also*, Bullock directive dated March 26, 2020, page 5 and Items 11.g, h, i, n, o, r, and s. Travel required to perform essential business operations is permitted under Gov. Bullock's order.

This notice hereby certifies that _____ is an employee of _____, a home building or related business deemed an essential business under applicable directives, and is performing work designated as critical or essential under federal and state guidance. Therefore the above-named is exempt from curfews, shelter-in-place, stay-at-home, and other restrictions, when traveling as necessary for work. This individual must be allowed access and right of way.

Authorized by:

Name: _____

Title: _____

Company: _____

Please contact _____ at (phone number) if you have any questions.
Thank you.