



# The Critical Path

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Construction Law Committee

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## In This Issue

### Leadership Note

A Message from the DRI Construction COVID-19 Task Force  
Chair ..... 2

By Danielle M. Waltz

### Feature Articles

Enforcement of Force Majeure: Can It Excuse Performance  
Resulting from the COVID-19 Pandemic? ..... 2

By Stephen J. Henning and Keith E. Smith

### OSHA

How to React to a Sick Construction Worker Who Is  
Presumed or Confirmed to Be Infected with COVID-19..... 5

By Kevin J. O'Connor and Shannon D. Azzaro

An Ounce of Prevention Is Worth a Pound of Cure..... 8  
By Michael Cimino and Benjamin Wilson

Potential Contract Defenses in a Post COVID-19 World ..... 10  
By Jon A. Hammerbeck

COVID-19 Pandemic  
Implications for Indoor Air Quality and HVAC Systems..... 12  
By Paul Bennett

Project Suspensions  
The Effect of COVID-19 on Active Construction..... 14  
By Michael A Collins, Jr.

CGL Coverage in the Time of Coronavirus ..... 16  
By Sheryl W. Leichenger and Diana L. Winfrey

Effects of COVID-19 on Construction  
Documenting, Proving and Recovering COVID-19 Cost and  
Schedule Impacts..... 21  
By Brian Stigler, Chase Meyers, Chris Ball, Daniel  
Stewart, and Gayathri Shetty

COVID-19  
Changes in the Landscape of Unemployment Benefits,  
Layoffs Versus Furloughs, and the WARN Act ..... 26  
By Michael P. Sams, Michelle De Oliveira, and Lindsay  
Burke

Special Issues for Employers During the  
COVID19 Pandemic ..... 30  
By Alicia R. Kennon

## Leadership Note

# A Message from the DRI Construction COVID-19 Task Force Chair

By Danielle M. Waltz



There is something special about the members of the DRI Construction Committee. They are incredible lawyers. They are great members of their community. They are leaders. They are friends.

And, as you would expect, when we asked them to pitch in during this uncertain time, they did. Quickly. Our Committee's Chair, David Jones, asked me seven days ago to chair the DRI Construction COVID-19 Task Force. And when David and I sent out the call to action for our members to become involved, our members delivered.

The Task Force quickly scheduled daily updates to our communities page on the state of construction law and our practices in the backdrop of the COVID-19 pandemic. We planned a webinar on COVID-19 issues in the construction industry; innovated by beginning to host weekly zoom conference "Toolbox Talks" with expert facilitators; preliminary began planning podcasts; began identifying a Task Force Service project for #DRICares; and quickly published this special COVID-19 Critical Path Newsletter.

So, thank you to each of the members our Task Force: Aaron White, Andrew Ferguson, David Jones, Diana Gerstberger, John Cahill, Jon Hammerbeck, John Surma, Kevin O'Connor, Patrick Mulry, Ryan Harrison, Stacy Moon,

Stephanie Eaton, and Aaron White. Thank you to our board liaison, Jeff Lowe and our Law Institute liaison, Glenn Zakaib. Thank you to the DRI staff, Denise Eichhorn, Tyler Howes, Jay Ludlam, Martha Fitt, Raul Blanco, and the many others who have facilitated and will continue to facilitate our work. Thank you to the Board and the Executive Committee for allowing us to act quickly and address the needs of our members.

Please reach out to me at [dwaltz@jacksonkelly.com](mailto:dwaltz@jacksonkelly.com) if you would like to be a part of the COVID-19 Task Force or if you have ideas/suggestions for topics to address or ways we can better deliver information to our members in a time where they need it the most. DRI and this committee care about each of you, your families and your practices. And as always and more at times like this, I am proud to be a part of this organization and of this committee. We are all in this together.

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*Danielle M. Waltz is a member in Jackson Kelly PLLC's office in Charleston, West Virginia, where she focuses primarily on litigation, handling complex multi-party construction matters, and government relations. She is the vice chair of the DRI Construction Law Committee and chair of its COVID-19 Task Force.*

## Feature Articles

# Enforcement of Force Majeure: Can It Excuse Performance Resulting from the COVID-19 Pandemic?

By Stephen J. Henning and Keith E. Smith



Much like the global impact from the coronavirus disease (COVID-19), not all occurrences can be foreseen. This is why many contracts contain a provision known as a force majeure clause. Force majeure clauses are especially important in times like these, where businesses are shutting down, the labor force is forced to stay home under government orders, and supply chains are interrupted or

non-existent. The question many in the construction industry and beyond are asking is whether the COVID-19 pandemic excuses performance under a contract? As usually goes with the law, it depends. This article will discuss the background of COVID-19 and the application of a force majeure clause and other similar contract terms.

## Background of COVID-19 and the “Pandemic”

Coronavirus disease (COVID-19) is an infectious disease caused by a newly discovered coronavirus<sup>1</sup>. Most people infected with the COVID-19 virus will experience mild to moderate respiratory illness and recover without requiring special treatment. Older people, and those with underlying medical problems like cardiovascular disease, diabetes, chronic respiratory disease, and cancer are more likely to develop serious illness.

On January 30, 2020, the World Health Organization designated the COVID-19 outbreak a Public Health Emergency of International Concern<sup>2</sup>. Thereafter, due to the significant spread of COVID-19, including more than 118,000 cases in 114 countries, with 4,291 deaths, the World Health Organization, designated COVID-19 as a pandemic on March 11, 2020<sup>3</sup>. As of March 24, 2020, the World Health Organization identified the following updated statistics: 372,757 cases in 195 countries, with 16,231 deaths.

On March 13, 2020, President Donald Trump declared a state of emergency. Many states had previously declared a state of emergency, including California and New York. Subsequently, Governors have been issuing executive orders requiring citizens to stay at home, subject to certain limited exceptions for essential workers. As of the date of publishing this article, seventeen states have issued stay at home orders, which encompasses more than 50 percent of the United States population.<sup>4</sup> Suffice to say that COVID-19 has had a significant and immeasurable impact on the global economy and the ability of parties to perform under contract.

## Force Majeure Clauses

### What Is Force Majeure?

Force majeure, commonly referred to as an “act of God,” is a contract provision which excuses or delays performance when unforeseeable circumstances occur. An “act of God” is commonly defined as “[a]n overwhelming, unpreventable

event caused exclusively by forces of nature, such as an earthquake, flood, or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable, and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight, as well as governmental action.”<sup>5</sup> The fact of the matter is that there is no one size fits all definition of force majeure and it depends on the specific language of the force majeure clause.

In practical terms, the qualifying event must be solely the result of a superhuman cause which was unforeseeable and could not have been prevented by the exercise of prudence, diligence and care. When the event does occur which triggers the force majeure clause, timely and reasonable notice must be provided.

### Sample Provisions

Many construction contracts contain express force majeure clauses. However, other Federal, State, and industry-created contracts (such as the AIA and ConsensusDocs) do not contain express force majeure provisions, but include provisions that excuse performance (e.g., delays and extensions of time) for qualifying events. It is standard and customary in the industry for the owner to grant the contractor an excusable delay for a force majeure event.

A standard definition of force majeure is provided below:

Force Majeure Event means, and is restricted to, any the following: (1) Acts of God; (2) terrorism or other acts of public enemy; (3) acts or omissions of a Governmental Agency beyond the reasonable foreseeability and control of Contractor, including but not limited to, conduct, actions, omissions and delays by the authority having jurisdiction over the Project; (4) *epidemics or quarantine restrictions*; (5) strikes, other than those resulting from a violation by Contractor or any of its Agents of Laws or applicable collective bargaining agreements, resulting in the unavailability of workers or replacement workers; or (6) unusual shortages in materials.

For example, in Federal government contracts, Federal Acquisition Regulation 52.212-4(f), defining excusable delays, provides as follows:

Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or

<sup>1</sup> [https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1)

<sup>2</sup> [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

<sup>3</sup> [https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-and-final-11mar2020.pdf?sfvrsn=cb432bb3\\_2](https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-and-final-11mar2020.pdf?sfvrsn=cb432bb3_2)

<sup>4</sup> <https://www.cnn.com/2020/03/23/us/coronavirus-which-states-stay-at-home-order-trnd/index.html>

<sup>5</sup> See, ACT OF GOD, Black’s Law Dictionary (11th ed. 2019); see also, 42 U.S.C. § 9601(1).

contractual capacity, fires, floods, *epidemics*, *quarantine restrictions*, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

Similarly, the AIA A201 General Conditions at Section 8.3.1, states as follows:

If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

As for the ConsensusDocs, Section 6.3.1 dealing with "Delays and Extensions of Time," specifically includes "epidemics" and "adverse governmental actions" as grounds for the contractor to receive an extension of the contract time.

### ***Is COVID-19 a Qualifying Force Majeure Event?***

As outlined above, the World Health Organization has identified COVID-19 as a pandemic and the state and federal governments in the United States have declared a state of emergency. Local cities and counties have issued orders for persons to shelter in place and to stay at home.

Therefore, contract clauses which excuse performance due to a pandemic or an epidemic are likely triggered under the circumstances involving COVID-19. However, where the force majeure clause or other excuse of performance clause does not specifically identify a pandemic or an epidemic, the contractor would need to rely on other language in the clause which refers to government action or unforeseeable events beyond the control of the contractor. Therefore, if your operations have been interrupted or delayed by the government's actions in response to COVID-19, you may be fortunate enough to find that the phrase "government action" has been included in the force majeure clause. This type of "government action" is happening all over the world, with many governmental

entities banning all non-essential operations and ordering citizens to stay at home. So long as these types of delays can be directly attributed to government actions, they may be considered as triggering events under force majeure clauses.

Notwithstanding the above, there is some grey area and push back can be anticipated in light of recent outbreaks involving SARS, Ebola, and H1N1, where an argument could be made that these events are not truly "unforeseeable." We expect to see litigation on this subject coming from the COVID-19 pandemic with arguments over foreseeability and interpretations over what was made more difficult versus impossible.

### ***Are There Other Contract Arguments to Be Made if There Is No Force Majeure Clause?***

The short answer is yes. While reliance on a force majeure clause is preferred as it provides the most enforceable provision to relieve a party of their obligation to perform, other contract arguments do remain. These include the contract law principles of frustration of purpose, impossibility, or impracticability.

Under the doctrine of frustration of purpose, where a party's principal purpose for entering into the contract is substantially frustrated without his/her fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, the party's duty to render performance is discharged<sup>6</sup>. It is said that "[t]he law never requires impossibilities" and that "[n]o man is responsible for that which no man can control."<sup>7</sup> As a result, where a party's performance is truly impossible and not just more difficult or more expensive, performance is excused<sup>8</sup>. Courts typically narrowly construe these provisions and the burden is on the party seeking to avoid the contractual obligation to establish a true frustration of the contract's purpose or that performance is actually impossible or impracticable.

### ***What Do You Risk in Declaring Force Majeure?***

Before declaring force majeure, it is imperative to understand all risks involved. A party that declares force majeure and does not actually have the contractual right to do so, may find themselves in breach of contract. An erroneous declaration of force majeure may be used against a party as evidence that it no longer intends to perform its

<sup>6</sup> Restatement (Second) of Contracts § 265 (1981)

<sup>7</sup> California Civil Code sections 3531 and 3526.

<sup>8</sup> 30 Williston on Contracts § 77:1 (4th ed.)



contractual obligations and constitutes an anticipatory breach of the contract. This could potentially amount to a repudiation of the contract and gives the opposing party a right to recover damages. As a result, before sending the letter declaring a force majeure event has occurred, a detailed review of the contract is necessary and guidance from counsel is recommended.

## Conclusion

The specific terms of your contract will dictate whether COVID-19 qualifies as force majeure or other form of excuse of performance and should therefore be analyzed on a case by case basis. On a going forward basis, specific care should be utilized in reviewing contracts to ensure that force majeure clauses are included and that the clause specifically covers events such as pandemics, epidemics, quarantines, emergency declarations, and government orders and the like. Force majeure clauses should no longer

be treated as throw in provision at the end of the contract that only refer to “Acts of God.”

*Stephen J. Henning is a co-founder of Wood Smith Henning & Berman LLP, an AmLaw 200 law firm with 26 offices throughout the United States. Steve is a skilled litigator, nationally recognized for results in complex construction, real estate, business and toxic tort litigation. He regularly represents Fortune 500 companies and preeminent members of the business community, including some of the nation's largest residential and commercial public and private owners, homebuilders, developers, investors, contractors and lenders.*

*Keith Smith, a partner of Wood Smith Henning & Berman LLP, is a skilled trial lawyer known for his expertise in handling a wide variety of complex matters for both public entities and private clients. His practice areas spans complex commercial litigation including issues involving construction, employment, directors and officers, catastrophic injury and professional liability matters.*

## OSHA

# How to React to a Sick Construction Worker Who Is Presumed or Confirmed to Be Infected with COVID-19

By Kevin J. O'Connor and Shannon D. Azzaro



The risk that a construction worker will show up to work at a project site, perhaps unaware, but already infected with the COVID-19 virus must be anticipated and

planned for. Such a situation threatens the health of other workers and imperils the continuance of the project itself. Construction Contractors, Subcontractors, and project Owners must be prepared to ensure all workers' immediate and long-term safety, properly document and report such incidents, and take decisive action to minimize the impact to the Project itself.

There are no hard-and-fast rules for dealing with the current, unprecedented crisis, especially in the unique environment of construction projects. There are, however, general rules and guidance that inform the proper course to follow, which guidance remains fluid and subject to change.

OSHA has developed general guidance for all industries in a whitepaper titled “Guidance on Preparing Workplaces for COVID-19,” available on OSHA's [website](#). This alert will assume the reader's familiarity with OSHA's overall guidance, as well as the CDC's general best practices guidance on COVID-19, both of which are required reading for any employer continuing to operate in this environment.

Within OSHA's guidance, employers are divided into four risk categories with recommendations on engineering controls, administrative controls, and personal protective equipment for protection against COVID-19 varying, depending upon the classification. Most American workers are expected to experience low (caution) or medium exposure risk levels at their place of employment.

“Very High Exposure” and “High Exposure” categories are described as (generally) those in the health-care

industry, paramedics, EMTs, mortuary workers and the like who face a high or very high risk of exposure.

“Medium Exposure” is defined as those workers whose jobs include frequent or close (within 6 feet) contact with other persons, and others who work in high-population density work environments. “Low Exposure” is the catch-all category for all other workers.

For employers with “Medium Exposure,” the OSHA guidance requires, as engineering controls, the installation of physical barriers, such as clear plastic sneeze guards. As administrative controls, employers in this category must inform customers about COVID-19 and ask sick customers to minimize their contact with employees; limit customer/public access to the worksite; consider and implement strategies to minimize face-to-face contact; and communicate the availability of medical screening.

For those workplaces falling within the scope of “Low Exposure,” there are no additional engineering controls recommended, and employers are recommended to monitor the CDC’s COVID-19 website and other public health communications.

Employers should ask employees who are sick to call out and not come to the workplace. Employers are permitted, in light of the pandemic, under the EEOC’s current guidance, to inquire as to whether employees are experiencing symptoms of COVID-19, including fever (per CDC guidelines, over 100.4 degrees Fahrenheit), cough, shortness of breath. It should be noted that an infected employee may not demonstrate all of these symptoms. Employers may also consider asking that employees notify them if they or their household members have been in close contact with someone with a suspected or confirmed case of COVID-19. It is currently permissible to screen employees for body temperature; however, this screening poses its own risks. For example, it is preferred to have a trained medical professional perform such screenings and the individual would need to have adequate personal protective equipment. Employers should familiarize themselves with leave entitlements under Federal, State and/or local law.

The most important thing is for the employer to immediately remove any suspected COVID-19 positive employee from the workplace to avoid exposing co-workers and further risking the Project. An employer who fails to keep its workers safe may be cited by OSHA under the general duty clause, especially if the employer allows an employee known to be sick to come to work and expose others. Where an employee in the workplace is suspected of

having COVID-19, the employee should be isolated immediately until such time as their status can be confirmed.

The employer should isolate the affected employee from other workers, identify any potentially exposed workers, and contact the CDC and/or local health authorities for further guidance. To the extent possible, employers should ask the employee who they have had contact with on the job site and where they have been working. The CDC guidance states that “[i]f an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (“ADA”). The fellow employees should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).” Under the ADA and similar state and local laws, the employer must maintain confidentiality regarding employee’s identity and status. The employee’s identity should not leave the organization and should only be limited to supervisors and/or Human Resources personnel with a “need to know.”

The employer should follow CDC and OSHA guidance to appropriately sanitize the area in and around where the infected employee was working. The CDC recommends that employers “[c]lean AND disinfect frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, and doorknobs. Dirty surfaces can be cleaned with soap and water prior to disinfection. To disinfect, use products that meet EPA’s criteria for use against SARS-CoV-2, the cause of COVID-19, and are appropriate for the surface.” The CDC recommends that where possible: close off the area to other staff, increase air circulation, and wait 24 hours, if possible, to disinfect to decrease risk of infection by cleaning personnel. More information on cleaning and disinfecting is available on the CDC’s [website](#).

For confirmed cases, there is limited definitive guidance as to when the employee may return to work. The CDC *currently* recommends exclusion from work until the employee is no longer under home isolation. The CDC’s *current* guidelines for discontinuing home isolation provide a non-test based and a test-based strategy. Tests are hard to come by currently, so the non-test based strategy is the most likely to be used and states as follows:

- At least 3 days (72 hours) after recovery, defined as resolution of fever without the use of fever-reducing medications,
- Improvement in respiratory symptoms (e.g., cough, shortness of breath), and

- At least 7 days have passed *since symptoms first appeared*.

As an alternative, the employee may discontinue home isolation using the test-based strategy upon:

- Resolution of fever without the use of fever-reducing medications,
- Improvement in respiratory symptoms (e.g., cough, shortness of breath), *and*
- Negative results for COVID-19 from at least two consecutive tests collected at least 24 hours apart.

As concerns reporting and recordkeeping, OSHA's guidance could prove problematic for employers, and the Associated General Contractors of America ("AGC") and other groups, such as the Construction Industry Safety Coalition ("CISC"), are currently working hard to convince OSHA to clarify its guidance as concerns construction workers.

OSHA's recordkeeping regulations (29 C.F.R. Part 1904), obligate employers to record any illnesses that are "work related" and which meet any one of the recording criteria which include: days away from work, job transfer, and medical treatment. Any work-related illness that qualifies under this criteria must be recorded on the employer's OSHA Form 300 and a Form 301 filled out. Generally an employer must record a work-related illness within seven calendar days after the employer learns of the illness. "An illness is work-related if it is more likely than not that a factor or exposure in the workplace caused or contributed to the illness."

OSHA has decided to treat cases of employees contracting COVID-19 as recordable incidents where the employee was infected as a result of performing work-related duties. COVID-19 is a recordable illness only where all of the following criteria are met:

- The case is a *confirmed case* of COVID-19;
- The case is work-related, as defined by 29 C.F.R. 1904.5; and
- The case involves one or more of the general recording criteria set forth in 29 C.F.R. 1904.7 (e.g., medical treatment beyond first aid, days away from work).

Section 1904.5(a) provides that an injury or illness must be considered work-related if an event or exposure in the work environment either caused or contributed to the injury or illness. Work-relatedness is presumed for injuries and illness resulting from events or exposures occurring in the work environment, unless an exception

in Section 1904.5(b)(2) specifically applies. A case is only presumed to be work-related if an event or exposure in the work environment is a discernable cause of the injury or illness or of a significant aggravation to a pre-existing condition. If an employee's condition arose outside of his work environment and there was no discernable event or exposure at work that led to his condition, the presumption of work-relationship does not apply.

It is critical that employers conduct a full assessment of an employee's work duties and work environment prior to making any decision to record the case, or not, just as would be done under the circumstances of any incident. OSHA's guidance is clear in stating that where there is no evidence that the employee contracted the virus in the workplace, it is not a recordable incident.

If the infection is work-related as noted above, and the infected employee is hospitalized as an in-patient, the hospitalization must be reported to OSHA within 24 hours of the incident. If the infected employee is not hospitalized as an in-patient but dies from the infection, the death must be reported to OSHA if it occurred within 30 days of the work-related incident.

OSHA's decision to treat COVID-19 illness differently than a cold or flu creates difficulties for employers in terms of these recording obligations, such as potential workers' compensation liability. It also creates the real potential for an employer's injury and illness records to be significantly impacted, and the skewing of Bureau of Labor Statistics' data regarding nationwide injury and illness trends. We will continue to watch the guidance from OSHA to see if it modifies its guidance on reporting COVID-19 related illnesses in the workplace.

Lastly, it must be mentioned that this article deals with obligations under OSHA's regulations, and that the guidance from OSHA and CDC continues to develop as this situation progresses. Some states, like California, may have their own broader reporting requirements which must be considered in addition to OSHA's requirements.

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*Kevin J. O'Connor is a shareholder at Peckar & Abramson, P.C., a national law firm with offices located throughout the country, and is an experienced trial attorney. His areas of concentration are construction and employment, inclusive of property and casualty, EPLI and D&O defense; class action defense; and restrictive covenant and trade secret litigation. Kevin is a frequent lecturer on these topics and has published numerous articles in those areas. Kevin received his Juris Doctor from Rutgers University School of*

*Law, where he served as Editor-in-Chief of the Rutgers Law Review.*

*Shannon D. Azzaro is a Senior Associate at Peckar & Abramson, P.C. and resident at its New Jersey office. Her*

*areas of concentration include EPLI and D&O defense, construction, restrictive covenant and other employment litigation.*

## An Ounce of Prevention Is Worth a Pound of Cure

By Michael Cimino and Benjamin Wilson



While COVID-19, the novel coronavirus, has upset the world balance as we knew it, many workers continue to carry out their duties and responsibilities. This goes

especially for construction workers, many of whom are designated “essential employees” within different states’ stay-at-home executive orders. However, with its high infectivity rate, COVID-19 is dictating that all workplaces take special precautions.

As a brief refresher, COVID-19 is a virus, and it spreads – quickly. COVID-19 can spread:

- Between people who are in close contact with one another;
- Through respiratory droplets when an infected person coughs or sneezes; and
- Through surfaces and objects if a person touches the object and then touches their own mouth or nose.

The symptoms of COVID-19 include:

- Fever,
- Cough,
- Shortness of breath, and
- May present non-respiratory symptoms as well.

Other people are even asymptomatic, meaning they have not experienced any symptoms at all, but still carry the virus. It is thought that people are most contagious when most symptomatic, but there may still be a chance of asymptomatic transmission.

In the next sections, we will explain what practices a construction site can take to ensure it is implementing the best practices in slowing the spread of COVID-19 and protecting their workers, how a construction site can stay in compliance with OSHA during this outbreak, and finally

what an employer should do if someone shows up on the site exhibiting COVID-19 symptoms.

### Best Practices for Prevention

The following information is presented on an equal footing with best practices. The regulatory requirements are usually less stringent and conforming with Best Management Practices (BMPs) will generally ensure compliance with corresponding regulatory requirements; however, each site should review the regulatory changes that have been enacted in the jurisdiction where the site is located and employees operate. Further, BMPs are focused on health issues and may not address all issues affected by changing regulation.

#### Health Precaution Best Management Practices

- Ensure that all employees are regularly washing hands, prior to beginning work, after touching communal surfaces, and regularly throughout the day. Hand sanitizer is not as effective as hand washing but is a useful alternative if access to soap and water is limited.
- Implement protocols that minimize contact between workers, staggering events and travel, adjusting shift start times, limiting access to work areas to only those workers essential for operations.
- Wherever possible employees should maintain personal distance of at least 6 feet and should avoid direct physical contact such as handshakes.
- Sanitize all equipment after use, this includes the cabs of mobile equipment, keys, badges, or any other equipment that must be shared.
- Increase air flow in buildings and vehicles where possible by opening windows or doors.



- Reduce on-site workforce as much as possible. Limit access to site from any non-employee personnel and be aware of anyone coming on to site.

## OSHA and COVID-19

OSHA worked together with the Center for Disease Control to issue guidance on preparing workplaces for this outbreak. For most workplaces, including construction, protecting workers will come down to basic prevention measures. These include:

- Frequent hand washing, including providing soap and water to workers, customers, and worksite visitors;
- Providing alcohol-based hand sanitizers (containing at least 60 percent alcohol) if no access to soap and water;
- Encouraging sick workers to stay home;
- Promoting good general hygiene, including posting flyers about proper hand-washing and coughing or sneezing into a sleeve or tissue;
- Maintaining or even expanding regular housekeeping practices, including disinfecting surfaces and equipment;
- Discouraging “shared” equipment, when feasible, and properly cleaning and sanitizing equipment when not; and
- Examining policies and practices, including flexible worksites (telecommuting) or flexible work schedules.
- Site operators may require on-site personnel to have their body temperature taken and may inquire as to whether any personnel on site has experienced any symptoms of COVID-19. However, information about symptoms and temperature must be treated as confidential medical information.

Construction sites may also consider the use of PPE to help limit exposure. During this outbreak, PPE recommendations may change for occupations, job tasks, or geographic locations. As always, PPE must be selected based upon the hazard to the worker; consistently worn; properly worn; regularly inspected and maintained; and properly cleaned or disposed of to avoid contamination.

Additionally, following OSHA’s already-existing regulations on the use of PPE may help limit the spread of the disease in the workplace. To be sure, there is no regulation governing the spread of diseases, including COVID-19. But, PPE standards require using gloves, eye protection, and face protection, where applicable. And, there is always the General Duty Clause, which requires employers to furnish

“employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

Important to keep in mind, too, is that the spread of the virus has not paused OSHA’s operations. This means:

- Health and safety inspectors are continuing to operate at sites across the country.
- Limiting access to the site due to coronavirus does not prevent inspector access to the site.
- Site representatives are still permitted to accompany an inspector on site and appropriate distancing is encouraged, such as traveling in separate vehicles and holding opening and closing conferences outside.
- If an employee contracts COVID-19 while on the job, it is considered a recordable injury.
- Any other employees or on-site personnel who came into contact with the infected person must be informed that they have been exposed without revealing any confidential information.

## COVID-19 Symptoms on Site and What to Do

What can an employer do when an employee shows up displaying these symptoms at a worksite? OSHA has recommended the following:

- **Be Aware:** Promptly *identify and isolate* the potentially infectious individual. This is a critical step to protect workers, customers, visitors, and others at a worksite. Be aware of workers’ concerns about pay, leave, safety, health, and other issues that may arise during infectious outbreaks.
- **Encourage and Inform:** Encourage workers to *self-identify symptoms* if they suspect possible exposure to the virus and to report those symptoms if necessary. Work with insurance companies and state/local health agencies to provide information to workers and customers about medical care in the event of a COVID-19 outbreak in your area.
- **Develop Policies and Procedures for Reporting Illness:** Employers are likely to see increased absenteeism during this time. If you haven’t already, *develop internal policies and procedures* for dealing with and reporting suspected illness. This includes implementing procedures for immediately isolating people who show symptoms of COVID-19 and even designating “isolation rooms” on the worksite. Do not require a healthcare

provider's note for those with acute respiratory illnesses to validate their leave or return to work.

- **Provide Precautions:** *Take steps to limit the respiratory spread* of COVID-19. Provide facemasks if feasible for the symptomatic person to wear. The facemask should not be confused with PPE for workers, though those too may help limit exposure.
- **Protect Workers:** Some workers may have to come into close contact with sick people. Use additional engineering or administrative controls, safe work practices, and PPE with those workers who come into close or prolonged contact with sick individuals, or those who are a high or very high risk of exposure.
- **Encourage Sick Employees to Stay Home:** *Actively encourage sick employees to stay home*, and ensure that sick leave policies are flexible and consistent with public health guidance. Maintain and develop policies that allow workers to stay at home and care for sick family members.
- **Communicate:** Reach out to businesses you partner with or contract with about the importance of sick employees

staying home. Encourage them to develop non-punitive leave policies.

Finally, OSHA, the CDC, and other government agencies are constantly producing guidance as this ever-evolving pandemic continues. Stay up-to-date by checking these agencies regularly for additional guidance. The Jackson Kelly Workplace Safety and Health Practice Group is also staying up-to-date of the latest developments and remains available to answer any questions you might have.

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*Michael T. Cimino is a member Jackson Kelly PLLC in the Construction, Manufacturing and Mining Law industry groups, focusing primarily on workplace safety and health. He practices out of the Firm's office in Charleston, West Virginia and serves as the Practice Group Leader for the Workplace Safety & Health Practice Group.*

*Benjamin J. Wilson is an associate in the Jackson Kelly PLLC Labor and Employment, Workplace Safety and Health, and Business Law practice groups, focusing on labor, employment, workplace safety and health, and transactional matters. He practices out of the Firm's office in Charleston, West Virginia.*

## Potential Contract Defenses in a Post COVID-19 World

By Jon A. Hammerbeck



The Director General of the World Health Organization (WHO) declared on January 30, 2020 that the outbreak of the novel coronavirus (2019 n-CoV) (hereinafter "COVID 19") met the criteria of a Public Health Emergency of International Concern. The outbreak was upgraded to pandemic status on March 11, 2020. As the outbreak continues to spread in the United States, owners, contractors and design professionals will be impacted greatly by interruptions in materials and performance capabilities as various levels of government at federal, state and local levels initiate and expand orders and regulations that limit or stop construction operations. This in turn will lead the practitioner to advise clients on a variety of possible contract defenses that will come into play as a result of the orders, regulations and the pandemic itself. This article will discuss from an overview perspective some of the options and issues that exist in this situation.

The potential application of a variety of contractual defenses and other doctrines will be applicable as performance, delays, payments and other contractual obligation issues arise as a result of pandemic and resulting governmental orders. These defenses and issues include Force Majeure, Impossibility, Impracticability and Frustration of Purpose concepts. The determination of these issues will focus significantly on the nature of the phrasing of various contractual provisions.

### Force Majeure

Force Majeure is a long-standing legal concept that goes well back in time to English law development, primarily derived in Maritime settings. The defense allocates risk of contractual performance if performance is delayed or stopped entirely due to circumstances outside the control of a party which makes performance commercially impractical or impossible or illegal. Notice to the parties to the contract must be provided as to the types of events

that cause such suspension or excuse of the contract performance. These events include general Acts of God and man-made events.

The excusing events must be beyond the control of the contracting parties and cannot be foreseeable or anticipated. The Force Majeure clause itself should be clear and concise, specifying which events qualify. There are two types of provisions. One type lists the various events. This type of clause is typically interpreted on its face and if the event is not listed, it does not qualify. *See e.g. Facilities Dev. Corp. v Nautilus Construction Corp*, 550 N.Y.S. 2d. 127,128 (3rd Dept. 1989). The other kind of clause is phrased more generally, and does not use a list of events, which permits more flexibility in arguing for or against a particular event as being applicable under the clause.

The clause should identify the events that qualify, who bears the risk for suspended or excused performance, which contractual obligations are covered, and how the parties determine whether the event creates the inability to perform. Suspension or complete excuse are to be identified as well.

Many clauses currently do not specify a pandemic or epidemic, and if one is drafting a contract now, clearly they should be added. It should also be considered that determining the event can be challenging; i.e. is it the pandemic itself or the order restricting the actual performance that is the underlying event. *See e.g. Pauley Petroleum v United States*, 591 F2d. 1308 (Ct. Cl. 1979) (Court ruled it was not clear that a regulation regarding alleged strict liability imposition for the Santa Barbara oil spill of 1969 actually changed liability standards, and thus Force Majeure oriented defense did not apply as claimed by the oil company).

One key issue is who determines whether the event qualifies. In AIA A201 2017 section 8.3.1 when determining whether there is a basis for contract time extension, subsection (3) sets forth specific events: “labor disputes, unusual delays in deliveries, unavoidable casualties, or other causes beyond the contractor’s control.” Subsection (5) then provides another reason for extending contract performance “by other causes that the Architect may justify.” Subsection (5) gives the Architect discretion but subsection (3) seems to potentially give the Contractor separate cause to allege “other causes beyond the contractor’s control.” (Please see also EJCDC 12.03 where the Engineer has discretion to make equitable adjustments as to time)

It should also be noted that where AIA A201 section 8.3.1 applies to contract time extension, sections 14.1.1.1-2 permit the Contractor to stop performance of the Contract if the Work is stopped for a period of 30 days due to issuance of an order by a court or public authority that requires all Work to stop, section 14.1.1.1, or by an act of government, such as declaration of a national emergency, that requires all work to be stopped, section 14.1.1.2. The challenge in applying this provision to the various COVID 19 state and local orders is whether the orders have truly stopped the Work itself.

The United States jurisdictions tend to follow the English approach, such as New York. Force Majeure limits damages only if the reasonable expectations of the parties are met. *Constellation Energy Services v New Water*, 146 A.D. 3d. 557,558 (1st Dept. 2017). The clauses are construed narrowly. *Kel Kim v Cent. Markets*, 510 N.E.2d. 295,297(N.Y. 1987). California courts have held that successful application of a Force Majeure clause suspends contract performance. *See Horsemen’s Benevolent & Protective Assoc. v Valley Racing Assoc.*, 4 Cal App 4th 1538, 1564–65(1992).

## Frustration of Purpose

Another related doctrine to Force Majeure is Frustration of Purpose. *Restatement 2d. Contracts* section 265. This defense applies if the principal purpose of the contract is frustrated by an unforeseen event. *See Lloyd v Murphy*, 25 Cal 2d. 48, 54 (1944), *see also* Pauley Petroleum v United States, *supra* (the court held there is no frustration if the legal environment as to liability is uncertain). This doctrine, and the ones discussed below, are all similar and intertwined in nature, and vary as to jurisdiction as to the terms of the particular concept.

## Impracticability

This doctrine is described in *Restatement 2d Contracts* section 261. Performance is excused if the event makes performance unfeasible. This assessment centers on commercial viability of the obligations at issue.

## Impossibility

Impossibility is similar to Impracticability but is more extreme in terms of the event and consequence involved. The Uniform Commercial Code section 2-615 defines it as Failure of Presupposed Conditions. Performance is excused when “it is prevented or delayed by irresistible, superhuman cause or an act of public enemy of the United States.”

California Civil Code section 1441 provides that a contract is void if a condition to the contract is impossible. See *also* Civil Code section 1598.

There is a high standard in proving this defense. During World War 2 the lessee of a tire store argued in attempting to be released from the obligations of the lease that the declaration of war triggered regulations that rendered new tire sales impossible. *Mitchell v. Ceazan Tires*, 25 Cal 2d 45 (1944). The court denied this argument, noting that the contract was executed during discussion of war entry by the United States, thus rendering the particular regulation as to tire manufacturing foreseeable. This type of approach as to timing of contracts will be very important for particular instances of contract disputes in the COVID-19 pandemic as the months of January, February and March of 2020 saw a change and escalation of the breadth of the pandemic and the orders that followed on a federal, state and local level.

The contractual defenses discussed above will be important as contract disputes escalate and multiply as the months proceed with the consequences of the pandemic and the various orders responding to it. Clarity of the contract terms and the timing of negotiations and public orders will be key in how these defenses are implemented.

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*Jon A. Hammerbeck has been a member of Ford Walker Haggerty and Behar since October of 2000, and has been a partner since 2006. He is a member of the State Bar of California, along with having Federal Bar memberships with the United States Supreme Court, Ninth Circuit Court of Appeals, and the Eastern, Central and Southern District Courts of California. His practice includes construction, tort, real property, insurance, contract, environmental, and mediation matters. He is an active member of the DRI Construction Law committee. He is a member of the DRI Construction Law Steering Committee, and was the program chair for the 2016 Construction Law Seminar as well. He has published multiple articles in DRI publications.*

## COVID-19 Pandemic

# Implications for Indoor Air Quality and HVAC Systems

By Paul Bennett



The COVID-19 pandemic has caused an increased interest in indoor air quality (IAQ) and the potential for infectious disease transmission. In this short article, we examine current science and potential issues regarding Heating Ventilation and Air Conditioning (HVAC) systems and transmission of the Novel Coronavirus (COVID-19).

Infectious disease transmission in buildings is not a new concern to the HVAC industry. HVAC designers have long known that poorly designed HVAC systems could contribute to airborne disease transmission and, conversely, well-designed systems can help control it<sup>9</sup>. Such HVAC design considerations are prominent in the health care industry and are a driver of the design, operations and maintenance in health care facilities. However, society is now faced with the possibility that any indoor environment could be a vector for the transmission of COVID-19.

The transmission of COVID-19 is still not fully understood, but there have been several recent studies that provide insight into the primary modes of transmission. In order to better understand the risks of transmission, it is important to look at possible transmission modes in buildings beyond just the HVAC system. Overwhelmingly, recent studies have shown that the primary mode of COVID-19 transmission is through direct physical contact with the virus and then touching one's eyes, mouth, or nose. Common touch points in buildings are lavatories, door handles, stair rails, and elevator cabs. This mode of transmission is consistent with influenza and Severe Acute Respiratory Syndrome (SARS) transmission in the past.

A person infected with COVID-19 can cause the virus to become airborne through coughing and sneezing, and even the simple acts of breathing and talking can potentially cause the virus to become airborne from highly

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<sup>9</sup> ASHRAE Position Document on Airborne Infectious Diseases, ASHRAE, January 19, 2014, reaffirmed February 5, 2020



infectious individuals<sup>10, 11</sup>. The behavior of airborne droplets or particles is strongly dependent on their size. Heavier particles will quickly settle out of the air onto surfaces. Consequently, larger particles/droplets are not considered an issue for HVAC systems but can create a transmission risk if someone touches those surfaces or is in close proximity to the source. To prevent this type of airborne exposure, the current CDC recommendation is to maintain six feet of social distance between people.

By contrast, smaller particles can remain in the air via a process known as aerosolization. It has been shown in a laboratory environment that COVID-19 can become aerosolized and survive in the air for several hours<sup>12</sup>. This longevity presents the potential for airborne transmission, particularly in buildings, where the HVAC systems could serve to transport and spread the particles. However, recent studies from China and Singapore that have taken numerous air samples in hospitals in areas with COVID-19 patients as well as in common areas, have found aerosolized COVID-19 to be non-detectable or very low, except for one case in a COVID-19 patient's bathroom<sup>13, 14</sup>. These findings indicate that, for practical purposes, the risk of airborne transport of the virus via HVAC systems may be relatively low in many buildings, likely due to the combined effects of dilution, ventilation and filtration that are inherent in HVAC systems.

That being said, the risk is not zero and there have been known infectious disease outbreaks through airborne transmission, particularly in situations with poor or no ven-

tilation<sup>15, 16</sup>. Recently there was a known COVID-19 outbreak at a mall in China wherein many of the infected people did not come into contact with the primary carrier. This outbreak is thought to have occurred due to touch points, but the possibility exists that it occurred through airborne transmission particularly in enclosed areas like an elevator cab<sup>17</sup>. During a SARS outbreak in 2003 there was an apartment building in China where it was speculated, but not proven, that the virus may have been spread through a faulty bathroom ventilation system<sup>18</sup>.

With these things in mind, the American Society of Heating, Refrigeration, and Air Conditioning Engineers (ASHRAE) Journal recently published an article with practical measures that building operators can consider to limit the possibility of airborne COVID-19 transmission<sup>19</sup>. These measures are subject to change as the industry learns more about COVID-19 transmission. Such measures include:

- Maintaining proper outdoor air supply in accordance with ASHRAE Standard 62
- Maintaining 24-hour fresh air supply
- Maintaining medium relative indoor humidity (between 40–60 percent)
- Increasing fresh air supply as much as possible
- Reducing, or disabling, reliance on demand-controlled ventilation (an energy saving process in which the level of the carbon dioxide in the air is monitored as a proxy for the number of people present and fresh supply air is modulated accordingly)
- Increasing filtration to MERV-13 or the highest level compatible with the filter rack
- Assume that HVAC filters are contaminated with COVID-19 and take appropriate safety measures when handling and disposing those filters

<sup>10</sup> Exposure to Influenza Virus Aerosols During Routine Patient Care, *Journal of Infectious Diseases* 2013:207, 1037–1046, W.E. Bischoff, et al.

<sup>11</sup> ASHRAE Position Document on Airborne Infectious Diseases, ASHRAE, January 19, 2014, reaffirmed February 5, 2020

<sup>12</sup> Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1, *New England Journal of Medicine*, March 17, 2020, van Doremalen, N., et al.

<sup>13</sup> Aerodynamic Characteristics and RNA Concentration of SARS-CoV-2 Aerosol in Wuhan Hospitals during COVID-19 Outbreak, Liu, Y. et al. Preprint (not peer-reviewed)

<sup>14</sup> Air, Surface Environmental, and Personal Protective Equipment Contamination by Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) From a Symptomatic Patient, *Journal of the American Medical Association*, March 4, 2020, Ong, S., et al.

<sup>15</sup> An Outbreak of Influenza Aboard a Commercial Airliner, *American Journal of Epidemiology* 110(1):1-6, July 1979, Moser, M.R., et al.

<sup>16</sup> Viral Load distribution in SARS Outbreak. *Emerging Infectious Diseases*, 11(12):1882–6, December 2005. Chu, C.M., et al.

<sup>17</sup> Indirect virus transmission in cluster of COVID-19 cases, Wenzhou, China, 2020. *Emerging Infectious Diseases* 2020 June. Cai J., et al. Preprint (not peer reviewed)

<sup>18</sup> Viral Load distribution in SARS Outbreak. *Emerging Infectious Diseases*, 11(12):1882–6, December 2005. Chu, C.M., et al.

<sup>19</sup> Guidance for Building Operations During the COVID-19 Pandemic, Schoen, L, ASHRAE Journal Newsletter, March 24, 2020 (not peer reviewed)

In summary, preliminary studies in hospitals suggest that the risk of airborne COVID-19 transmission in properly designed and functioning HVAC systems may be low or non-existent. A number of HVAC operational methods can be considered to further decrease that potential risk. As future testing and studies occur these methods may be re-evaluated. To reduce the spread of COVID-19 within buildings most effectively, the primary focus for building maintenance should be on surface disinfection and the primary focus for building occupants should be on hand

washing and social distancing as well as self-isolation when ill.

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*Paul Bennett, MS, PE, CBIE is a licensed professional engineer in 18 states and a licensed general contractor. He is a Principal Engineer and Office Director for Exponent's Denver, Colorado office where he investigates performance problems with building systems, including HVAC systems.*

## Project Suspensions

# The Effect of COVID-19 on Active Construction

By Michael A Collins, Jr.



As the headlines continue to rock an already stressed construction industry, the COVID-19 pandemic will continue to cause further impacts, varying in both type and magnitude, on active project sites, both immediately and for the months to come. Over the last few decades, the modern construction industry is accustomed to, and relatively resilient to, project-specific impacts (excluding the late 2000s financial crisis). For the last 100+ years labor and material shortages, material recalls, severe weather patterns, natural disasters, inflation, labor disputes, catastrophic on-site accidents, and, until the past week, an insufficient labor pool to meet project demand, have all been a part of construction projects and related contractual relationships. However, the construction industry is not accustomed to, and appears in no way prepared, to absorb a blow like a worldwide pandemic of the magnitude being projected with COVID-19.

When evaluating your options as an Owner to suspend an active project, consider the following:

### Develop Your “Emergency Response” Team

- The Owner must develop its “Emergency Response” Team. Members of such a team should include key design team members, owner consultants and representatives, key general contractor personnel, and even key subcontractors and suppliers.
- Orchestrate meaningful discussions regarding the current realities, and encourage open discussions

surrounding issues related to trade labor availability and concerns with supply chains.

## Understand Related Contract Provisions

### Design Team

- The Owner may likely be required to compensate the Architect (and its subconsultants) for services performed since its last periodic billing and the date of suspension, as well as costs reasonably associated with the interruption of work.
- The period of suspension is likely not infinite. If the suspension exceeds a contractually defined number of calendar days, the Architect may be able to terminate the agreement with written notice.
- Contract provisions aside, overarching consideration should be given to the ongoing business relationship and the risks that both parties have in today's environment. If the architect loses key personnel during this downtime, where does that leave the Owner in attempting to complete the project, as well as placing the Owner in uncomfortable positions with its Contractor?

### Construction Team

- The Owner will likely be required to compensate the Construction Manager (or General Contractor) and subcontractors for work in place as of the date of suspension, applicable indirect costs, and related demobilization costs. Bottom line, understanding

termination-related provisions is vital and cost-benefit projections should be run.

- Suspension as a result of the actions of an authority having jurisdiction, a national emergency, or failure for the Owner to fulfill its obligations are often addressed differently than suspension for convenience.
- Finally, similar to the issue involving retention of qualified design professionals, the challenges in the Owner and General Contractor relationship is what should the General Contractor do with its Subcontractors. This challenge can be exacerbated by situations involving Subcontractors with cash flow and access to capital issues. Furthermore, given the context we are discussing, a Subcontractor is most likely going to lose some of its project trade force. With that in mind, when the Project does start back up (in earnest), Owners and General Contractors should be cognizant of the likely possibility of additional schedule and progress impacts as a result of these factors.

### Consultants

- The Owner will likely be required to compensate the various Consultants for services performed since its last periodic billing and the date of suspension, as well as costs reasonably associated with the interruption of work plus a predefined fee (depending on the specific contract and project delivery mechanism being employed).

### Written Notice to Project Participants

When the decision is made to suspend the activities of the project, clear communication is key. Provide written notice to all design, construction, and consultant team members that includes, at a minimum, the provisions set forth in each agreement and prescribed delivery method of notices along with the following basic information:

1. Project name
2. Project owner
3. Date of agreement being suspended
4. Identification of key contract terms related to the suspension
5. Identification of the effective date of suspension
6. Related requests for information as of the date of suspension

## Document Field Conditions

Documenting the status of the “Work in Place” may seem like a daunting task, but remember, if we know where we left off, we will be better positioned to re-start. Below are select data points to gather when embarking upon a suspension:

### Photographic documentation of Project site

1. Photograph (and video) the “Work in Place” in all available areas, from all available vantage points. Unfortunately, often the photo you will need in the future could be the one you didn’t take today.
2. Photograph current field conditions
3. Equipment on site
4. Materials on site (staged for installation & stored)
5. General condition of site (trash, small tools, field offices, etc.)
6. Consider aerial documentation via drone

### Collect current project controls documents

1. RFI logs (requests for information)
2. PCO logs (potential change orders)
3. COR Logs (change orders)
4. Submittal log
5. Inclement weather log
6. Daily work logs/ reports
7. Most recent schedule updates

## Develop Suspension Budget Projection Scenarios

There can be financial benefits, as well as impacts, to the implementation of Project suspensions. Consideration should be given to the costs associated with a Project suspension, including but not limited to:

1. Owner costs (including exposure to costs of the Owner’s client or customer)
2. Interim project “support” costs (utilities, extra security, protection, etc.)
3. Design costs
4. Construction costs
5. Owner consultants’ costs

## 6. Owner vendors and restocking costs

### Understand When Suspension May Lead to Contract Termination

The period of suspension is typically defined in parties' agreements. Suspensions, regardless of cause, may become terminations of existing contracts between some, or all, of the relevant parties at some point. It is important to understand these key contractual clauses to ensure all vested parties are aligned and aware of stipulated contractual dates and notice provisions. However, as is the case in many traditional situations, termination should never occur without a great deal of diligence and forethought.

### Suspension Period Communications

It is important to remember that everyone on the project team is impacted and has concerns when a project is suspended. Consider maintaining periodic update calls to keep all project participants up to date on the status of the suspension.

### Be Prepared to Re-Start the Project

As the timing becomes appropriate to resume the project, the Owner must be prepared to address outstanding costs associated with the suspension. Further, as the Owner, you will likely be required to, or requested to, provide informa-

tion to support the financial capacity of your organization to complete the project.

### Conclusion

Project suspensions are never ideal but may become necessary as the world responds to the impacts of COVID-19. Knowing your contractual obligations, key dates, notice provisions, and taking a principled and measured approach will ensure a higher degree of success as the project comes out of suspension and work restarts on site.

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*Michael Collins, CPE, CPC, is Senior Vice President, Certified Professional Constructor, Certified Professional Estimator, and LEED Accredited Professional at J.S. Held. Michael leads the Owner Representation Practice. His expertise includes projects valued over \$5B covering 40M sf on facilities ranging from mixed use developments, multi-family, student housing, commercial office, performing arts, retail, healthcare, K-12 and higher educational engagements. Michael has supported Owners in the delivery of capital improvement projects and advocates for their interests in Program & Project Management, Owner's Representation, due diligence, financing support, architect & contractor selection and project management. He leads a team of experienced professionals who collaborate and focus on the needs and goals of the Owner and the successful completion of their projects.*

## CGL Coverage in the Time of Coronavirus

By Sheryl W. Leichenger and Diana L. Winfrey



In light of recent developments, the following scenarios have been considered, in terms of whether there may be coverage afforded under a Commercial General Li-

ability (CGL) policy:

- Construction workers are infected with the coronavirus and, as a result, the work on the project is shut down and delayed. It resumes a few weeks or months later and misses the opening for the hotel or apartments. Are the project owner's *delay damages* covered under a CGL policy?
- Materials or products that are manufactured off site are delayed because the virus is affecting manufacture and distribution of these products? Again, there is a delay in completing the project and the owner has incurred lost rents and profits. Are the project owner's *delay damages* covered under a CGL policy?
- An infected worker spreads the virus to other workers causing illness and/or death. Are these claims for damages for *bodily injury* brought on behalf of the injured workers covered under a CGL policy?

Whether there is insurance coverage available for a loss related to the coronavirus will depend on the type of insurance purchased, the wording of the individual policy,



and the circumstances surrounding the claim. The following discussion explores coverage potentially available under a CGL policy.<sup>20</sup>

## Courts Will Be Asked to Determine Whether Delay Damages Attributed to the Infection of Workers or Disruption of the Supply Chain Are Covered Under the Standard CGL Coverage Form.<sup>21</sup>

As a preliminary matter, only the Bodily Injury and Property Damage Liability Coverage, in contrast to the Personal and Advertising Injury Liability Coverage, could arguably apply. With respect to these *delay damages*, the project owner is not seeking damages because of “bodily injury” or injury arising out of commission of any “personal and advertising injury” offense.

The question becomes whether either of the two *delay damages* scenarios meet the requirements for coverage of non-excluded “property damage” caused by an “occurrence” (“accident”). The following provides a discussion of the issues the insurers, and eventually, the courts, will face in making these determinations. As you read the following, keep in mind that it is the insured which carries the burden of establishing that a claim falls within the coverage afforded under the CGL policy.

### Has an “Occurrence” (“Accident”) Been Alleged?

Based on the “occurrence” (“accident”) requirement for potential coverage under a CGL policy, there is no coverage unless conduct on the part of the insured was a cause of delay. Voluntary and deliberate conduct is not an “accident.” *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302; and *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co.* (2018) 5 Cal. 5th 216.

Policyholder counsel will likely assert that an “occurrence” is involved if it is alleged that the insured failed to respond properly to the virus outbreak at the project, *i.e.* negligence in failing to keep the virus from spreading worker to worker, or failing to locate other sources for materials needed. Policyholder counsel will likely argue that delays in completion of the project due to infection of

the workers constitute damages because of “bodily injury,” and covered under a CGL policy.

A negligence theory may be groundless from a factual standpoint (could the insured really have done anything to avoid the delay under the circumstances), but depending on the allegations, it may be sufficient to trigger a duty to defend if the claim otherwise presented a potential for covered liability. On the other hand, an insurer may argue that no “occurrence” would be involved if the insured’s misconduct was limited to the insured’s voluntary and deliberate shutdown of the work it was performing, whether as a result of being requested to do so by government authorities, or as a result the insured’s own decision.

*Note:* Check the construction contract to see if it includes a **Force Majeure** clause (French for “superior force”) that might apply to the extent that the project owner would seek damages from the insured on a breach of contract theory, in contrast to a negligence theory, of recovery. A **Force Majeure** clause excuses a party’s performance of its obligations under a contract when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. A **Force Majeure** clause generally allows a party relief if a **Force Majeure** event materially impacts, or renders impossible, the performance of the contract. This relief is usually the suspension of the parties’ obligations under the contract during the **Force Majeure** event and, if the event continues for a certain period of time, the right to terminate the contract. The question will be if there such a clause, and whether it includes a pertinent term such as “disease,” “epidemic,” or “pandemic,” and whether it includes a government-mandated cessation of activities.

### Has There Been “Property Damage”?

To meet its burden to establish coverage, an insured must establish an allegation of “property damage,” which may be defined to include physical injury to tangible property, or, loss of use of tangible property which is not physically injured.

### Is There Physical Injury To Tangible Property?

In neither hypothetical is the project being delayed or shut down because of contamination of (physical damage to) the property itself – the cause of the delay in completion of the project is infection of the workers or supply chain disruption. However, insurers can expect policyholder counsel to argue that contamination of the jobsite falls within the definition of “property damage” in terms of physical injury

<sup>20</sup> While this article emphasizes California insurance law, the law in your jurisdiction may be different.

<sup>21</sup> The analysis is pursuant to ISO Commercial General Liability Coverage Form CG 00 01 04 13.

to tangible property. This issue is expected to receive a good deal of attention, both in terms of the interpretation of the policy, along with the development of the science behind the theory.

As to contamination of property, research thus far has indicated that it appears that transmission of the coronavirus is human to human, rather than inanimate object to human. The Centers for Disease Control and Prevention (“CDC”) has stated: “The virus is thought to spread mainly from person-to-person. Between people who are in close contact with one another (within about 6 feet). Through respiratory droplets produced when an infected person coughs or sneezes. . . . It may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads.” (Posted at: <https://www.cdc.gov/coronavirus/2019-ncov/about/transmission.html>). However, it can be expected that policyholder counsel will argue that the virus physically stays on a surface for a yet-to-be determined period of time, thus contaminating surfaces of the construction materials. In that case, an insurer, and possibly a court would have to determine whether the presence of a contaminated work area constitutes “property damage.”

#### **Is There Loss of Use of Property Not Physically Injured? Even if There Were, It Would Be Excluded Damage Pursuant to Application of Exclusion M**

Policyholder counsel is likely to assert that the project owner’s loss of use of the project due to delay would qualify as “property damage” in terms of “loss of use of tangible property that is not physically injured.” *Thee Sombrero, Inc. v. Scottsdale Ins. Co.* (2018) 28 Cal.App.5th 729 (loss of ability to use property as a nightclub following revocation of conditional use permit due to security company’s negligence in failing to prevent shooting at nightclub constituted loss of use of tangible property not physically injured; “‘loss of use’ means the loss of any significant use of the premises, not the total loss of all uses”).

However, even if a determination were made that such loss of use fell within the definition of “property damage,” such damage would likely be excluded under Exclusion m., the Damage To Impaired Property Or Property Not Physically Injured exclusion, which provides, in pertinent part, as follows:

“Property damage” to . . . property that has not been physically injured, arising out of: . . . (2) A delay or failure by you

or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

In this hypothetical, the project is property not physically injured arising out of a delay or failure by the insured to perform the construction contract as required by its terms (i.e. on time). And, based on these facts, the exception to the exclusion clearly does not apply because, even if a court agreed with a policyholder argument that the property sustained “sudden and accidental physical injury,” it would have occurred during operations and not “after it has been put to its intended use.” *All Green Electric, Inc. v. Security National Ins. Co.* (2018) 22 Cal.App.5th 407 (exclusion applied where insured’s failure to properly install bolt and other electrical components led to the loss of use of the mammography unit and “sudden and accidental injury” did not apply).

#### ***Pursuant to California Law, Would the Pollution Exclusion Stated in the Current Standard CGL Coverage Form Apply?***

Exclusion f. as stated in the current standard form only precludes coverage for “‘bodily injury’ or ‘property damage’ arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants’”:

- (a) at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;
- (b) at or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
- (c) which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom the named insured may be legally responsible;
- (d) at or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured’s behalf are performing operations if the “pollutants” are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or

(e) at or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants."

The "pollutants" definition stated in the coverage form is limited to "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

Policyholder counsel may argue that a court applying California law would likely conclude that this pollution exclusion does not apply to the claims for injury or damage arising out of coronavirus exposure at the construction site because none of the situations referenced in subsections (a) through (e) are involved. In addition, pursuant to *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal. 4th 635, California has limited application of the exclusion to injury and damage arising from events commonly thought of as pollution, *i.e.* "traditional environmental pollution."

### ***Check The Particular Policy To See If Any Endorsement Exclusions Could Also Apply***

Each policy must be considered on its own, and as such, the entirety of the policy must be reviewed for language relevant to the claim. For example, does the policy include a broader pollution exclusion wherein the definition of "pollutants" would arguably include a virus, or where application of the exclusion extends to more than just the limited situations stated in the pollution exclusion that is included in the current ISO CGL coverage form? And, is the applicable jurisdiction one which, in contrast to California, does not limit application of a pollution exclusion to a "traditional environmental pollution" situation?

The COVID-19 virus is the source of the coronavirus disease outbreak. The particular policy may contain an exclusion that could apply to injury or damage arising out of a virus. The prime example is a Communicable Disease Exclusion. The ISO Communicable Disease Exclusions are CG 21 32 05 09, which modifies the Commercial General Liability Coverage Part, and CG 33 76 05 09, which modifies the Products/Completed Operations Coverage Part. These exclusions exclude coverage for "bodily injury" or "property damage" arising out of the actual or alleged transmission of a communicable disease. And, they apply even if the claims against an insured allege negligence or other wrongdoing in supervising, hiring, employing,

training or monitoring of others who may be infected with and spread a communicable disease; testing for a communicable disease; failure to prevent the spread of the disease; or failure to report the disease to authorities.

On February 10, 2020, ISO released two optional endorsements addressing the coronavirus but only for use with the standard Commercial Property forms to provide limited Business Interruption coverage for business interruption due to actions by civil authorities in order avoid or prevent infection or spread by or from the coronavirus. These endorsements have not been filed and are not being added to the ISO portfolio of forms. At last report, no optional endorsements have been prepared by ISO regarding CGL coverage.

### **Bodily Injury Claims by Workers Injured by the Spread of the Virus on the Project May Be Covered Absent an Applicable Exclusion**

Only the Bodily Injury and Property Damage Liability Coverage, in contrast to the Personal and Advertising Injury Liability Coverage, could arguably apply to claims brought by workers for bodily injury or sickness alleged to have resulted from exposure to the coronavirus at the jobsite. A worker who becomes sick as a result of on-site exposure to the virus, or the estate of such a worker who dies from the virus, would be seeking damages because of "bodily injury" ("bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time"), not because of injury arising out of commission of a "personal and advertising injury" offense. On the other hand, "bodily injury" may not be involved where a claimant is only complaining of fear of exposure, exposure without actual symptoms, or other mental or emotional injuries unless resulting from actual bodily injury (sickness or disease).<sup>22</sup>

Policyholder counsel is likely to assert that an "occurrence" would be involved where it is alleged that the insured failed to respond properly to the coronavirus outbreak situation, *i.e.* negligence in failing to keep the virus from spreading worker to worker by failing to provide sufficient warnings or safety measures (*e.g.* not providing sufficient masks or hand sanitizers). Again, a negligence theory may be groundless from a factual standpoint (could the insured really have done anything to avoid the

<sup>22</sup> Some policies may include emotional distress or mental anguish in the definition of "bodily injury," and a minority of states include mental anguish as being encompassed in the definition of "bodily injury."

delay under the circumstances), but it may be sufficient to trigger a duty to defend if the claim otherwise presented a potential for covered liability.

However, if the worker who became sick or died was the employee of the insured, the injury to employee and workers compensation benefits exclusions stated in the CGL coverage form should apply to preclude a coverage obligation regarding the claim.

And, the particular policy should be checked to see if any endorsement exclusion could apply to the “bodily injury”:

- Does the policy include a broader pollution exclusion wherein the definition of “pollutants” would arguably include a virus and application of the exclusion extends to more than just the limited situations stated in the pollution exclusion that is included in the current ISO CGL coverage form? Is the applicable jurisdiction one which, in contrast to California, does not limit application of a pollution exclusion to a “traditional environmental pollution”?
- Does the policy include an endorsement exclusion that could apply to “bodily injury” arising out of a virus, such as the ISO Communicable Disease Exclusion?
- Does the policy contain an exclusion that precludes coverage for bodily injury claims by any “employee,” “temporary worker,” “volunteer worker” of any contractor or subcontractor hired or retained by or for any insured?

## Conclusion

Coverage available under a CGL policy for claims related to the coronavirus is anticipated to be a topic of much contention, with the courts ultimately being the final arbiters of coverage. There are unlimited scenarios which may be asserted in addition to those set forth above. For example, what coverage is available where a contractor learns of an employee who is exposed and that employee touched building materials? Under that scenario, would there be

coverage during the “quarantine period” following the employee’s contamination of the building materials? Further still, if construction is shut down by local authorities as being non-essential, what coverage, if any, is available for losses due to the shut-down? Finally, at least with respect to this discussion, is there coverage where an insured shuts down a project for fear of contamination? There are endless possibilities with respect to claims in connection with the coronavirus. And whether there is coverage depends on the coverage purchased by the insured. An insured dealing with these claims must review all of its policies and tender appropriately should a claim be made, as even if there is no coverage available under a CGL policy, there may be coverage elsewhere.

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*Sheryl W. Leichenger is the managing partner of Selman Breitman’s construction defect coverage team in California. She has more than 25 years of experience representing insurers in complex coverage disputes and coverage litigation, including cases arising out of extracontractual matters, emphasizing third-party insurance coverage, construction and environmental matters, products liability, professional liability, food liability, and underwriting disputes.*

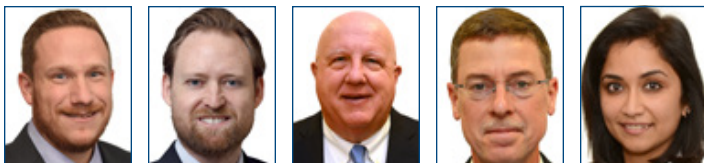
*Diana L. Winfrey is a partner in the Los Angeles office of Selman Breitman LLP. Diana represents insurance companies in insurance coverage and related matters, with an emphasis on construction cases involving multiple primary and excess policies, as well as OCIP (Wrap Up) policies. Diana’s practice also includes coverage analysis for first and third-party general liability, aviation and products liability claims. In addition to addressing insurance coverage issues, she counsels clients regarding underwriting, issues related to the drafting of policy language and endorsements, as well as claims handling and other business practices. Diana has over 35 years of practice, including over 20 years of experience in construction, both from a defense and insurance coverage standpoint, which provides her a unique ability to evaluate coverage claims from a global perspective.*



## Effects of COVID-19 on Construction

# Documenting, Proving and Recovering COVID-19 Cost and Schedule Impacts

By Brian Stigler, Chase Meyers, Chris Ball, Daniel Stewart, and Gayathri Shetty



As the nation comes together to slow the spread of COVID-19, federal agencies, state and local governments, and the private sector are working together to protect communities and ensure the continuity of functions critical to public health and safety; and economic and national security.

The Cybersecurity and Infrastructure Agency (CISA) has developed an “Essential Critical Infrastructure Workforce” advisory list to help state, local, tribal and territorial officials identify critical sectors, workers and functions that should continue during the COVID-19 response. Based on the specific nature and purpose of your project, it may be classified as “Essential” and be allowed to continue during the COVID-19 response, or it may be classified as “Non-Essential” and be shut down during the COVID-19 response. It is possible that your project could be classified as a “Non-Essential” project, but be allowed to continue as an “Emergency” project that is necessary to protect the public health and safety of the occupants, or a project that would be unsafe to leave in its partially completed state.

Examples of projects that have been identified as “Essential” include roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing and homeless shelters. Ultimately, the designation of whether your project is “Essential” or “Non-Essential” is determined by the governmental agency having jurisdiction over your project.

Regardless of your project’s classification, it most likely has been impacted by COVID-19. Although the specific impacts may be unique to your project, they generally fall into the following three categories:

1. Initial disruption and delay impacts related to COVID-19 that occurred prior to any mandate from the governmental agency having jurisdiction to “restrict” or “shut down” construction;
2. Disruption and delay impacts that occurred as a result of a “shutdown” due to COVID-19; and

3. Disruption and delay impacts that may occur during construction of those projects that are deemed to be “Essential” and allowed to continue during the COVID-19 response.

This article offers guidance to entities involved in construction projects regarding documenting, proving, and pricing the schedule and cost impacts resulting from the COVID-19 pandemic.

### Important Contractual Considerations from a Claims Perspective

Several contractual aspects should be considered in the context of exercising your rights to relief due to COVID-19 impacts, whether they are disruption, delay or other cost related impacts.

Although contractual issues require thorough legal analysis, we will touch on a few of the contractual considerations that are most likely to affect cost recovery associated with COVID-19 impacts: 1) Notice; 2) Force Majeure; 3) Entitlement; 4) Pricing Changes and Claims; 5) Reservation of Rights; and 6) Termination for Convenience.

For contractors, the ability to recover for COVID-19 typically begins with providing proper notice to the owner. Generally, the purpose of notice provisions is to inform the owner of impacts that are occurring or are foreseen, thus affording the owner an opportunity to mitigate or avoid the impacts. Notice requirements vary among private contracts, as well as federal and state contracts. Some states strictly enforce the notice requirements in their state contracts and may deny relief if proper notice is not provided, particularly if the owner was prejudiced or harmed by the absence of proper notice.

Most, but not all, construction contracts have some form of a force majeure clause that applies in the event that either party cannot perform for reasons which are outside the control of either party and could not be avoided by the exercise of due care. Some force majeure clauses are broad enough to cover circumstances such as the COVID-19 impacts, and others specifically refer to issues such as epidemics or pandemics. It is possible that your contract

is more limited, however, and may only cover certain enumerated events that may or may not include events such as the COVID-19 pandemic. Recent federal guidance seems to indicate that the impacts of COVID-19 may excuse timely performance under federal contracts and agencies should be flexible in providing time extensions if contractors are unable to perform due to COVID-19 related interruptions. Actions taken by governmental entities to restrict businesses, travel and social contact may also influence a determination as to entitlement to recover the costs resulting from the pandemic.

Although the COVID-19 issue is a unique and evolving problem, you should follow the standards of proof for establishing entitlement to time or cost relief in your contract.

The contract requirements for establishing entitlement to an extension of time vary depending on the private, state, or Federal contracts involved. Federal contract requirements often vary between agencies. Some contracts provide limited direction for proving delay while others provide detailed instructions on time impact analyses that are required to be submitted. Any forum in which a dispute related to delay is addressed will require proof establishing that the work was actually delayed due to COVID-19 related issues.

Most contracts include provisions on the pricing of change orders and claims. These pricing provisions typically will address the allowability and allocability of cost and establish the standards of proof required for change orders and claims. Generally, most contracts will require proof that: 1) the costs were attributable to the particular COVID-19 cause or event; 2) the costs were actually incurred or reasonably estimated; and 3) the costs are allowable under the contract.

A contractor should reserve its rights in change orders related to COVID-19 pandemic if there could be disruption, delay, cost, and cumulative impacts beyond what was contemplated when the change order is negotiated. Where change orders are forward priced, it is even more important to do so in order to manage risks inherent in projecting COVID-19 impacts.

Owners may elect to terminate construction contracts in light of the COVID-19 impacts. This may be a prudent action on the part of the owner in order to mitigate and avoid adverse financial consequences of the COVID-19 pandemic. Contract provisions on termination for convenience often specify the types of costs that the contractor is entitled to recover in the event of a termination and

should be reviewed carefully and followed by both parties as they try to reconcile and close out the contract.

## Proving and Pricing Impacts

The complete ramifications of COVID-19 are unknown and we may not fully understand the consequences for construction projects for months following the return to normal business routines. As the impacts are only starting to materialize now, the situation across the construction industry continues to change rapidly especially considering the differences in governmental oversight, mandates, and individual company procedures. As discussed earlier, the impacts vary depending on geographic location, project type, and whether the construction projects are deemed “Essential” or “Non-Essential.” With that in mind, the list below provides a glimpse into the types of issues that are causing disruption and delay impacts that construction projects are currently experiencing, as well as those that might potentially emerge.

- **Supply chain disruptions:** Early on during this pandemic, contractors started seeing procurement issues, including late deliveries of materials and equipment, given the impacts on transporting goods and the reliance on globalized manufacturing. Major exporting countries for building materials include China, Italy, and Spain, which are three of the hardest hit areas for COVID-19 cases. Some suppliers, even in the U.S., are shutting down fabrication shops or reducing to skeleton crews which is affecting materials and equipment deliveries.
- **Labor shortages:** Projects are experiencing a lack of resources for skilled labor due to workers’ fears to commute to the job site in metropolitan areas that rely on public transportation. Sick workers, including those that have contracted COVID-19 or have symptoms, are also impacting the labor pool for job sites due to required 14-day quarantine periods. Other measures are being implemented, such as the rotation of personnel to minimize exposure if they cannot work from home. This primarily applies to management; however, subcontractors are trying to balance this in a way that does not impact production or schedule.
- **Staggering of shifts:** Certain sub-trades, such as interior finishes, are staggered in congested areas to prevent a dense workforce and comply with Centers for Disease Control and Prevention (“CDC”) guidelines regarding distancing of personnel. In some instances, contractors are utilizing first and second shifts to prevent or minimize delays, but this may result in additional costs

for unanticipated premium time for union and non-union workers.

- **Site shutdowns:** In the event of a positive case, the response is still evolving, but some sites are utilizing a sitewide alert system to inform the workforce that the affected areas are shut down for the entire workday. The shutdowns allow for a third-party cleaning company to disinfect the areas where the infected persons interacted. Also, quarantining measures are employed for 14 days for anyone that interacted with the infected person.
- **Lower worker morale:** Aside from the obvious productivity impacts, contractors are also dealing with employee morale issues due to the threat of contracting COVID-19, commuting safely to and from work, and engaging in longer or different work hours.
- **Site coordination:** Some sites are cancelling foreman meetings and superintendents are coordinating individually or in small groups. This leads to potential lost productivity and issues related to effectively managing the construction on site.

These issues may result in disruption and delay impacts to your project. As such, you may see claims for the traditional disruption and delay impacts that you have seen in other construction claims. These costs typically include increased labor and equipment costs due to productivity impacts, extended project management and site running costs due to delays, and home office overhead costs. Because the COVID-19 issue brings its own set of unique challenges, we also wanted to highlight some of the less common costs that your clients may incur as they deal with COVID-19. The following is a list of associated costs that construction companies should consider due to the resulting impacts on construction:

- **Material escalation:** COVID-19 is impacting the global supply chain in a number of ways. The impacts caused by COVID-19 may invalidate your purchase orders or trigger escalation clauses within them. For higher demand products, these material escalation costs may be higher than normal due to impacts to the supply chain and/or unavailability of alternative suppliers.
- **Labor premium costs:** As stated above, some projects are staggering trades by adding shifts to avoid site congestion as a response to the COVID-19 virus. Therefore, contractors are incurring labor premium costs for weekend and overtime work. Weekend and overtime work can increase labor costs by a factor of 50 to 100 percent.

- **Other premium costs:** As we stated above, the full extent of the impacts due to the COVID-19 issue is currently unknown. The following is a list of other potential premium costs that contractors may incur due to COVID-19, but the potential impacts are not limited to these items: 1) increased/expedited transportation cost; 2) increased/expedited fabrication costs; 3) additional employee benefits, such as flexible sick-leave, due to new policies to support workers during COVID-19; and 4) additional health and safety costs, which is discussed in more detail below.
- **Health and safety costs:**
  - Enhanced personal protective equipment (“PPE”), such as masks for workers. Subcontractors that are liable for providing own PPE may have difficulties collecting the appropriate materials and maintaining cleanliness for reuse.
  - Additional costs for providing and maintaining cleaning areas, such as slop or utility sinks and cleaning products for washing hands.
  - Costs related to hiring cleaning services to disinfect job site trailers and field offices daily, including turnstiles at site entry points, computers, phones, desks, and similar frequent touch areas.
  - Costs for retaining additional laborers that are designated to regularly clean frequent touch areas, like door knobs and elevator buttons.
  - Other increased costs for health and safety of workers, including hiring personnel to perform temperature checks on workers entering the site.
- **Additional on-boarding and training costs:** Contractors may incur additional costs for on-boarding and re-training personnel returning to work; training additional or replacement workers; and training workers to comply with updated health and safety regulations added to address the COVID-19 pandemic.

## Tips for Proving Disruption and Delay Impacts

As stated above, the specific impacts that your project experiences due to COVID-19 are unique to your project, but most likely can be broken into the following three categories:

- 1) Initial disruption and delay impacts related to COVID-19 that occurred prior to any mandate from the governmental agency having jurisdiction to “restrict” or “shut down” construction;

- 2) Disruption and delay impacts that occurred as a result of a “shutdown” due to COVID-19; and
- 3) Disruption and delay impacts that may occur during construction of those projects that are deemed to be “Essential” and allowed to continue during the COVID-19 response.

“Essential” projects may experience the impacts identified in categories 1 and 3, while “Non-Essential” projects may experience the impacts in categories 1 and 2. Regardless of the impacts the project experiences, in order to recover relief for the impacts caused by COVID-19, you will need to demonstrate: 1) the causal link between COVID-19 and the disruption and delays you experience; and 2) the causal link between the disruption and delays experienced due to COVID-19 and the additional costs.

This section provides tips and best practices for documenting impacts and maintaining the necessary records to prove disruption and delay impacts. Certain actions that should be undertaken to support future claim resolution:

- Provide notice adhering to contract guidelines;
- Document *all* COVID-19 related restrictions impacting the project; including all realized impacts due to COVID-19 in January and February 2020 prior to any official restrictions or shutdowns being imposed;
- Create a *Schedule Update and Narrative* documenting the status of the project prior to COVID-19 impacts.
- Create a *Schedule Update and Narrative* documenting all known impacts from COVID-19 effects, restrictions or shutdowns. This schedule update and narrative should clearly identify the impacts to the critical path caused by COVID-19 that have been realized;
- Projects that are classified as “Essential” and remain operational should maintain accurate monthly schedule updates and incorporate actual and forecasted impacts for known COVID-19 in the schedule; and in addition to these schedules, contractors should consider developing a set of daily or weekly reports to identify, record and track all impacts that project is experiencing due to COVID-19, whether they are “critical path” or “non-critical path” impacts. In addition to these reports, we suggest photographing the impacts that you are experiencing on site due to COVID-19. It is important to log these photographs to authenticate this documentation when presented at a later date.

The following are examples of the types of issues and information that should be tracked and recorded during construction:

### ***Labor Impacts***

- Accurately record labor resources; including the following categories:
  - a. Indirect personnel;
  - b. Direct personnel; and
  - c. Subcontractor personnel.
- Identify and record all “Work Hour” restrictions (e.g. daily shutdowns for quarantine and cleaning).
- Accurately describe all impacts to labor resources; including but not limited to identification of the following:
  - a. Date, time and duration of impact;
  - b. Personnel impacted; and
  - c. Areas of the project that are impacted.

### ***Material and Equipment Impacts***

- Identify and record material and equipment shortages impacting critical and near critical path work;
- Identify and record all material and equipment delivery delays;
- Identify and record all material and equipment quarantine delays; and
- Identify and record idle equipment impacted by critical path delays.

### ***Productivity and Schedule Impacts***

- Track and maintain record of “actual” productivity rates achieved during construction performed during COVID-19 pandemic. Identify and record all resources dedicated to the performance of the work, hours worked by these resources and actual output of work achieved by these resources. It is important to track productivity with as much detail as possible. For example, best practices recommend that productivity is tracked by type of work, area of the project, by shift, etc.
- Compare “actual” productivity rates achieved during construction performed during COVID-19 pandemic to “demonstrated” productivity prior to COVID-19 pandemic and “demonstrated” productivity on historical projects. Provide notice of any impacts to productivity experienced during the COVID-19 pandemic to owner or general contractor.



- Identify all issues impacting productivity and schedule, of which COVID-19 may be the sole cause or one of the causes. We have identified some of the specific issues resulting from COVID-19 that may cause disruption and delays above.
- Track and maintain record of “actual” and “forecasted” start dates, durations and finish dates. Compare these “actual” and “forecasted” dates and durations to “as-planned” schedule and identify differences. Investigate and explain reasons for differences.
- Identify and document all mitigation measures that are implemented to maintain and/or “recover” the schedule, such as re-sequencing, acceleration, etc.
- Coordination between the owner and contractor should occur to obtain buy-in of mitigation efforts, if possible.

### **Pricing Delay and Productivity Impacts**

This section provides tips and best practices for documenting your costs related to disruption and delay impacts. Before the COVID-19 pandemic developed, vendors, subcontractors, and contractors were estimating, pricing, bidding, signing contracts, budgeting, scheduling, and performing billions of dollars of construction projects in the U.S. and internationally. Even though this pandemic is causing worldwide havoc, construction industry stakeholders continue to press to deliver projects on time while maintaining profitability. These goals require using the same tools the industry has been historically using to achieve past success: the contract agreement and an extensive collection of change associated documentation.

As noted above, project records are fundamental to the industry participants. At their base level, construction related documents are all used to assemble information, pricing estimates, contract agreements, budgets, actual costs, and plans. It is with these same document tools vendors, subcontractors and contractors can be best served in documenting, proving and recovering COVID-19 cost and schedule impacts. Specifically, this documentation includes, but is not limited to, the following:

- Bid Documents and Pricing Estimate;
- Contract Agreement; and
- Budget Report / Cost Accounting and Reporting.

The *Bid Documents and Pricing Estimate* are the baseline set of documents used for all change, extra work, or variation comparisons. A complete copy of all estimate

documents and all associated estimating records should be maintained and readily accessible to all stakeholders.

The *Contract Agreement* will detail the procedures and mechanisms associated with changes, including notice, time requirements, submittal detail requirements for a request for a change to the contract sum, or duration of performance or both. All stakeholders should review and understand the contract general conditions, changes, and dispute clauses and always obtain clarification and guidance from legal counsel when needed.

The *Project Budget* is typically a detailed distribution and consolidation of the bid estimate material quantity and cost items into a client-unique cost-code or work breakdown structure, suited to the individual project type. The cost codes typically include specific line items for labor, material, equipment, and subcontractor costs. The baseline budget forms the initial line-item cost against which expended cost and committed costs are recorded within a *Cost Accounting and Reporting* system. When delay events occur, such as COVID-19, stakeholders should contemporaneously modify the cost-code structure in their cost accounting systems to create new cost-codes to track the general and specific types of costs noted in the sections above.

Additionally, stakeholders should use all forms of project communication to document the cost and schedule impacts, including:

- Daily Reports;
- Field Inspection Reports;
- Photographs and Video;
- Delivery Tickets;
- E-mail Communications;
- Meeting Minutes;
- Request for Information;
- Transmittal Logs; and
- Monthly Schedule Narratives.

### **Conclusion**

This article offers guidance to entities involved in construction projects regarding documenting, proving, and pricing the schedule and cost impacts resulting from the COVID-19 pandemic. Regardless of your project’s classification, it most likely has been impacted by COVID-19. Although

the specific impacts may be unique to your project, they generally fall into the following three categories:

- 1) Initial disruption and delay impacts related to COVID-19 that occurred prior to any mandate from the governmental agency having jurisdiction to “restrict” or “shut down” construction;
- 2) Disruption and delay impacts that occurred as a result of a “shutdown” due to COVID-19; and
- 3) Disruption and delay impacts that may occur during construction of those projects that are deemed to be “Essential” and allowed to continue during the COVID-19 response.

Careful consideration of several factors including properly documenting impact costs and delays are key to recovering for COVID-19 impacts.

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*Brian Stigler advises clients on a range of topics including the development and defense of construction claims, dispute avoidance, change order negotiations, risk assessments, project controls, change management, contract review and assessments and project scheduling. He has over 15 years of experience with construction disputes includes schedule delay analysis, forensic accounting, damage calculations, productivity studies and litigation support.*

*Chase Meyers is a Senior Manager and leads Exponent’s Construction Consulting team in New York City. He has 15 years of experience in construction, including significant*

*dispute resolution and litigation support work across the Americas, Europe, Asia, Africa, and Australia. Mr. Meyers has been appointed as an expert witness on matters of delay and quantum. He is a member of the Society of Construction Law, New York Building Congress, and Association of International Petroleum Negotiators.*

*Chris Ball is a Senior Manager within the Construction Consulting practice of Exponent, Inc. and works out of the Alexandria, Virginia, office. Mr. Ball is a construction management executive with over forty years’ experience in field construction, construction management, analysis, and adjudication of construction projects and associated disputes.*

*Daniel Stewart is a Senior Manager within the Construction Consulting practice of Exponent, Inc, and works out of the Alexandria, Virginia, office. Mr. Stewart has over 30 years of experience in construction consulting including consulting on construction, executive level construction advisory services, and hands on construction management. Mr. Stewart provides expert witness testimony on matters including schedule delays, contract changes, and damages.*

*Gayathri Shetty is a Senior Manager within the Construction Consulting practice of Exponent, Inc, and works out of the Alexandria, Virginia, office. Ms. Shetty has over 17 years of Project Management and Dispute resolution experience. Ms. Shetty has supported her clients in analyzing construction claims related to schedule delays for mediation, arbitration and litigation.*

## COVID-19

# Changes in the Landscape of Unemployment Benefits, Layoffs Versus Furloughs, and the WARN Act

By Michael P. Sams, Michelle De Oliveira, and Lindsay Burke



The Massachusetts Department of Unemployment Assistance (“DUA”) has adopted emergency regulations (430 CMR 22:00) to address the COVID-19 pandemic and the hardship it may cause to businesses and employees.

An employee in “standby” who is temporarily unemployed because of the lack of work due to COVID-19 with an expected return-to-work date may apply for unemployment benefits. The one-week waiting period

that is normally applicable to unemployment claims has been waived, along with the requirement that an employee receiving unemployment benefits actively search for work.

The employee must:

- take reasonable measures to maintain contact with the employer; and
- be available for all hours of suitable work offered by the employer.

Employers will need to verify the employee's "standby" status, including the return-to-work date. The following criteria also come into play:

- if the employer doesn't respond to an inquiry from the DUA to verify the employee's standby status, the employee will be deemed on standby for 4 weeks
- if the employer responds and confirms the employee's standby status, the employee will be on standby status until the return-to-work date, which is maxed at 8 weeks
- if the employer responds to the DUA, noting that the employee is not on standby or doesn't have a return-to-work date within 8 weeks, then the usual unemployment benefits criteria (outside the COVID-19 context) apply

In the event of a COVID-19 infection in the workplace, the DUA has discretion to extend the employee's standby status beyond the maximum 8-week period. The COVID-19 infection would need to either "close or severely curtail" business operations for more than 8 weeks.

So long as a written and timely request is made, employers have the option of requesting a 60-day extension for the time within which to file reports, pay contributions or make payments in lieu of contributions without penalty or interest.

These regulations are effective now and will be effective for 90 days.

## Reduction of Exempt Employee's Pay During Business or Economic Slowdown

Faced with economic uncertainty and a slowdown in business operations, can an employer reduce an exempt employee's weekly salary by reducing the employee's hours? Generally, no. But let's discuss.

In a nutshell, a properly exempt (salaried) employee who meets the salary basis and primary duty tests, must be paid a full week's pay for any workweek in which the employee performs any work regardless of how many hours or days the employee works. Deductions in an exempt employee's pay are not allowed for absences occasioned by the employer or by the operating requirements of the business. If work is not available and the employee is ready, willing, and able to work, deductions may not be made.

With very limited exceptions, a deduction in the predetermined salary of an exempt employee will, generally, result in the loss of the exemption and require that the employee be paid at least minimum wage and overtime.

An exempt employee need not, however, be paid for a workweek in which no work is performed.

An employer may, in certain circumstances, however, reduce an exempt employee's pay *prospectively* during business or economic slowdown. According to the U.S. Department of Labor, an employer may reduce an exempt employee's weekly pay prospectively "during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements."

The reduction in pay must "reflect the *long-term* business needs[.]" The salary reduction must be unrelated to the quantity or quality of work performed, and the employee may retain the exemption so long as the salary basis (at least \$684 per week) and primary duty tests continue being met. The key is that the deduction from an exempt employee's predetermined pay occasioned by day-to-day or week to-week determinations of the operating requirements of the business are *not* allowed. A short-term, day-to-day or week-to-week deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations is not allowed.

Employers contemplating a reduction in an exempt employee's pay to deal with a business or economic slowdown should consult with an employment attorney and address each circumstance with care.

## Layoffs vs. Furloughs

A *furlough* entails the reduction of the days or weeks that an employee may work. A *layoff* is, generally, treated as a termination and it can be temporary or permanent. Several factors come into play when making businesses decisions related to a potential furlough versus a layoff. These factors generally relate to how exempt and non-exempt employees are treated under federal and state wage and hour laws.

### Exempt Employee: Furlough vs. Layoff

An exempt employee may be furloughed. However, the parameters outlined above must be followed with care. The employee must be paid a full week's pay for any work week in which the employee performs any work. To impose cost-cutting measures, a private employer can for example, place an exempt employee on a furlough for a week at a time. So, for example, an employee would work 2 or 3 weeks out of 4. That way, the employee is entitled to a full week's pay for the weeks worked and can collect

unemployment benefits for the weeks the employee does not work.

It is important that during a furlough, the employee be relieved of all job duties and responsibilities because if the employee performs any work during a furlough, then the employee will be entitled to a full week's pay.

In a layoff scenario, the layoff is treated like a termination and the employee would be entitled to unemployment benefits—but no additional pay from the employer.

### ***Non-Exempt Employee: Furlough vs. Layoff***

Like exempt employees, a non-exempt employee may also be subject to a furlough as a result of reduced hours / schedule. The employer is only required to pay the non-exempt employee for the hours the employee works.

In a layoff scenario, the layoff is treated like a termination and the employee would be entitled to unemployment benefits—but no additional pay from the employer.

### ***Exempt & Non-Exempt Employees: Unused, Earned and Accrued Vacation, PTO, Sick Time and Health Insurance***

Unused earned and accrued vacation time:

- **Layoff:** the time must be paid out. The Office of the Attorney General has issued FAQs stating that it will not take enforcement action for untimely payment of vacation if “an employee voluntarily agrees to save accrued vacation for later use[.]” However, the AGO rightly pointed out that it does not have control over private litigation.

- **Furlough:** there is no need to pay out the time because the employment relationship will not be altered if the employee's schedule is being reduced.

Unused earned and accrued sick time:

- **Layoff:** there is no need to pay out unused earned and accrued sick time, *unless* the company's policies and/or practices include paying out unused earned and accrued sick time at the time of termination.
- **Furlough:** there is no need to pay out the time because the employment relationship will not be altered if the employee's schedule is being reduced.

Health Insurance

- **Layoff:** An employer need not pay an employee's health insurance premiums while an employee is laid off. The employee is given the option to elect COBRA coverage.

An employer may, opt to cover the cost of COBRA and/or consult with its health insurance provider to see if there is an option for the employer to continue paying health insurance premiums while an employee is laid off.

- **Furlough:** employers should keep an eye out to see if their benefit plans require that an employee work a certain number of hours to be covered under the company's health insurance, but the health insurance coverage should, as a general matter, continue uninterrupted.

### ***What Are Businesses Obligations Under the WARN Act During the COVID-19 Pandemic?***

Businesses with at least 100 full-time employees that are contemplating a large-scale layoff or workforce termination due to the COVID-19 pandemic may have notice obligations under the federal Worker Adjustment and Retraining Notification (WARN) Act or state “mini-WARN” Acts. This alert addresses common federal WARN Act questions prompted by the COVID-19 pandemic. The WARN Act requires covered employers to provide at least 60 days' advance notice of a mass layoff or plant closing. The employer cannot complete the planned layoff until the 60 days have expired. A “mass layoff” is a reduction in force, at a single site of employment, during any 30-day period for (a) at least 33 percent of the employees and at least 50 employees (excluding part-time employees); or (b) at least 500 full-time employees. A “plant closing” is the permanent or temporary shutdown of a single site of employment, if the shutdown results in an employment loss of 50 or more full-time employees.

An “employment loss” means (a) an employment termination (*i.e.*, the employer does not intend to re-hire the departing employees), (b) a layoff for longer than six months, or (c) a reduction in hours of work of more than 50 percent during each month of any six-month period. There are exceptions in the regulations for when an employee is relocated or transferred to employer-sponsored programs, such as job training.

These threshold criteria are important to understand, because even if the employer is planning a large layoff, it may not trigger a 60-day WARN notice before it can go into effect. Importantly for the current COVID-19 pandemic situation, if the layoff or reduction in hours lasts six months or less, there is no WARN event. An employer implementing a layoff because of COVID-19 likely thinks it is announcing a short-term layoff. That said, if the pandemic lasts longer than expected, the layoff could end up being more than six months. In those circumstances, an employer



that previously enacted what it thought would be a short-term layoff (six months or less) that is extended beyond six months due to business circumstances not reasonably foreseeable at the time of the initial layoff is required to give notice once it becomes reasonably foreseeable that the extension is required.

Many employers facing mandatory shut-downs or unexpected financial crises understandably believe that imposing a 60-day notice requirement would be impracticable because of the quick spread and immense impact of the pandemic. Importantly, under the WARN Act, there are two exceptions that could come into play and protect against a potential employee lawsuit for failure to provide a WARN notice. An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the plant closing or mass layoff is caused by (a) business circumstances that were not reasonably foreseeable as of the time notice would have been required or (b) a natural disaster. An employer relying on these exceptions must give as much notice as is practicable – even if it is after the layoff has already taken place.

Examples of natural disasters include floods, earthquakes, droughts, storms, tidal waves, tsunamis and similar effects of nature. To qualify for the natural disaster exception, the plant closing or mass layoff must be a direct result of a natural disaster. If the plant closing or mass layoff is an indirect result of a natural disaster, the natural disaster exception does not apply, but the unforeseeable business circumstance exception may apply. An “unforeseeable business circumstance” is caused by some sudden, dramatic and unexpected action or condition outside the employer’s control, which most observers would agree applies to the current pandemic.

We are not aware of any cases addressing whether a virus or pandemic constitutes a natural disaster or unforeseeable business circumstance, since the last pandemic in the United States was in 1918, and the WARN Act was passed in 1988. However, both the natural disaster and unforeseeable business circumstance exceptions seem likely to apply to this unprecedented crisis.

If, however, an employer fails to give the WARN notice when it should have, it may be vulnerable to a lawsuit by a terminated employee. Where the notice period should have been a full 60 days, damages for a WARN violation can be roughly estimated at two months’ pay per employee, plus benefits, as well as attorneys’ fees. While the law requires employers to give advance notice of the plant closure or mass layoff to certain local government units, and there is a fine of \$500 per day of the notice period for failure to give this notice, it is extremely rare for the government to seek or collect this fine from a distressed company.

The federal government has not yet issued any guidance on whether the WARN Act will continue to apply to the COVID-19 pandemic. Our employment law group continues to monitor this quickly changing situation.

Employers are encouraged to seek the advice of counsel to explore options and creative solutions to address the impact COVID-19 is having in the workplace.

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*Michael P. Sams is a founding member and shareholder of Kenney & Sams, PC. Mike also is a Past Chair of DRI’s Construction Law Committee. He focuses his practice in construction law and civil trial practice generally. Mike has received an AV Rating, the highest rating for legal ability and professional ethics, from the Martindale-Hubbell Law Directory and has been rated one of the top 100 lawyers in New England by Boston Magazine and a New England Super Lawyer since 2005.*

*Michelle De Oliveira is a litigator who handles employment-related disputes. In the litigation arena, Michelle represents clients in employment-related matters, such as, wage and hour, restrictive covenants, discrimination and sexual harassment, before state and federal courts and administrative bodies, such as the Massachusetts Commission Against Discrimination.*

*Lindsay Burke, a Director at Kenney & Sams, defends and asserts the rights of companies entangled in complex disputes. Her cases often involve business-to-business contract disputes, business divorce, trade secret litigation, non-competition agreements, and questions regarding intellectual property ownership.*

# Special Issues for Employers During the COVID19 Pandemic

By Alicia R. Kennon



In recent days and weeks, the employment landscape has changed dramatically as a result of COVID19. Cities, Counties, and States are rolling out various social distancing and shelter-in-place orders that are impacting all industries and all socio-economic segments of our population. In response Congress enacted Families First Coronavirus Response Act (FFCRA). Among its provisions, are two new laws that require employers to provide *paid sick leave* of up to two weeks, and *paid family leave* for up to 12 weeks due to the impact of COVID-19. Below is a summary of an employer's obligations under the FFCRA, which is slated to take effect April 2, 2020:

## Emergency Paid Sick Leave Act (EPSLA)

Employers, with less than 500 employees<sup>23</sup>, must provide two weeks of paid sick leave to any employee unable to work or telework due to the following:

- Government quarantine or isolation order related to COVID-19;
- Doctor's advice to self-quarantine due to COVID-19 concerns;
- Employee experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Employee's need to care for someone who is subject to a quarantine, isolation order, or doctor's recommendation to self-quarantine;
- Employee's need to care for a son or daughter who is home due to school or daycare closure related to COVID-19 concerns; or
- Employee experiencing any other substantially similar condition specified by the Secretary of Health and Human Services HHS).

Any employee that has been quarantined (not shelter in place) by the government or a physician due to a diagnosis of or while seeking a diagnosis for COVID19 is entitled to full wage replacement for up to 80 hours for all full time employees. Additionally, the maximum sick pay owed is

\$511 per day or \$5,110 per employee. The amounts owed vary based on an employee's status as full or part-time. The Secretary of Labor has reserved all rights to enforce this provision in accordance with Federal Labor Law and the failure to comply and/or any efforts to take adverse employment action against an employee for utilizing the EPSLA will result in civil liability, fines up to \$10,000, and 6 months imprisonment. The silver lining, however, is that employers will get a 100 percent offset or quarterly credit against the employer's quarterly tax obligation.

## Emergency Family and Medical Leave Expansion Act (FMLA)

Employers with less than 500 employees must provide up to 12 weeks of FMLA leave to any eligible employee who is unable to work or telework due to a need for leave to care for a son or daughter under 18 if the school is closed, or the child care provider is unavailable, to due to a public health emergency.

After the first 10 days of leave (which is unpaid but likely covered by the EPSLA above), employers must pay 2/3 of an employee's regular rate of pay for all normally scheduled hours per day for up to 12 weeks. The maximum paid FMLA leave is *\$200 per day and \$10,000 total per employee*. Employers are prohibited from requiring employees to first use or substitute any accrued paid leave under its own policies; however, employees have the choice to first exhaust paid leave available under company policy. Lastly, Employers must reinstate the employee to the position held prior to leave, unless:

- The employer has less than 25 employees; *and*
- The employee takes leave related to COVID-19, their position does not exist at the time they wish to return due to economic conditions or other changes in operations due to a public health emergency; *and*
- The employer makes reasonable efforts to reinstate the employee to an equivalent position with equivalent benefits, pay and other terms of employment; *and*
- If reinstatement efforts fail, the employer makes reasonable efforts to notify the employee of equivalent positions for one year after the date the need for leave ends, or 12 weeks after the employee takes leave, whichever is earlier.

<sup>23</sup> Note, however, that the Secretary of Labor has the "authority" to exempt small businesses with less than 50 employees when the payment of this sick leave "would jeopardize the viability of the business as a going concern."

The same tax credit will be provided to employers for these mandatory payment obligations as is provided by the EPLSA.

If your company or client is facing a shut down or workload reduction as a result of COVID19, it is incumbent upon you to also confirm whether your State, County, or City has any additional provisions that may be applicable under these highly unusual circumstances.

*ing developers and general contractors in construction related claims, Alicia developed an expertise arising from employment related claims and has been closely following the impact of COVID-19 on all segments of the workforce including “essential” construction employers.*

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*Alicia R. Kennon is a partner in Wood, Smith, Henning & Berman’s Northern California office. In addition to defend-*