

AMID THE PANDEMIC

Construction Sites

moving forward during the pandemic

By Christopher Scott D'Angelo

Much has been written since the pandemic related shut-down was imposed addressing what rights, liabilities, and remedies may exist between the contractor and owner anent delays, increased costs, material availability, incentive bonuses, and penalties. Other articles have focused on insurance coverage issues relating to business interruption or delays occasioned by the pandemic. We assume that you have seen those, but invite you to contact this author if you have any questions.

CONTRACTOR RESPONSIBILITIES

Here, the focus will be on contractor responsibilities for operations and worksite safety relating to COVID-19 and the pandemic and government requirements or recommendations.

The understanding in the medical and public health communities as to how the coronavirus spreads and the best way to combat such spread is continually evolving. Therefore, it is crucial for contractors to be vigilant about keeping current with such developments. To assist in that effort, some resources are provided below.

Contractors—like all employers—are responsible for providing a safe and healthy workplace, both for their employees and for others expected to be onsite, including subcontractors, owners, architects, engineers, inspectors, delivery personnel, visitors, etc. To this end, it is incumbent on the contractor to conduct a thorough hazard assessment to identify potential

workplace hazards related to COVID-19 and to develop and implement a comprehensive plan. Such a plan should use appropriate combinations of engineering controls, workplace administrative policies, personal protective equipment (PPE), decontamination procedures, social distancing, screening, access, and employee training to protect workers and other persons coming onto the workplace from contracting or spreading COVID-19.

OSHA: www.osha.gov/SLTC/covid-19/construction.html

CDC: www.cdc.gov/niosh/topics/hierarchy/default.html

It is also imperative that the contractor coordinate its plans and procedures with the owner as well as other occupants or users of the property.

Such a plan should be specific to the particular worksite, identify all areas and job tasks with potential exposures to COVID-19, and include control measures to eliminate or reduce such exposures. Contractors should collaborate with employees and unions, if any, to develop, implement, and monitor the plans. Plans should assume that employees may be able to spread COVID-19 even if they do not show symptoms: www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

By now, the reader should be very familiar with the CDC's recommendation and state-imposed requirements for individuals to wear cloth face coverings

in public settings or where other social distancing measures are difficult to maintain. The CDC is quick to add, however, that wearing a cloth face covering is in addition to the need to practice social distancing (i.e., staying at least 6 feet from others and reducing the concentrations of people). Of course, the social distancing recommendation is very difficult to achieve in practice on construction worksites, which simply highlights the need for PPE and other procedures and protocols to provide the best protections possible.

However, OSHA warns in its guidance document ***Cloth Face Coverings in Construction*** that cloth face coverings are not appropriate substitutes for such PPE as respirators (like N95 respirators) or medical facemasks (like surgical masks) in workplaces where respirators or facemasks are recommended or required to protect the wearer. OSHA further advises that it may not be practical for workers to wear a single cloth face covering for the full work shift on a construction site if they become wet, soiled, or otherwise visibly contaminated during the work shift. If cloth face coverings are worn on construction sites, employers should provide readily available clean cloth face coverings (or disposable facemask options) for workers to use when the coverings become wet, soiled, or otherwise visibly contaminated.

The Center for Construction Research and Training provides significant resources in a number of categories such as

guidance on workplace practices, employee and invitee safety and training, and personal protective equipment (PPE): [covid.elcosh.org/index.php](https://www.covid.elcosh.org/index.php).

CDC also offers a host of information and resources, such as: ***Guidance for Businesses & Employers***
www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

Coronavirus Disease 2019 (COVID-19): Construction Workers
www.cdc.gov/coronavirus/2019-ncov/community/organizations/construction-workers.html?deliveryName=FCP_2_USCDC_10_4-DM29003

OSHA likewise has important information and requirements: ***Guidance on Preparing Workplaces for COVID-19***
www.osha.gov/Publications/OSHA3990.pdf

COVID-19 - Control and Prevention /Construction Work
www.osha.gov/SLTC/covid-19/construction.html

North America's Building Trades Unions and CPWR have created: ***NABTU and CPWR COVID-19 Standards for U.S. Construction Sites (April 27, 2020)***
www.cpwr.com/sites/default/files/NABTU_CPWR_Standards_COVID-19.pdf

The American Industrial Hygiene Association (AIHA) provides the following: ***Returning to Work: Construction Environment***
aiha-assets.sfo2.digitaloceanspaces.com/AIHA/resources/Returning-to-Work-Construction-Environments_GuidanceDocument.pdf

The Equal Employment Opportunity Commission (EEOC) has also provided guidance about COVID-19 testing, temperature checks, and symptom assessments and ADA compliance: ***Coronavirus and COVID-19***
www.eeoc.gov/coronavirus
What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws:
www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Keep in mind, too, that each state or local municipality has or may have their own requirements, so it is imperative that the contractor check and incorporate those into the plans for worksites in those states or municipalities.

CLOSING THOUGHT

As a reminder, but beyond the scope of this article, employers must be cognizant of and comply with a number of other employment

laws and regulations relating to the response to or impact of the pandemic and government responses. Some resources can be found on the Department of Labor's website relating to the Fair Labor Standards Act (FLSA) the Family and Medical Leave Act as amended by the Families First Coronavirus Response Act, and the Uniformed Services Employment and Reemployment Rights Act, such as under ***COVID-19 and the American Workplace:*** www.dol.gov/agencies/whd/pandemic, or on the EEOC website regarding discrimination and compliance with laws it administers, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act, such as under www.eeoc.gov/coronavirus. ■

about the author

Christopher Scott D'Angelo is a partner and chair of both the Business Disputes & Products Liability Practice and International Practice at Montgomery McCracken Walker & Rhoads LLP, based in Philadelphia and New York City. His practice involves business, products liability, construction, class action, and insurance counseling and litigation, including his role as national counsel for several major U.S. clients and his representation of foreign concerns in the United States and U.S. concerns abroad. He is a member of the Construction Law and Litigation Committee of the International Association of Defense Counsel. He can be reached at cdangelo@mmwr.com.

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