

MEMO: CONCERNING MARKETPLACE CONTRACT CHANGES IN RESPONSE TO COVID-19, AS WELL AS PROJECT-LEVEL CONSIDERATIONS FOR THE CONTRACTOR

You may recall the recently published [Memo Concerning the Interplay of the Coronavirus \(COVID-19\) and Force Majeure Provisions in Contractor and Subcontract Agreements](#). The purpose of that memo was to advise our underwriters, agents, and contractors about the potential impact of the COVID-19 pandemic on contractual relations, as well highlight some general guidelines to consider and things to watch for.

It has not taken the market long to adapt. While some contractors (including accounts of our very own) are petitioning owners for relief due to the impact to manpower and schedule, some owners are working to ensure contractors' remedies are expressly limited. Take, for instance, two recent real-world examples that were brought to our attention from the field:

Add new 8.3.4 to A201: Owner and Contractor recognize the existing and potential extraordinary measures being taken by governments, companies, and individuals due to COVID-19 and the potential impacts from the same on this Project. Owner shall not be liable to Contractor for extended overhead or any other delay damages, and the GMP shall not be increased, due to shortage of labor, materials or other causes arising from COVID-19.

This language is meant to be inserted into the A201 General Conditions. Contractors, agents, and surety underwriters must be on a keen watch for such modifications, as their prevalence will undoubtedly increase. Below is a second example, expressly excluding COVID-19 from the scope of a force majeure event:

CONDITIONS OF THE CONTRACT

A1.1 SECTION 00 73 00– SUPPLEMENTARY CONDITIONS

SC-12 CHANGE OF CONTRACT TIMES

SC-12.1. Add the following paragraph immediately after Paragraph 12.1.D:

Both the Owner and the Contractor have evaluated the effects of COVID-19 on this Contract. The Nevada Department of Public Safety, Division of Emergency Management, adopted an emergency regulation on March 20, 2020, defining Owner and construction companies as an Essential Licensed Business. The Owner and the Contractor expressly agree that COVID-19 and what is known about COVID-19 as of the execution of this Agreement are not considered Force Majeure Events.

Conversely, we are also seeing positive examples of contractors pushing their own set of modifications, such as the following example:

[Choose one that applies: Contractor/Subcontractor] shall not be held liable for any impacts, delays, labor overruns, material overruns and/or cost overruns related to its Work stemming from the current flu epidemic, and/or COVID-19 (Coronavirus epidemic) as defined by the United States Centers for Disease Control and Prevention. [Choose one that applies: Contractor/Subcontractor] shall further be entitled to a change order for any and all time and costs associated with said epidemic(s).

The public sector is also adopting resolutions. Effective March 30, 2020, the Ohio Department of Transportation (“ODOT”) is allowing non-compensable 30-day extensions in “the event of project delay or impacts to performance due to a voluntary or mandatory COVID-19 virus Directives, Orders, quarantine or closure directed by government authorities . . .” The ODOT memo provides that either party may petition for a termination for convenience at the expiration of the 30 days if the work cannot resume (ODOT retains discretion to grant the request). ODOT will leave these measures in place until the “emergency order [including Ohio’s Stay At Home Order] or declaration of any government official is lifted.”

Despite the push for modifications such as the above examples, the salient points of our prior memo remain the same, namely: carefully read the contract (with the consultation of an attorney if necessary); promptly communicate the circumstances concerning the delay with the appropriate party (in writing); take reasonable measures to mitigate damages; and diligently document efforts. Remain vigilant and thorough in your review of contracts, especially as it relates to the provisions concerning delay (and any exhibits and/or amendments).

Considerations of delay impact and contractual clauses are but one aspect of the disruption facing contractors across the nation and the world at large. Contractors will have many practical considerations to confront, if and when COVID-19 directly impacts the prosecution of work on their jobsite. The following is not meant to be an exhaustive overview of all potential challenges a contractor may face, and it is not a substitute for consultation with a licensed attorney in your jurisdiction. However, the following points are meant to provide you with general, practical considerations for addressing jobsite concerns should COVID-19 result in a shutdown.

As with all questions concerning your rights and obligations, the best place to start is with the Contract Documents themselves. However, regardless of your contractually-assumed level of responsibility, there are some measures that all parties may want to consider. Even if you yourself do not have the contractual obligation to take any of these measures, it is likely that someone on the project does, and their action (or inaction) may directly impact your situation.

In present times, a directive or order to cease work as a result of COVID-19 should be reasonably anticipated to happen at any time. If a project you are involved in experiences a sudden shutdown, consider whether you are (or will be) prepared to address some of the following immediate and short-term concerns

Have you provided for secure transportation and relocation of critical project files? Alternatively, can files be accessed remotely?
Have you safeguarded project equipment and tools?
Have you contacted any scheduled delivery services and placed a hold on ordered material?
Have you provided for secure fencing and/or signage to properly advise other parties of the shutdown of the site?
Does the site have cameras, or other means of deterring and/or preventing unauthorized access to, or tampering with, the project site?
Whether it is prudent to notify local officials and/or authorities of the shutdown, in order to advise them the site will not be occupied during this time. Also key with respect to coordinating impacts to roadway traffic and/or ongoing operations in any impacted facilities.
Have any hazardous conditions been properly dealt with (e.g. open excavations, manholes, tripping hazards)?
Have containers and/or systems with liquids been drained and/or been conditioned with accepted additives in order to prevent freezing and damage?
Have hazardous materials been properly secured?

In addition to the above, you may consider photographing or videotaping walkthroughs of the project in order to further preserve the record.

If the project does not resume within a reasonably short period of time, you may need to consider longer-term impacts, including those that relate to the handling of stored materials. For example:

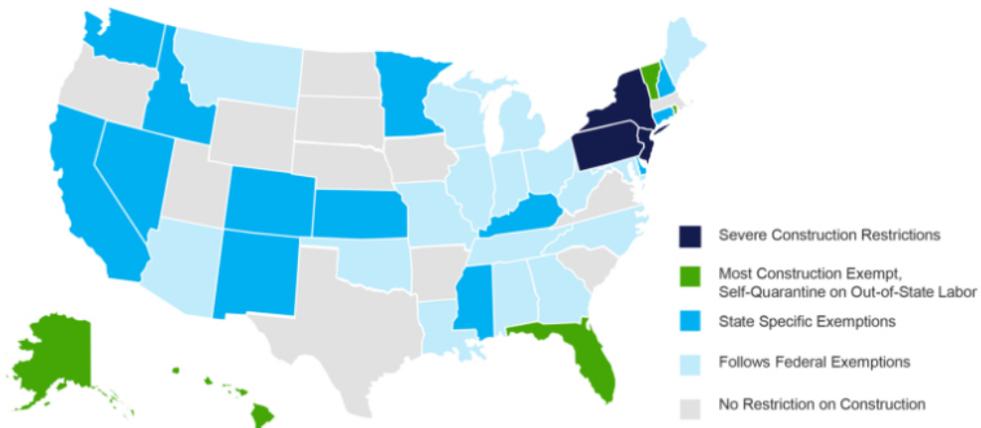
Do any of the materials that require maintenance during prolonged periods of storage? The seasonal impact of your location will undoubtedly play a factor.
Have you checked manufacturer and/or supplier specifications for any special care or handling of stored materials?
Do filters, cartridges or the like need to be changed on any HVAC equipment?
Have fire prevention systems been recently inspected and/or tested?

Regardless of the timing and duration of a shutdown, you should consider providing notice and an opportunity to your subtrades to remove and/or secure any equipment that may belong to them.

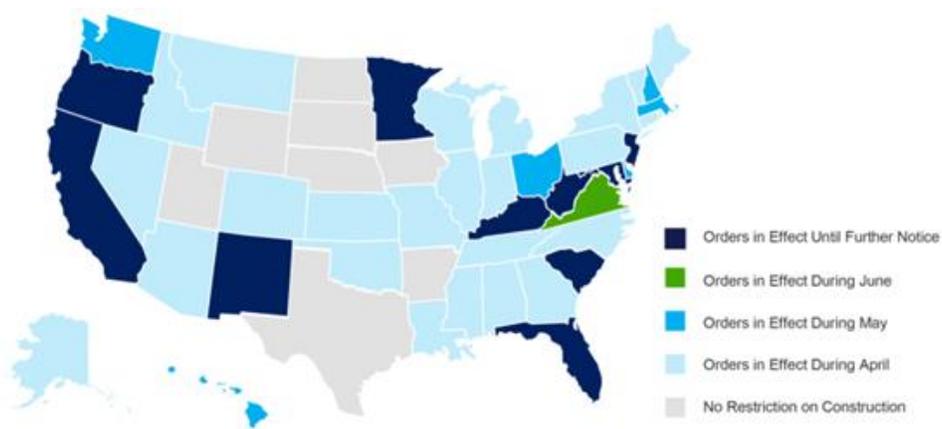
It is also important to consider how timely these measures can be adopted. If an immediate shutdown is ordered, how quickly can any of the above steps be implemented? Planning is crucial, so that parties can react with expediency and efficiency. If feasible, identify an individual(s) as a designated coordinator for your response during this time.

More and more states have imposed some form of restriction on construction activities in the past few weeks. Below is a recent map of state-level restrictions on construction, followed immediately by a second map indicating the duration of the restrictions:

State-Imposed Restrictions on Construction Due to COVID-19



Duration of State-Imposed Restrictions on Construction Due to COVID-19



You can also take this opportunity to reach out to your subtrades, calling on subcontractors to provide up-to-date accounts payable and receivable so that you have an idea of what projected costs or expenses may roll upstream during any downtime. It is also a good opportunity to check in with suppliers to advise them of the potential for impact, and to get updates on order statuses and/or any supply chain disruptions.

Keep in mind that COVID-19 initiated disruptions or delays to your ability to perform, or even be present on the site, can occur at any time. Being prepared will better position you to respond. Remember to document all impacts to your performance and keep critical project information readily-accessible in some format. Preparedness is key and will save you from having to plan on the spot.

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