



The Impact of Coronavirus on Business, Employment and Construction Law Issues: An Overview

On January 30, 2020, the World Health Organization (“WHO”) declared COVID-19 a/k/a “coronavirus” a public health emergency of international concern. Coronavirus is now classified as a pandemic, meaning that it is an epidemic occurring worldwide, or over a very large area, crossing international boundaries and affecting a large number of people. Confirmed cases of coronavirus have spread to over 120 countries since it was first identified in China, infecting more than 120,000 people and causing more than 4,000 deaths worldwide. In the United States, there have been more than 1,000 confirmed cases and more than 30 deaths to date. The symptoms of coronavirus are similar to that of the flu and include fever, dry cough, and trouble breathing. Coronavirus is transmitted person-to-person among those in close contact.

The impacts of the pandemic are expected to spread across a wide range of industries, resulting in disruption to supply chains and the global workforce. This report will address the potential legal impacts of coronavirus in the areas of construction law and employment law, though many of the concepts have general applicability to contracts covering a wide range of businesses.

Coronavirus in Construction: Force Majeure Clauses, Business Interruption Coverage, Employee Management, and Protecting Against The Impact

In today’s global economy, many of the supplies used for the construction of projects in the United States and generally for the manufacturing of construction equipment are shipped from countries around the world, including China - the largest construction market in the world and a leading supplier of construction materials. As providers of construction supplies are impacted by the spread of coronavirus, delivery of those supplies may be delayed severely or halted completely.

If coronavirus continues to pervade the United States, there may also be a shortage of labor in the construction workforce. Cumulatively, the spread of coronavirus will likely influence the cost, timeliness, and feasibility of both new and existing construction projects. Consequently, it is crucial for professionals in the construction industry to evaluate their current contractual provisions regarding excusal of delay or non-performance of contractual duties, business interruption insurance policies, employee management protocol, and strategies to safeguard against business losses.

Can Force Majeure Clauses Shield Liability for Non-Performance of Contractual Obligations Due to the Spread of Coronavirus?

A force majeure clause in a contract excuses a party's performance due generally to certain types of acts beyond its control. The concept of force majeure is a creature of contract, meaning that if the contract does not contain a force majeure clause, the excuse of force majeure for non-performance may not be available.

Businesses in construction and other industries should consider the inclusion and application of force majeure clauses in their contracts. The scope of force majeure clauses will depend on the terms of the contract, the circumstances in which the contract was executed, and other relevant facts. Where the definition of an event of force majeure in a contract includes disease, epidemic, or pandemic, business entities should have a strong claim that the spread of coronavirus constitutes a force majeure event.

Where the definition of force majeure does not expressly contain language concerning disease, epidemic, or pandemic, entities must evaluate whether the spread of coronavirus otherwise falls into the category of force majeure as defined in their contracts. One commonly used standard force majeure clause, from the FIDIC Silver Book, defines four criteria that must be satisfied for an event or circumstance to constitute force majeure:

- (1) an exceptional event or circumstances beyond the affected party's control has occurred;
- (2) the affected party could not reasonably have provided against the event or circumstance before entering into the contract;
- (3) the same party also could not reasonably have avoided or overcome the event or circumstance once it arose; and
- (4) the event or circumstance is not substantially the result of an act or omission by the party.

It is possible that coronavirus qualifies as a matter of force majeure under this four-factor test. It may be less clear, however, whether a non-performing party could be afforded relief if non-performance was the result of restrictions on movement stemming from the spread of the virus, rather than a diminished workforce resulting from sick employees. Affected entities should consult counsel to determine whether a force majeure clause protects them from material losses.

Other common force majeure clauses, such as that used by the American Institute of Architects, may also provide relief for the non-performing entity.

A force majeure clause may also provide a contractor with an extended period of time to complete a project. This would largely depend on whether the contract also contains a "no damage for delay" clause. These clauses limit a contractor's compensation to direct general condition costs or to a unit price mutually agreed to in advance. Moreover, delays overseas will naturally drive up domestic costs. Since standard form construction contracts usually only allow for substituted materials when there is a cost savings to the project owner, unexpected increases due to an event like a worldwide virus outbreak are potentially the sole responsibility of the contractor; unless there is a price-escalation clause.

One such cost-adjusting clause that permits recovery has been promulgated by the Associated General Contractors of America (“AGC”). AGC ConsensusDocs cost-adjustment clause, § 200.1, Time and Price Impacted Materials Amendment provides a sensible framework for project owners and contractors to protect themselves against construction material price volatility when market fluctuations are a concern. Clauses like AGC’s provide an agreed-upon base-line from which either party may be given an entitlement to an equitable adjustment in the face of a grave and unforeseen market condition like the coronavirus. Standard business contracts may also provide relief for material price escalations and cost adjustments.

Does My Insurance Policy Cover Business Interruption Due to the Spread of Coronavirus?

Businesses should also determine whether their first-party insurance will cover business interruption losses due to the spread of coronavirus. Usually, business interruption insurance coverage provides relief to insureds for lost profits and additional expenses when their business operations are disrupted as a result of physical loss or damage to the insured property.

In the wake of the coronavirus pandemic, however, there may be several potential conflicts that could bar insureds from coverage under business interruption insurance. Coronavirus may not satisfy the “direct physical loss or damage to property” requirement that is necessary to trigger traditional business interruption insurance coverage. Insurers will likely deny business interruption coverage because coronavirus has not *directly* caused physical loss or damage to property. Business interruption coverage may be available, however, where the government orders the closure or restriction of access to an insured property if the order results in direct physical loss or damage to property. Some policies also contain communicable disease exclusions that may bar coverage for claims relating to coronavirus. Businesses should consult their attorney or insurance provider to evaluate coverage under such circumstances.

In response to the outbreak of coronavirus, the Insurance Services Office (“ISO”) has issued endorsements for use with commercial property forms that would provide coverage even absent a showing of direct physical loss or damage to property. These forms provide limited business interruption coverage due to actions taken by civil authorities to avoid or limit the spread of coronavirus.

The first form, entitled Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus, would cover actual loss of business income or extra expenses incurred due to a civil authority quarantining or closing a business premises to prevent infection or spread of the virus. This coverage would apply even if the order is enforced based on the suspicion of risk of infection from coronavirus and not actual presence of coronavirus on the premises.

The second form, entitled Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation), extends coverage where a civil authority closes or restricts the use of public transportation in the area of the insured property.

Policyholders should confirm that they are protected for any business interruptions to the extent their geographic area, business supply-chains and/or other areas in which they conduct business are impacted by the spread of coronavirus.

Further Protecting Against the Impact of the Coronavirus

The spread of coronavirus impacts the construction industry in several ways. As providers of construction materials worldwide and their employees are affected by the spread of coronavirus, delivery of those supplies could be significantly delayed or ceased altogether. Additionally, if the spread of coronavirus increases in the United States, a shortage of labor available in the construction industry could occur. Thus, leaders in the construction industry should consider how to protect against these risks in new and existing projects.

For new projects, contractors should consider including contract provisions that account for this uncertainty by allocating the risk to the owner or allowing for reasonable adjustment to the contract price or time to complete the project in the event of significant unexpected price increases in construction materials and/or of delivery delays due directly or indirectly to the spread of coronavirus and any restrictions on movement imposed in response thereto. In the alternative, contractors should consider adding contingencies to their pricing to protect against these possibilities.

For existing projects, contractors should review their contracts to determine if there are provisions that already address any delays in the delivery of, or increases in the price of, construction materials or labor. Additionally, contractors should look for language in force majeure clauses, as mentioned above, that protect against the possible impact of coronavirus. Finally, contractors should review their contracts to see how the risks for unexpected delays and/or price increases are allocated between the parties.

In the Wake of the Spread of Coronavirus, How Should I Manage My Employees?

Employers should have a plan in place in order to prepare for the potential outbreak of coronavirus in their region or workplace. Such plans should identify exposure risks and seek to prevent the disruption of essential business operations. Employers should consider including in such plans protocols for establishing alternative work site, including working remotely and/or staggered shifts. If these options are not feasible for your business, it is crucial to evaluate how your business may adapt to disruptions to your normal course of business, including delays in delivery of materials, loss of suppliers, loss of essential employees, and/or widespread absences.

Businesses should establish protocols for sick and at-risk employees. For example, symptomatic employees (with a fever, cough, shortness of breath, or other symptom lasting more than 24 hours) may be instructed to stay home from work. Moreover, employees with a sick family member or who have traveled abroad recently should notify their supervisors of the potential risk of infection. Employers should explain their leave policies for sick employees, which should be adaptive and non-disciplinary on account of the ongoing pandemic. With adapted policies, employees will be encouraged to self-quarantine and protect other employees at the workplace if

they are sick or symptomatic. Ultimately, this will prevent the spread of coronavirus and lead to a healthier and more productive workforce.

However, employers should remember to pay close attention to state and federal wage and hour law, leave law and the employer's own internal policies before reducing hours or pay or placing employees on leave. This analysis may be different for exempt and non-exempt employees. Employers should think long and hard about imposing restrictions such as a furlough or partial week reductions in salary and should consult with their accounting and legal staff or professionals.

It may be helpful, depending on the location and severity of the risk, to coordinate an employer's internal decisions with state and local health officials. It is crucial that all affected entities work together to ensure accurate and timely transmission of information. ***Again, such actions must be taken in accordance with applicable federal and state laws regarding the dissemination of personally identifiable information and privacy laws concerning health information.***

In managing employees during the coronavirus pandemic, employers should also review the requirements of the Occupational Safety and Health Act of 1970 (the "OSH Act"). The OSH Act requires employers to provide their employees with safe working conditions that are free from serious recognized dangers and comply with safety rules and regulations under the OSH Act. It is important to remember that employees are expected to work *unless* they genuinely believe that an imminent danger exists and a reasonable person would agree that there is a real danger of death or serious physical harm. An "imminent danger" is defined as any conditions or practices in any place of employment where a danger exists that can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.

Is Your Business Ready to Respond to Coronavirus?

For an employer, a pandemic such as coronavirus can impact the workplace in large and small ways. In the interests of protecting employees, clients, and the workplace, there are several steps that an employer should consider in order to mitigate the spread of coronavirus in the workplace.

Employers should encourage sick employees and employees with sick family members to stay home. In addition to ensuring that sick and symptomatic employees remain out of the workplace during their sickness, employers should also encourage proper respiratory etiquette and infection prevention measures, such as frequent hand washing, application of hand sanitizer, and keeping good personal hygiene habits. Moreover, it is important for employers to facilitate an increase in the cleaning of common surfaces at the workplace.

Not only should an employer keep a hygienic workplace, but in order to prepare for longer-term impacts of coronavirus, they should also consider the following steps:

1. Have a Business Response Plan to Respond to the Pandemic

Identify response plan team members and responsibilities of those members. It might be prudent to establish an employee communication plan and/or protocol for warning employees of changes. Evaluate whether there is a need to revise an emergency operations plan.

2. Identify critical functions of your business operations and the employees who can support them

Identify the “essential employees” in the operation of your business. What is critical to ensure that the business can operate and the essential employees can perform their jobs? What are essential technology needs? Who are the critical suppliers needed to carry on business as usual and what is their willingness to continue to support the needs of your business during a pandemic? What *must* you have in order to continue business in the wake of a pandemic?

3. Assess your ability to support staggered shifts and/or alternative work facilities (i.e., working remotely)

Consider whether your business has ample software and/or equipment to enable employees to perform their job responsibilities remotely. It is critical to explain to employees your expectations and their obligations pertaining to working from home. It will be essential to evaluate insurance/liability issues as well as possible FLSA issues inherent in taking these steps.

4. Create human resources policies that can be used during such a pandemic

Most likely, the majority of the following HR policies will be impacted greatly by the implications of a proper response plan: Absentee Policies, Sick Leave, Wage Payment, Medical Leave, Benefits, and Bereavement. Evaluate your existing policies and consider updating these to account for possible changes your business will need to undertake in response to the pandemic. Anticipate the creation of new policies such as Shutdown and Recovery, Job Training, Flex Time/Telecommuting/Staggered Shifts, Pay Continuation, and/or Housing or Financial Assistance.

5. Identify Key Governmental Partners That Serve as a Liaison During a Pandemic

While employers should not provide medical opinions or advice concerning the spread or the effects of coronavirus, they should have a basic knowledge of appropriate health organizations, government agencies, and other sources of information about coronavirus and preventing the spread of disease. In addition to the Center for Disease Control, there are multiple local, state, and/or national resources to provide such information and guidance.

6. Educate Employees

Do your employees know about the signs of infection, transmission of disease, proper preventative measures such as sanitation, and company directives that respond to issues related to the spread of coronavirus? Implement training to cover these and any additional policies that your business is enacting to safeguard against the spread of coronavirus.

7. Be Mindful About Privacy Information

Employers should also consider their employees' privacy information, particularly when it comes to healthcare information. Employers' conduct vis-à-vis their employees' health and health-related information is covered by state and federal employment statutes. For example, the employee could be eligible for protected leave under the Family Medical Leave Act. Businesses should consult their human resources department and counsel to ensure employees' privacy is properly maintained.

8. Be Mindful of Applicable Wage Payment Laws for Exempt and Non-Exempt Employees

If employers must close business due to the ongoing pandemic and employees are not working, they would generally not be required to pay non-exempt employees under the Fair Labor Standards Act ("FLSA") because the FLSA minimum wage and overtime laws only attach to hours worked in a workweek. Non-exempt employees who are paid hourly but are not working any hours during the pandemic are not entitled to minimum wage laws under the FLSA.

However, salary rules require that exempt employees (meaning that they are paid a salary and use discretion and independent judgment in performing their job duties) who perform at least some work in the workweek be paid the entire salary for that workweek. There are exceptions to this, including when an employer is open for business but the employee stays home for the day and performs no work.

Employers should also review their employment contracts, any collective bargaining agreements, or other policies to determine whether they have a legal obligation to continue paying employees if the business is closed during the pandemic.

SOURCES OF GENERAL INFORMATION

For more information and updates about coronavirus, please reference the following links:

World Health Organization ("WHO")

<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

Centers for Disease Control and Prevention (“CDC”)

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

State of Connecticut

<https://www.ct.gov/Coronavirus>

United States Occupational Safety and Health Administration (“OSHA”)

<https://www.osha.gov/SLTC/covid-19/>

Please feel free to contact the following individuals at Updike, Kelly & Spellacy, P.C. with any questions or to inquire as to representation related to these topics:

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Updike, Kelly & Spellacy, PC would like to thank associates Jeffrey Bausch, Jeffrey Renaud and Jason Martinez for their contributions to this article.

The foregoing information is intended to provide an overview of potential legal issues and implications concerning the spread of the coronavirus and its potential impact on business operations and workforce. This information does not constitute legal advice and in no manner whatsoever establishes an attorney-client relationship with readers. As with all business decisions, individual actions by employers must be carefully considered based upon work environment, individual employee circumstances and a myriad of other factors. Businesses should consult with counsel before adopting general corporate policies and enforcing any resulting actions on individuals or groups of employees.