

COVID-19's Impacts on Construction Projects

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COVID-19 and the ensuing shutdown of much of the economy will affect construction projects dramatically. Projects have become more difficult to perform as industry participants juggle their obligations to their customers, employees, and the public. The impacts will get worse before they get better.

This article identifies some construction law issues facing owners, contractors, subcontractors, and suppliers grappling with the impacts of the virus.

When a contractor or subcontractor cannot meet the project schedule, does COVID-19 excuse the delay and warrant a time extension? It depends on the language of the contract. As discussed by my colleague, David Robinson, in his March 3 Insight, in most US jurisdictions, epidemics, pandemics and other unforeseeable Acts of God do not automatically excuse breaches of contract. In order to determine whether COVID 19 provides an excuse, begin by looking at the terms of the relevant contract.

Does the contract provide an excuse for breaches that result from pandemics, epidemics, or other Acts of God? Industry form documents seem to excuse delays resulting from COVID-19:

- **AIA:** Article 8 of the AIA Standard General Conditions (Document A201 - 2017) provides in pertinent part that the Contract Time shall be extended if the Contractor is delayed by (a) an act or neglect of the Owner or Architect or of a Separate Contractor; (b) unusual delay in deliveries, unavoidable casualties, or other causes beyond the Contractor's control; (c) delay authorized by the Owner, or (d) by other causes that the Contractor asserts, and the Architect determines, justify delay.
- **ConsensusDocs:** Article 6 of the ConsensusDocs Standard Agreement and General Conditions between Owner and Constructor (Document 200 - 2017) calls for an equitable extension of time if the contractor is

delayed at any time by “any cause beyond the control of the Constructor.” It specifically lists “epidemics” as an example of a cause beyond the contractor’s control.

- **EJCDC:** Article 12 of the EJCDC Standard General Conditions of the Construction Contract (2007) is similar to ConsensusDocs. It calls for an extension of the Contract Times where Contractor is prevented from completing any part of the work due to delay “beyond the control of the Contractor.” It specifically lists “epidemics” as an example of a delay beyond the contractor’s control.

While a good argument can be made that these documents excuse delays that result from COVID-19, the contractor still should follow contractual notice provisions and demonstrate the extent to which the delay resulted from the virus.

Of course, many contracts do not mirror industry form documents. Subcontracts, especially, come in all shapes and sizes. Many subcontracts do not include any provision excusing the subcontractor’s delay under any circumstances. What then?

When contracts do not provide excuse, non-contractual law in most US jurisdictions provide only a few legal theories that might excuse contractual breaches. Two examples are:

- **Impossibility:** Non-contractual common law provides an excuse if a contract becomes literally impossible to perform. Literal impossibility, though, is rare. Impossibility does not apply when a contract has become merely more difficult or expensive.
- **Frustration of purpose:** Non-contractual common law provides an excuse if an uncontrollable event occurs that, as a practical matter, destroys the breaching party’s purpose in entering the contract. The purpose must be so frustrated by the event that the value the party reasonably expected to obtain from the contract cannot be realized.

Successful defenses based on impossibility or frustration are rare. Whether either one applies to COVID-19 requires careful analysis. It is not at all clear that COVID-19 will justify application of either doctrine.

Who bears the financial burden of increased costs and delays? COVID-19 will make performance of many contracts and subcontracts more expensive. Supply chains will be disrupted, material prices may increase, absenteeism will decrease labor efficiency, and general conditions will be extended. Can a contractor or subcontractor recover its increased costs from its customer?

As with the question of excusability, start the analysis by looking at the terms of the relevant contracts. Do the contracts allow a contractor or subcontractor to change its price or pass price increases upstream? Material price escalation clauses are not uncommon, but application of other contractual provisions is less clear. Carefully examine the differing site conditions clauses to determine whether the conditions on your projects meet the contractual definition of a differing site condition. Some provisions may support a claim.

When an Owner or Contractor suspends or terminates a project or part of a project, who bears the cost? Owners and contractors are carefully analyzing whether they should terminate or suspend projects or portions of projects. Some will opt to press forward while some will opt to terminate or suspend. Virtually every contract and subcontract allows the upstream party to suspend or terminate the project at any time for any reason, without a showing of

downstream default.

The disputes center on who must pay for lost revenue (including overhead and profit) and who bears the costs to demobilize and remobilize. Those questions can be answered only by looking at the relevant contracts. Many contracts require the contractors and subcontractors to bear the costs; many others allow recovery.

Labor and Employment Issues. Employment issues related to the virus are complex and numerous. Employers must balance many competing interests: complying with contractual obligations, producing revenue to pay employees and creditors, protecting employees and the public and complying with existing regulations like ADA and HIPAA. Congress appears likely to pass the Families First Coronavirus Response Act. Other new laws will follow. Serious consideration of employment issues is beyond the scope of this article. For more information, see various Insights published by Nexsen Pruet colleagues available [here](#).

What should construction participants do now? Almost every construction contract requires a claimant to notify the other party in writing as soon as an impact occurs. Anticipate as best you can how the virus will impact your work. Consider not only your obligations to your customer but also your subcontractors' and suppliers' obligations to you. Can your subcontractors and suppliers meet their obligations?

As soon as you identify the current or future problems, notify your customer in writing. **DO NOT WAIT.** State the reasons for the problems. Relate the reasons to the virus or impact of the virus. Describe how the virus will impact the project's schedule and costs. Even if you cannot quantify the impacts, provide the notice and identify what you can identify. Reserve rights to give more detail later.

Remember to communicate expectations downstream to subcontractors and suppliers. Let them know your expectations about project compliance, staffing, and health and safety.

By anticipating problems and communicating them early, you will not only preserve your contractual rights, you might find the other party is sympathetic. Working together you can mitigate the impacts on everyone.

Communicating orally or via text is not enough. Email and mail an old-fashioned freestanding document like a letter, change order request, or notice of claim. Nexsen Pruet has drafted a set of templates for contractors to send to owners and subcontractors. The templates are available for a small fee. For more information, contact any Nexsen Pruet construction attorney.

If you have not already analyzed your projects and communicated with your customers, subcontractors, and vendors, act now.

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