

Construction in the Age of COVID-19: Analyzing Impacts and Strategies

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Owners, contractors, and designers alike are feeling the effects of COVID-19 and related federal, state, and local orders regarding the pandemic. There are a litany of issues – both legal and practical – that Owners need to assess when deciding how to manage ongoing projects and those in the pipeline.

First and foremost, Owners must analyze all applicable state and local shelter-in-place and business closure orders and any published interpretive guidance to determine if it is legal and feasible for their construction operations to continue. This analysis often requires a consideration of the Owner's industry sector, as well as the construction sector. For example, as of today, Maryland and California consider construction companies essential businesses that may continue operations. Ohio's order contains a lengthy but non-exclusive list of the types of construction projects that may continue. On the other hand, Pennsylvania has deemed construction non-essential except for emergency repairs and the construction of healthcare facilities and New Jersey published a discrete list of construction projects that may continue.. Thus, if you are an Owner who provides healthcare services, your State and Local orders might allow your construction projects to continue *even if* construction in general is banned.

To make matters more confusing, some states, such as California, also have Local orders that are not entirely in-line with their state order. In those instances, Owners must analyze state preemption law to determine which order governs. And, the orders have changed and will continue to do so as states and the Federal Government adjust their response to the pandemic. Owners must be vigilant in remaining up to date with all applicable jurisdictional orders. What is consistent is that the states are all looking to the Federal Critical Infrastructure Sectors for guidance, which can be found here: <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19> Unfortunately, the guidelines are very broad and also require interpretive gymnastics.

While the various governmental actions differ in specifics, they all have potential impacts on construction projects. In addition, the practical impact of a highly contagious virus on supply chain, working environments, and employee/worker health have led to significant uncertainty. As if these considerations were not enough for Owners to evaluate, they must then weigh whether a project that can proceed *should* proceed.

Although the list below is certainly not complete, some combination of the following issues have begun and will continue occur:

- supply chain disruption because
 - foreign provided items or domestic items with foreign parts that are delayed;
 - domestic suppliers develop labor shortages due to illness, strikes, government shelter-in-place orders, etc.;

- transportation costs become excessive due to split shipments, non-containerized, etc.;
- labor unavailability because
 - employees are sick;
 - employees are quarantined or self-isolated;
 - employees are fearful of working;
 - services needed by employees have closed (school closures, etc.);
 - employees need to care for family members;
- additional medical screening and testing costs;
- delay driven by cumulative impact of additional medical screening, sanitation measures, and social distancing requirements;
- added costs caused by reduction in use of shared equipment for hygiene purposes (tools, iPads, radios, equipment, water, etc.);
- unavailability or shortages of protective equipment and supplies;
- limitations on travel due to
 - government restrictions;
 - corporate restrictions;
- limitations on the size of groups working together;
- governmental shut down/shelter in place and social distancing restrictions causing:
 - unavailability of government inspections and approvals due to inspectors, code enforcers, and permitting officers not being permitted to work;
 - restrictions on work force travel and operations;
 - disrupting or impacting bid openings, pre-bid and pre-proposal meetings and site tours, etc.;
- increased costs due to limited availability of vendors;
- added costs due to project suspensions (temporary shoring and bracing, securing of sites, additional project monitoring and security, demobilization and remobilization); and

- acceleration costs to mitigate delays.

If and when these effects occur, there will be financial impacts on projects that will need to be analyzed under existing contract provisions, force majeure contractual or statutory provisions, and frustration of purpose theories. In addition, each project will have separate business, political, and practical issues that must be considered. The first step in this analysis is to gather the necessary information on a project-by-project basis. [Click here](#) for an outline of Legal, Governmental, Practical, and Business considerations that Owners should consider when assessing their construction projects during the COVID-19 pandemic.