

Coronavirus/COVID-19, Construction Contracts, and Legal Next Steps



March 17, 2020

By: Mason Avrigian, Jr. and Paul A. Logan

Post & Schell, P.C.

The impact of the Coronavirus (COVID-19) is unprecedented in modern times as the disease reaches virtually every facet of business and day-to-day life throughout the United States and many parts of the world. The end of the virus, while doubtless to occur at some point, is unknown, which creates greater uncertainty and increases the level of business risk and concern.

The construction industry, of course, is not immune from the impacts. As business activity continues to slow and more and more parts of the economy are temporarily suspended, construction contractors must consider how to handle a slowdown or even a shutdown in the availability of labor and materials to perform ongoing contracts. [On March 16, 2020,](#)

[Boston became the first major city to shut down all construction projects for a 2-week period.](#) Other cities could follow suit in the coming days and weeks. This potential development will put completion of work and contract obligations at risk, opening contractors to potential liability and claims for nonperformance, delays in completion, and potential damages

Contractors need to be armed with positions and responses in the event owners or other parties in the industry seek to enforce contracts that become virtually impossible to perform. If your business encounters these circumstances, you must consider various legal positions and arguments to protect your interests. Some of the potential options include the following:

(continued from page 1)

- 1. Force majeure clause.** The term “force majeure” (a French term meaning “superior force”) is generally defined as “a superior or irresistible force;” or “an event or effect that cannot be reasonably anticipated or controlled.” Many contracts, especially public and private construction contracts, contain force majeure clauses that excuse performance due to specified events and conditions that are generally outside the parties’ control. The usefulness of a force majeure clause due to the effects of the COVID-19 virus will depend on the specific terms of the clause, if any, in your contract. A force majeure clause is one of the first contract terms that should be evaluated if your performance of a pending contract is adversely affected by any aspects of the COVID-19 virus.
- 2. Impossibility of Performance.** Impossibility of performance is a principle of law that excuses a party’s performance of a contract in certain circumstances. The principle generally means that where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty of performance is discharged unless the language of the contract or the circumstances indicate to the contrary. Corollary principles of law are known

as frustration of purpose and impracticability of performance.

- 3. Prevention by Government Regulation or Order.** Another principle of law that is potentially applicable to the current circumstances involving COVID-19 is when a party’s performance is adversely affected by a government order or regulation. Under this doctrine, if a party’s performance is made impracticable by having to comply with a domestic or foreign government regulation or order, the regulation or order is considered to be an event the non-occurrence of which was a basic assumption on which the contract was made.

Using these legal concepts, the recommended next steps:

1. Review your contracts and subcontracts. Force majeure clauses are often a part of the “boilerplate” terms.
2. Assess the notice requirements. You likely need to give notice of events that are claimed to be force majeure. Prime contractors - notify your owners, suppliers, and subcontractors.
3. Document the impacts. You will need to have documentation to support any force majeure claims or defenses. The documentation should

(continued from page 2)

include that which identifies the affected manpower, equipment, and materials and when the impact began and ends.

4. Provide notice to "business interruption insurance carriers."
5. Prepare. Some contracts allow for termination or cancellation in the event of a force majeure event.
6. Mitigate. You have an obligation to mitigate damages. Therefore, consider alternative ways to perform the contractual obligations and reduce costs.
7. Plan. Companies may have responsibilities to their employees. Begin contingency planning to lower the risk of COVID-19. Consider all the alternatives.

These principles and steps can be effective defenses to minimize or nullify the adverse effects of the COVID-19 virus on contract performance. The coronavirus outbreak requires immediate action. Company executives should consult their in-house and outside counsel for assistance to comply with its contracts and applicable law. If you encounter problems in the performance of an ongoing construction contract due to the current circumstances involving the effects of the COVID-19 virus and the various government actions and face potential liabilities, our [Construction attorneys](#) can perform a contract analysis and develop an effective position to defend your company.

[Click here for more information on our Construction Practice Group and a list of attorneys.](#)

We wish you and your entire organization health and safety in these difficult and challenging times.

Disclaimer: This post does not offer specific legal advice, nor does it create an attorney-client relationship. You should not reach any legal conclusions based on the information contained in this post without first seeking the advice of counsel.

About the Authors:

Mason Avrigan, Jr. is a Principal and Co-Chair of the Firm's Construction, Government Contracts & Surety Law Practice Group. For over 25 years, he has represented owners, contractors, subcontractors, material producers and other parties in construction matters and construction litigation in Southeastern Pennsylvania and New Jersey. He also handles general commercial litigation matters and real estate transactions and disputes.

mavrigian@postschell.com / (215) 587-1106



Paul A. Logan is a Principal in the Firm's Construction, Government Contracts & Surety Law and Commercial Litigation Practice Groups and is the Administrative Principal of the Firm's Wilmington, DE office. He focuses his practice on the representation of contractors, and other businesses, that deal with local, state, and federal governments via General Services, OSHA, SEPTA, the Federal Aviation Administration (FAA), the Federal Highway Administration (FHA), the Environmental Protection Agency (EPA), and state departments of transportation, among many others.

plogan@postschell.com / (215) 587-6608

