

In The News

Construction Is Mostly Continuing Nationwide, But Firms Need To Beware Of Hidden Liabilities

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The U.S. construction industry remains largely open, with many reports coming in of work sites operating as other businesses close to prevent the spread of the coronavirus.

General contractors and construction trade associations around the U.S. have stressed the economic importance of continuing development. They also argue some projects should be considered essential, and have stressed construction sites are generally safe since operators work outdoors and workers often wear face masks and gloves. The Centers for Disease Control and Prevention and the Occupational Safety and Health Administration have provided guidance for construction workers and their managers on staying open amid the virus's spread.

In many cases, keeping job sites humming can be the best approach to balance health and economic output.

But, construction attorneys and experts say, a monolithic approach to the virus could result in construction-related businesses taking on hidden liabilities.

Their takeaway is that though contractors may be allowed to proceed, they should do so with extreme caution and pay attention to their contracts and insurance coverages.

"I wish there was one obvious answer or a clear path out of this new coronavirus wilderness, but there isn't," Tulsa, Oklahoma-based Hall Estill construction attorney, shareholder and partner Michael Keester said.

To avoid opening themselves up to legal liability if work continues, or taking unexpected financial losses if construction is paused, contractors and developers should closely consider factors like location, work site conditions and clauses like force majeure and civil authority in their contracts and insurance coverage, he said.

"For the benefit of American industry and its workers at all levels, I would like to see project sites stay open and active," Keester said. "However, this question isn't capable of one answer. Whether the site stays open depends on too many variables and those factors are evolving and changing at warp speed."

The final decision on whether to close a project is largely contingent on where the activity is occurring. The recommendations for a development inside an urban Washington state community, where the virus has caused a concerning number of infections and deaths, may vary from what is given to construction firms working in rural Wyoming.

Keester said construction project stakeholders need to consider incidents of exposure, the size of each project, the number of workers required on-site and whether workers associate in shared spaces.

It isn't just about following a safety checklist from the CDC and OSHA, but also considering whether you are asking workers on-site the right questions. They may appear healthy, but where did they go before coming to work? Are they a local crew, or have they traveled?

This is a time for nuance and deep thought, Keener said.

“With any decision the industry faces, they have to be careful [and] mindful of acting in a reasonably prudent manner and not exposing their workers to unnecessary risks,” Keester said.

Another top priority for construction firms is to review all their contractual and insurance coverage agreements with a lawyer and determine whether they include force majeure clauses or liquidated damages provisions.

Force majeure clauses, which offer parties the ability to avoid performance requirements and liabilities when uncontrollable factors hinder a project, are bound to come up, Keester said.

But don't automatically expect force majeure to be a panacea for the industry during this pandemic.

“There is not a force majeure in every construction contract,” Keester said. “There is a whole gamut of construction contract forms and terms that are used. And while many of the form contracts like AIA have force majeure provisions, not all of them do. It's certainly not something that's imputed into every contract.”

Even if there is a force majeure clause, whether a site's specific coronavirus event triggers it is a whole separate issue, he said.

“There is a very large continuum of analysis that has to be done to determine whether your particular force majeure provision is going to give you that relief,” he said.

Contractors should also see if they have civil authority clauses built into their business interruption insurance coverages, Munsch Hardt attorney and shareholder Michael Huddleston said.

These clauses are pretty limited, he said, but they can provide coverage if a civil authority, such as a government mandate to temporarily close, prevents you from accessing or using your property.

If civil authority coverage is present, it's usually part of an insurance contract's business interruption provisions.

Contractors should keep in mind there is no guarantee that certain contract terms and insurance coverages will automatically kick in when it comes to virus-related interruptions, Keester said.

There is a question of whether a virus outbreak is considered a triggering event in any given insurance policy or construction contract. The only safe way to act in such a situation is to communicate directly with the experts on these issues and avoid quick measures, Keester said.

“Act prudently in making all these decisions, including whether the project must be suspended, but try to communicate and act in concert with the other project players,” he said. “Owners, contractors, subcontractors, material men, design engineers and construction managers should work together when facing these very tough decisions.”

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