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| TO: | Peter Vlahos, PA Aggregates and Concrete Association |
| FROM: | Raymond P. Pepe |
| DATE: | March 24, 2020 |
| RE: | Impact of the Pennsylvania Covid19 Orders Prohibiting Operation of Non-Life-Sustaining Businesses |

You asked us to advise you regarding how the orders issued by Pennsylvania Governor Tom Wolf and the Pennsylvania Secretary of Health on March 19, 2020 directing the closure of all business that are not life-sustaining affect the members of the Pennsylvania Aggregates and Concrete Association. In particular, you asked whether members of the association delivering ready-mixed-concrete to customers have any obligation to determine whether deliveries are being made for a purpose authorized under the Governor’s Order, and if not, whether your members are exposed to any liability for making such a deliveries.

The Governor’s Order designates as life-sustaining businesses:

* all types of mining, including nonmetallic mineral mining and quarrying;
* cement and concrete product manufacturing;
* lime and gypsum product manufacturing;
* truck transportation and rail transportation; and
* activities that support rail and road transportation.

Construction activities are **not** designated as life-sustaining activities, except for emergency repairs, the construction of health care facilities, and other construction activities authorized pursuant to a waiver of the restrictions imposed by the Orders issued by the Governor’s Office.

The Orders issued by the Governor and the Secretary of Health were based on section 7301 of the Pennsylvania Emergency Management Law, 35 Pa.C.S. § 7301; section 5 of the Disease Prevention and Control Law of 1955, 35 P.S. § 521.5; sections 2102(a) and 2106 of the Administrative Code of 1921, 71 P.S. §§  532 & 536; and the Quarantine and Isolation Regulations of the Department of Health, 28 Pa. Code §§  27.60-27.68.

There are no specific sanctions provided for violations of the Governor’s Order by the Emergency Management Law. However, under the Disease Prevention and Control Act, the Administrative Code and the Health Department’s regulations, violations of Health Department’s orders and regulations are summary offenses subject to fines of $30 to $300, and in default of payment of a fine, for imprisonment of up to 30 days. It is not necessary to prove that a person acted intentionally, knowingly or recklessly to support prosecution for a summary offense.

In addition, an enforcement policy issued by the Governor’s Office states that enforcement actions for “serious violations” may be taken under the Pennsylvania Crimes Code for the obstruction of the governmental functions. This is a second degree misdemeanor, subject to fines up to $5,000 or double the pecuniary gain derived from an offense, whichever is higher, and potentially be imprisonment of up to two years. Prosecution for obstruction of governmental functions, however, requires proof that a person “intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty,” and does not apply to “failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.” Liability for an intentional violation also requires proof that the “conscious object” of person is to engage in the prohibited conduct or cause prohibited result.

Under Pennsylvania law a person is only criminally liable for the conduct of another if a person “causes an innocent or irresponsible person” to engage in the violation of the law; is made statutorily responsible for conduct of another; acts as an accomplice by promoting or facilitating the commission of an offense by soliciting a person to commit an offense by aiding, agreeing or attempting to aid a person in planning or committing an offense; or intentionally aids another to commit a crime, such as by safeguarding or converting the proceeds of a crime into negotiable funds. To be found to have aided or abetted a violation, a person must have been an active partner in promoting a criminal act, but the “least degree of concert of collusion” is generally sufficient to find liability as an accomplice.

Under these principles, persons manufacturing and delivering ready-mix-concrete and other cement and concrete, or other nonmetallic mineral products have no duty to determine whether their customers are using these products for a permissible purpose, but should take care not to engage in any conduct that could make them liable for the conduct of their customers by promoting use of their products in violation of the Covid19 Orders and by acting as an accomplice in the violation of the Orders by soliciting a customer to commit an offense by intentionally aiding in the planning or committing violations of the Orders.

As a prudent measure to protect against possible allegations that a person has solicited, aided or abetted violations of the Covid19 Orders, it would be prudent prior to accepting an order and making a delivery to obtain a written certification from the customer that any products delivered will be used in compliance with the Orders. A copy of the certification should either be carried in the delivery vehicle or the driver should be provided a statement indicating that all deliveries are being made to provide material needed in emergency repairs, for the construction of health care facilities, or pursuant to waivers of the Covid19 Orders issued by the PA Governor’s Office, and that documentation regarding the purpose of individual deliveries is available at the company’s office. In accepting certifications from customers, care should also be taken not to be willfully blind the misrepresentations by a customer.